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October 1, 2007

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, "Electioneering
Communications," 72 Fed. Reg. 50261 (Aug. 31, 2007)

Dear Mr. Katwan:

These comments are submitted on behalf of Alliance for Justice ("AFJ") in response to the Notice of Proposed Rulemaking ("NPRM") on electioneering communications issued by the Commission in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S.Ct. 2652 (2007) ("*WRTL II*"). AFJ requests an opportunity to testify at the hearing scheduled for October 17, 2007 through its outside counsel, Michael B. Trister.

AFJ is a national association of environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. These organizations support legislative and regulatory measures that promote political participation, judicial independence and greater access to the public policymaking process. During debate on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), AFJ expressed concern that the law's broad provisions limiting electioneering communications would curtail legitimate communications addressing legislative and other policy issues. After BCRA took effect, AFJ joined with other nonprofits and unions in submitting a petition for rulemaking seeking an exception to BCRA's prohibition on corporate and union electioneering communications for grassroots lobbying. *See* Notice of Availability, Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From The

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Legal Aid Society Employment Law Center
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and Educational Fund
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National Abortion Federation
National Association of Criminal Defense Lawyers
National Campaign for Sustainable Agriculture
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Center for Youth Law
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National Council of Nonprofit Associations
National Education Association
National Employment Lawyers Association
National Family Planning and Reproductive Health Assoc.
National Immigration Forum
National Immigration Law Center
National Law Center on Homelessness and Poverty
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National Legal Aid & Defender Association
National Low Income Housing Coalition
National Mental Health Association
National Partnership for Women and Families
National Senior Citizens Law Center
National Veterans Legal Services Program
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National Youth Advocacy Coalition
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Seton Hall School of Law
Center for Social Justice
States United to Prevent Gun Violence
The Sierra Club Foundation
The Wilderness Society
Tides Center
University of Pennsylvania Law School
Public Service Program
Violence Policy Center
Women's Law Project

Definition of "Electioneering Communications," 71 Fed. Reg. 13557 (March 16, 2006). AFJ also appeared as *Amicus Curiae* in *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006) (*per curiam*), and *WRTL II*, supporting rulings that would protect speech by advocacy organizations under the First Amendment.

Before addressing the substance of the NPRM, we wish to raise a concern regarding the time frame for concluding this rulemaking. Under the current schedule for Presidential caucuses and primaries, BCRA's first black-out window will begin on December 14, 2007, thirty days before the scheduled date of the Iowa caucuses, and could begin earlier.¹ Also, the BCRA black-out windows will begin in early January, 2008 for the Congressional primaries in Illinois (February 5, 2008) and Maryland (February 12, 2008). Since the Commission's regulations are subject to a thirty-day Congressional review period before they may take effect, and the hearing in this rulemaking is scheduled for October 17, 2007, this leaves little time for the Commission to consider and resolve the issues presented.²

Rather than rushing to meet the tight time frame available, the Commission should consider the following alternative steps. The Commission could, for example, issue the final regulation with a short E & J, which could be supplemented at a later date. Or, as proposed by Commissioner von Spakovsky in a similar situation, *see* Agenda Document No. 06-53 for Meeting of August 29, 2006 (proposing temporary regulation creating grassroots lobbying exception to electioneering communication prohibition), it could issue a temporary regulation to take effect immediately, with a final regulation to be issued when the full rulemaking process is completed. Finally, the Commission could announce that, as a matter of enforcement policy, it will give retroactive effect to any final regulation that it issues after the BCRA periods kick in with respect to the 2008 election cycle. While this approach would not provide timely detailed guidance to the regulated community, if this announcement were made prior to December 14, 2007, it would at least reduce the chilling effect from the absence of any guidance.

¹ Several states have already scheduled presidential selection procedures prior to the Iowa caucuses, including West Virginia (January 1-14, 2008), Wyoming (January 5, 2008), and the District of Columbia (January 8, 2008). The application of BCRA § 203 to these procedures is unclear at this time.

² The schedule for this rulemaking allows less than four weeks between the oral hearing and the date on which the final regulation must be transmitted to Congress if it is to take effect in time for the Iowa caucuses. In contrast, in the Commission's first rulemaking on electioneering communications, which was conducted pursuant to a statutorily mandated deadline, the hearing was held on August 28-29, 2002 and the final regulation was transmitted to Congress six weeks later on October 11, 2002. In the second electioneering communications rulemaking, undertaken in response to judicial decisions striking down several of the original BCRA regulations, the hearing was held on October 20, 2005 and the final regulation was transmitted nearly eight weeks later on December 15, 2005. It seems unlikely that the Commission will need less time to resolve the more complex issues raised in this rulemaking.

I

The Commission Should Adopt Alternative 2

AFJ supports the adoption of Alternative 2 because it has the advantage of applying a single definition of “electioneering communications” for all regulatory purposes, rather than using different definitions for different provisions. This approach also would result in treating alike all persons and entities who wish to engage in broadcast communications prior to elections.

As set out in the NPRM, the principal differences between Alternative 2 and Alternative 1 are that the Alternative 2 would make it unnecessary for corporations and labor organizations to report their permissible electioneering communications and it would also narrow the circumstances under which permissible electioneering communications might be regulated as coordinated communications. The difference with respect to coordinated communications is insignificant, however, because even under Alternative 2 permissible electioneering communications would still fall within the fourth content standard of the current regulation defining coordinated communications. *See* Reg. § 109.21(c)(4).

AFJ recognizes that the reporting requirements in BCRA § 201 were upheld against a facial First Amendment challenge in *McConnell v. FEC*, 540 U.S. 93, 194-202 (2003), and that the as-applied constitutional challenge in *WRTL II* was limited to the flat prohibition on corporate electioneering communications in BCRA § 203. However, these cases did not address, let alone resolve, the issue now facing the Commission. *McConnell* upheld section 203's reporting requirements for broadcast advertisements which were the functional equivalent of express advocacy, not the genuine issue ads addressed in *WRTL II* and this rulemaking. Furthermore, since BCRA's reporting requirements apply to all broadcast ads that fit within the definition of “electioneering communications,” including ads that do not fall within the “functional equivalency” test adopted in *WRTL II*, it is unclear whether Congress would have intended individuals and entities to report on communications that do not satisfy this constitutional standard.³ In light of the constitutional questions raised by requiring disclosure of broadcast issue ads, Congress, not the Commission, should make the initial determination whether or not to require reporting in this context.

³ BCRA § 401, the statute's severability provision, states that if any provision of the statute, or the application of any provision, is held to be unconstitutional, the remainder of the statute, and their application to any person or circumstance, shall not be affected by the holding. As a result of this provision, the Supreme Court's decision in *WRTL II* leaves in tact all of the other provisions of the statute, which might not have been the case under prevailing case law in the absence of such a provision. In this rulemaking, however, the question is not whether BCRA § 201 may still be enforced as a constitutional matter, but whether the electioneering communications reporting requirements should be applied to a type of broadcast advertisement which was not even recognized under the original statute. BCRA § 401 has no bearing on this issue.

Finally, since reporting of electioneering communications prior to *WRTL II* was largely limited to individuals and a small number of unincorporated entities, it is unclear whether, and if so how, Congress would want to apply the reporting requirements with respect to the full range of corporations and labor organizations which may now pay for electioneering communications under some circumstances. As we discuss in Part IV of these comments, application of the current reporting rules to permissible electioneering communications by nonprofit corporations raises policy and administrative questions for which the Commission has received no legislative guidance. The Commission would be well within its discretion to wait until Congress has time to address these questions by adopting Alternative 2.

II

The General Rule Set Forth In The NPRM Improperly Shifts The Burden of Proof to Corporations and Unions and Does Not Include Important Elements of the Rule Announced By The Supreme Court

The NPRM proposes the same substantive requirements to define the constitutionally mandated exclusion recognized by the Supreme Court in *WRTL II* for both Alternative 1 and Alternative 2. The proposal includes a general rule and two safe harbor exclusions. In this section, we address the general rule under which corporations and labor organizations could make an electioneering communication to those outside the restricted class if the communication “is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate,” Prop. Reg. § 114.5(a) (Alternative 1), or the communication falls within an exception to the basic definition of electioneering communication which uses the same standard. Prop. Reg. § 100.29(c)(6) (Alternative 2). This language is problematic both in what it says and what it does not say.

1. Both Alternative 1 and Alternative 2 are extremely troublesome because they suggest that the burden of proof rests on any corporation or union that seeks to rely on the constitutional exclusion. Thus, a corporation or labor organization could not make an electioneering communication outside its restricted class under Prop. Reg. § 114.15(a) unless the corporation or union is able to establish that the communication is subject to a reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate. In Alternative 2, the NPRM proposes to include the *WRTL* standard as an “exception” to the definition of electioneering communication, rather than as part of the basic definition in Reg. § 100.29(a), which similarly suggests that the burden is on the corporation or union to show its communication is not protected.

In the Supreme Court, the Commission argued vigorously that the district court had erred by placing the burden on the government to establish that *WRTL*'s ads were not protected, rather than on the organization to show that the ads were protected. See Brief of Appellant Federal Election Commission in Nos. 06-969 and 06-970 (O.T. 2006), 28. AFJ argued, however, that the Commission's position misstated the Court's long-standing jurisprudence regarding the burden of proof in constitutional cases, see Brief *Amicus Curiae* On Behalf Of The Alliance For

Justice, 15-18, and Chief Justice Roberts emphatically agreed: “Under strict scrutiny, the *Government* must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.” 127 S.Ct. at 2664 (emphasis in original).

Consistent with this ruling, Chief Justice Roberts articulated the applicable constitutional standard in a way which places the burden squarely on the Commission if it wishes to challenge a broadcast ad under BCRA § 203; a court, he stated, should find that an ad is the functional equivalent of express advocacy “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S.Ct. at 2667. As a consequence of this holding, a respondent charged with violating BCRA § 203 may not be required to come forward with an acceptable interpretation of its ad, but the Commission must show that there is no reasonable interpretation of the ad other than an unacceptable one. And, in close cases, the Commission should find against a violation for, as Chief Justice Roberts also put it, “in a debatable case, the tie is resolved in favor of protecting speech,” 127 S.Ct. at 2669 n. 7, not in favor of censorship, as the proposed regulation suggests.

The Commission should rewrite its proposed rule along the lines suggested in section 3 of this part in order to conform to Justice Roberts’ language and should make clear in the final E & J that the burden of proof will be on the Commission at all stages of a case challenging a particular communication under BCRA § 203.⁴

2. In addition to misstating the basic constitutional rule adopted in *WRTL II*, the general rule proposed in the NPRM omits important elements of the Supreme Court’s plurality opinion that give meaning to its constitutional standard. The Court made clear, for example, that in determining whether a communication is the functional equivalent of express advocacy, neither the speaker’s intent nor the actual effect of the communication is relevant: “To safeguard [the liberty protected by the First Amendment], the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” 127 S.Ct. at 2666. The Court further stated that in determining whether a communication is constitutionally protected it is the language of the ad that is determinative and “contextual factors ... should seldom play a significant role in the inquiry.” 127 S.Ct. at 2669. Finally, as a corollary to the foregoing rules, the Court made clear that *any inquiry into whether an ad is protected* “must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation.” 127 S.Ct. at 2666; *see also id.* at 2669 and 2669 n.7.

These repeated warnings by the Supreme Court regarding as-applied judicial challenges to BCRA § 203 are as, or even more, salient with respect to the Commission’s own efforts to

⁴ The burden of proof may be particularly important in enforcement cases before the Commission. At the RTB stage of any enforcement proceeding, the burden should not be on the respondent corporation or union to demonstrate the existence of a reasonable interpretation of its communication other than an appeal to vote for or against a candidate. Rather, the burden should be on the Office of General Counsel to demonstrate that no such reasonable interpretation exists before the Commission may authorize an investigation to go forward.

enforce BCRA § 203. In order to allow for speedy resolution of complaints under BCRA § 203 without full-blown factual investigations into contextual factors of the kind rejected by the Court, the standard adopted by the Commission should include each of the above elements of the *WRTL II* decision. In addition, the Commission should consider developing a procedure under which corporations and labor organizations could obtain pre-enforcement review of their proposed electioneering communications on an expedited basis.

3. In order to effectuate fully the Supreme Court's decision in *WRTL II* as set forth above, AFJ proposes the following revisions to the general rule proposed in the NPRM:

Alternative 1 - Prop. Reg. § 114.15(a)

Permissible electioneering communications. Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class without violating the prohibition contained in 11 CFR 114.2(b)(3) unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate taking into account the words of the communication and not its intent or actual effect and, except in unusual circumstances, without regard to external factors such as the timing of the communication and the corporation's or labor organization's separate activities in support of or opposition to a candidate identified in the communication.

Alternative 2 - Prop. Reg. § 100.29(a)(4)

Is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate taking into account the words of the communication and not its intent or actual effect and, except in unusual circumstances, without regard to external factors such as the timing of the communication and the corporation's or labor organization's separate activities in support of or opposition to a candidate identified in the communication. A communication shall not satisfy this section if it meets the requirements of either paragraph (c)(6)(i) or (ii) of this section:

III

The Proposed Safe Harbor For Grassroots Lobbying Is Too Narrowly Framed

The NPRM's proposal for a grassroots lobbying safe harbor is a useful approach to achieving constitutional protection for nonprofit advocacy communications without the necessity of full-blown factual inquiries of the kind which the Supreme Court stated should be avoided. Rather than making it possible to resolve specific cases quickly and without extensive fact-finding, however, the safe harbor in the NPRM is so narrow that it would in most cases simply

shift the focus of inquiry back to the general rule of “express advocacy equivalency”. The safe harbor should be revised, therefore, as follows.

Structure of the Safe Harbor. The NPRM states that “a communication would qualify for the proposed safe harbor for grassroots lobbying communications only if it satisfies all four prongs.” NPRM, 72 Fed. Reg. at 50265. And, it further suggests, that a communication must meet all elements of each prong. *Id.* This approach is wholly inconsistent with *WRTL II*. While the plurality opinion referred to certain facts as showing that WRTL’s ads were “consistent with that of a genuine issue ad,” and lacked “indicia of express advocacy,” 127 S.Ct. at 2667, Chief Justice Roberts did not state that the specific elements listed in his opinion are a *sine qua non* for determining whether a grassroots lobbying communication is protected. Such an approach would have been inconsistent with the very nature of an as-applied challenge, which relies on the facts of each individual case taken as a whole. Furthermore, in joining the plurality opinion, Justice Alito made clear that he had an open mind with respect to future as-applied challenges that might not fit squarely within the factors identified by Chief Justice Roberts. See 127 S.Ct. at 2674-75. As we show below, while some of the elements of the safe harbor proposed in the NPRM may sometimes bear on whether a communication should be protected, this will not always be the case depending upon the content of the communication as a whole. By making every element a condition of protection, the Commission would undermine the administrative and constitutional benefits attributable to adopting a safe harbor in the first place, and we urge the Commission to adopt a more flexible approach to the safe harbor.

First Prong. The first prong of the safe harbor should be satisfied if a communication addresses a legislative or executive branch issue or an issue of public concern.⁵ As noted in the NPRM, the plurality opinion in *WRTL II* did not state that a communication must be “exclusively” about a legislative or executive branch matter or issue in order to be protected from regulation. Communications addressing policy issues facing the nation and important in an election may also be the subject of genuine issue ads. As the Court’s plurality opinion makes clear, “discussion of issues cannot be banned merely because the issues might be relevant to an election.” 127 S.Ct. at 2669 n. 7.

It also should not be necessary to show that the matters or issues addressed in a communication are “pending” in order to qualify for the safe harbor. In *WRTL II*, Chief Justice Roberts stated that a court need not ignore basic background information “such as whether an ad ‘describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future,’” 127 S.Ct. at 2669, quoting the district court at 466 F. Supp. 2d at 207, but he cautioned that the need to consider such background “should not

⁵ The examples in the NPRM of what would constitute a “legislative or executive matter or issue,” see 72 Fed. Reg. at 50265, are too narrow to be helpful to the regulated community and should not be included in the final regulation or E & J lest they be seen as defining the limits of the regulation. The examples do not include initiatives or undertakings of executive branch officials and agencies other than the President, do not include amendments and other legislative actions which have not received a bill number, and do not include issues which have risen to prominence through events or other means than “through events in the states.”

become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.” *Id.* Whether a legislative or executive branch matter is “pending” may in some cases present difficult factual determinations and, moreover, does not take into account whether the issue is “likely to be the subject of such scrutiny in the near future.” Including this element will defeat the very purpose of a safe harbor - namely to allow determinations to be made quickly and without detailed inquiry - and it should not be a mandatory element of the proposed safe harbor.

Second Prong. A communication also should fall within the safe harbor regardless of whether it urges an officeholder “to take a particular position or action” or the general public to “adopt a particular position” and to contact an officeholder with respect to this position. Prop. Reg. §§ 114.15(b)(i), 100.29(c)(6)(i)(B). This requirement should be dropped entirely from the safe harbor because it is too narrow in two separate respects.

First, the safe harbor should not be limited to communications that urge a candidate “to take a particular position” or that urge the general public to contact a candidate with respect to a particular position. Nonprofit organizations frequently urge the public to find out where specific candidates stand on an issue of concern to the organization, without stating a particular position on that issue. Especially for IRC § 501(c)(3) organizations that are prohibited from intervening in political campaigns, this may be one of the few ways in which the organization may inject its issues into the campaign without violating the tax laws. Also, as Example 4 in the NPRM, 72 Fed. Reg. at 50268, demonstrates, the line between an exhortation to take a “particular position” and a more general exhortation to a candidate/officeholder to vote in a particular manner on a category of legislation (bills weakening environment protections) is so unclear as to be meaningless.

Second, it is unnecessarily restrictive to limit the safe harbor to communications that are addressed to current officeholders, rather than to all candidates in an election. Nonprofit organizations often ask candidates to pledge to follow a particular position if they are elected, regardless of whether the candidate is an incumbent or a challenger. Organizations may also ask candidates not to accept campaign support from a particular industry, such as the oil or tobacco industry. Advocacy of this kind would be severely limited without any justification if this prong is limited to communications addressed only to office holders, rather than all candidates.

Third Prong. A corporate or union broadcast ad also should not be excluded from the safe harbor merely because it mentions an election, candidacy, political party, opposing candidate, or voting by the general public, as proposed in the third prong of the safe harbor in the NPRM. As the examples in the NPRM make clear, references to an election, candidacy, etc. will not automatically mean that the communication is the equivalent of express advocacy. Thus, an ad which sets out the two candidates’ positions on an issue in a neutral fashion and then urges the public to remember to vote on election day can hardly be interpreted as having no reasonable interpretation other than to vote for or against one of the candidates. An ad which discussed a candidate’s position on an issue, but concludes with “Vote. It’s important to your future,” as set forth in the NPRM, would still be constitutionally protected since at best the implication of the

tag line is unclear and it clearly does not demonstrate that the ad is the equivalent of express advocacy. This prong would also disqualify any ad, such as Example 4 in the NPRM, which mentions an officeholder's or candidate's acceptance of campaign contributions from a particular industry, since this would by definition be a reference to an election.⁶ Since these references may frequently be benign, they should not be part of the safe harbor and this prong should be dropped in its entirety.

Fourth Prong. AFJ agrees that whether a communication takes a position on a candidate's or officeholder's character, qualifications, or fitness for office may be relevant in deciding whether the ad should fall within the proposed safe harbor. There are a number of problems, however, with how the Commission intends to implement this prong.

A. The presence of these factors *standing alone* should not be determinative of whether the communication falls within the safe harbor. Rather, as discussed above, these factors should be considered in the context of the communication as a whole; the presence of a single element mentioned in the fourth prong should not disqualify the communication, where it is relevant to assessing the candidate's position on an issue that is addressed in the communication. For example, an ad that focuses on a candidate's campaign position on the sanctity of marriage and then points out that the candidate himself has been divorced and remarried several times should not, in our view, fall outside of the safe harbor. Similarly, an ad which describes a candidate's position against the sale of tobacco to minors but points out that the candidate has accepted large amounts of campaign support from the tobacco industry should also fall within the safe harbor. Allegations that a candidate has misrepresented his own record or accomplishments also should not disqualify a communication standing alone, if the misrepresentation bears on an issue that is also addressed in the ad. Pointing out, for example, that a candidate who says he or she is opposed to the Iraq War voted in the past to support the War should not disqualify a communication from protection under the safe harbor even though it might be regarded as taking a position on the candidate's "character".

B. The NPRM also suggests that mentioning an officeholder's⁷ prior position or record with respect to an issue would not disqualify the communication under the fourth prong unless the officeholder's past position is discussed "in a way that implicates the officeholder's character, qualifications, or fitness for office." 72 Fed. Reg. at 50266. As the examples in the NPRM

⁶ Providing an officeholder's contact information as his or her campaign headquarters might be seen as a reference to an officeholder's candidacy, as suggested in the NPRM, but it still could not reasonably be seen as demonstrating that an ad is the equivalent of express advocacy. Similarly, implied references to candidacy such as photo shots of a candidate near the Capitol, in a mock-government office or other images is subject to the same objection. Assuming *arguendo* that these images even suggest "candidacy," they very clearly do not standing alone amount to the equivalent of express advocacy, which is the only relevant issue after *WRTL II*.

⁷ It is unclear in the NPRM whether the Commission's reference to "officeholders" is intended to mean that an ad's reference to a non-officeholder candidate's prior record or position on an issue would always or never disqualify it from the safe harbor. If the former, this position cannot be supported for the same reasons as discussed in connection with the third prong.

make clear, however, it is extremely difficult to determine whether a reference to a candidate's position or record implicates his or her character, qualifications, or fitness for office. Given the Supreme Court's admonition that close cases must be decided in favor of speech, not censorship, AFJ believes that mentioning a candidate's prior record or position should never disqualify a communication from protection under the safe harbor.

Revised Safe Harbor. In order to reflect the above concerns, AFJ proposes that the first safe harbor in the regulation read as follows in either Alternative 1 or Alternative 2:

A communication that, when taken as a whole, discusses a legislative or executive matter or issue or an issue of public concern and does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office, other than by describing the candidate's prior record or position with respect to the matter or issue.

IV

If The Commission Adopts Alternative 1, It Should Clarify the Reporting Requirements Applicable to Corporations and Labor Organizations

The Commission is proposing in Alternative 1 to revise the rules on reporting electioneering communications to accommodate reporting by corporations and labor organizations making electioneering communications that are permissible under the proposed regulation. See NPRM, 72 Fed. Reg. at 50271. Specifically, the Commission would allow a corporation or labor organization to use a segregated bank account to pay exclusively for electioneering communications that are permissible under the *WRTL II* exemption. If such an account is used, the corporation or union must report the name and address of each donor who donated an amount aggregating \$1000 or more to the segregated bank account since the first day of the preceding calendar year. Prop. Reg. §§ 104.20(c)(7)(ii); 114.4(d)(2)(i). If a corporation or union uses general treasury funds, rather than a segregated bank account, to pay for an electioneering communication protected under *WRTL II*, the Commission asks whether the corporation or union should be required to report the name and address of each donor who donated an amount aggregating \$1,000 or more to the corporation or union during the relevant period and, if so, which receipts would qualify as "donations". *Id.*

In responding to the Commission's questions regarding the use of funds from an organization's general treasury, it is first important to recognize that the agency is writing on a blank slate. As noted in the NPRM, the Supreme Court in *McConnell* upheld BCRA § 201's reporting requirements against a facial First Amendment challenge. The Court's holding was a narrow one, however. The reporting requirements in issue only applied to those individuals and entities that were permitted under BCRA to make electioneering communications, namely unincorporated organizations and QNCs. Moreover, the holding was limited to reporting of electioneering communications that were the equivalent of express advocacy. By creating a new

category of speech - communications that are not the equivalent of express advocacy - and allowing corporations and labor organizations to use their general treasury funds to pay for them, *WRTL II* opens up questions that could not have been, and were not, considered or decided in *McConnell*.

Nonprofit corporations making electioneering communications under the *WRTL II* exception may receive funds into their general treasuries from a wide variety of sources: membership dues; admission fees, subscriptions, sales of educational materials and other revenue from their exempt activities; interest, dividends and other income from investments; and income from unrelated business activities. Neither the plain meaning of the statutory term "contributors," BCRA § 201(f)(2)(F), nor the regulatory term "donations," Reg. § 104.20(c)(8), is broad enough to include all forms of revenue received by a nonprofit organization. Furthermore, if nonprofit organizations are required to report each and every source of all such funds aggregating \$ 1,000 or more during the current and previous calendar years, the accounting and reporting burdens will be enormous, and would far exceed all reporting requirements otherwise applicable to such organizations.⁸ Finally, reporting all sources of revenue that could have been used to pay for an electioneering communication would be misleading to the public since it would suggest a connection between the revenue sources and the ads when none in fact exists. For these reasons, the Commission should make clear that the "donations" to nonprofit organizations which must be reported do not include any sources of revenue except for gifts, grants and contributions as listed on line 1 of IRS Form 990.

The more difficult question is whether corporations and unions should be required to report every unrestricted grant or contribution aggregating more than \$1,000 made during the reporting period or should they be required to report only those grants and contributions that are designated to support the organization's electioneering communications? AFJ believes that the latter approach is more consistent with the purposes of the statute, Congress' approach with respect to reporting of independent expenditures, and established First Amendment principles.

First, given the high cost of broadcast media in today's market, a donor to an organization of a \$1,000 unrestricted contribution is unlikely to have any influence on whether a corporation or labor organization decides to run an electioneering communication and/or the content, timing or other elements of the communication.

Second, it would be unfair to donors of unrestricted funds to suggest that their contributions have been used to support specific electioneering communications with which they may not agree and for which they have had no direct involvement. Indeed, in AFJ's experience,

⁸ For tax purposes, with the exception of gifts, grants and contributions, nonprofit organizations report only the total amount of revenue received in different categories, without reporting the individual sources of their revenue. See IRS Form 990, Part I, lines 2-11 (2006). Organizations exempt under sections 501(c)(3) or (4) of the Internal Revenue Code ("IRC") are required to identify individual donors only for contributions of \$5,000 or more, and in some instances IRC 501(c)(3) organizations are only required to report contributions exceeding 2% of all contributions received during the reporting period. See IRS Form 990, Schedule B (2006).

some prospective donors have refused to make grants to nonprofit organizations because they are unwilling to have their unrestricted grants reported as a source of funding for particular advocacy communications. In contrast to restricted grants and contributions, which must be used for the purpose designated by the donor, unrestricted grants and contributions may be used by the organization for any lawful purpose in the discretion of the organization, without the permission or approval of the donor. It would be completely misleading to suggest that a donor of an unrestricted contribution was in any way responsible for an organization's broadcast communications covered by BCRA § 201.

Third, the approach we suggest is consistent with the reporting requirement for independent expenditures by political committees and other persons. Such entities must identify each person who made a contribution in excess of \$200 to the person filing such report, only if the contribution "was made for the purpose of furthering the reported independent expenditure." FECA § 434(c)(2)(C); Reg. § 109.10(e)(1)(vi). The Commission has stated that under this provision, reporting of independent expenditures "is limited to those who contributed specifically for independent expenditures."⁹ Final Rules, "BCRA Reporting," 68 Fed. Reg. 404, 413 (Jan. 3, 2003).

Finally, restricting reportable contributions to those made for the purpose of furthering the reported electioneering communication may be necessary to preserve the constitutionality of BCRA § 201. In *McConnell*, the Court refused to create a blanket exemption from BCRA's reporting requirements based on the Court's earlier approval in *Buckley v. Valeo* of FECA's reporting requirements for independent expenditures. See 540 U.S. at 196 and 196 n. 81. The Court appeared to assume, however, that BCRA § 201, like FECA's independent expenditure reporting requirement, was limited to contributions made for the purpose of supporting the communication being reported.¹⁰ See 540 U.S. at 194 (BCRA requires reporting of "all persons sharing the costs of the disbursements.") If the statute is not construed in this manner, it would not be narrowly tailored to serve a compelling interest, as required by the First Amendment, since it would require disclosure of anyone who made a contribution to the reporting entity of as little as \$1,000 at any time in the current and preceding calendar years, a period that could reach 22

⁹ The quote is from the portion of the 2003 E & J that addressed disclosure of donors to a segregated bank account. The portion of the E & J addressing disclosure of donors when not using a segregated bank account did not indicate whether disclosure was limited to donors of amounts restricted for electioneering communications. In any event, the primary application of the disclosure requirement was to QNCs, whereas the question now before the Commission involves all corporations and labor organizations. To the extent that the prior regulation and E & J may be read to suggest that QNCs must report both restricted and unrestricted donors to their general treasury accounts, the question should be reconsidered in light of *WRTL II*.

¹⁰ In its brief in *McConnell*, the Commission similarly compared BCRA's reporting requirements for electioneering communications with FECA's independent expenditure reporting requirements. See Brief For The Federal Election Commission, Et. Al., Nos.02-1674, et. al. (O.T.2002) 119 ("[§ 201] simply updates the requirements that have long applied to express advocacy, and were upheld in *Buckley*, to reflect BCRA's adjustment of Section 441b to apply to 'electioneering communications.'")

months before the ad was disseminated.¹¹ *Cf. California Pro-Life Council, Inc. v. Getman*, Civ. S-00-1698 FCD/GGH (E.D. Ca. February 22, 2005) (upholding reporting requirements for ballot measure activity because they were limited to contributions for express political advocacy); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1318-1319 (S.D.Ala. 2000) (limiting reporting requirement to contributions made for the purpose of expressly advocating ballot measures). AFJ's proposed construction of BCRA § 201 avoids this constitutional infirmity.

V

The Regulation Should Include Safe Harbors for Public Service Announcements and Promotions of Charitable Organizations and Events

The Commission should adopt separate safe harbors for public service announcements and charitable promotions because such communications are not the functional equivalent of express advocacy and are readily identifiable on the basis of their content alone.

A safe harbor for PSAs should apply to any electioneering communication within the meaning of BCRA §§ 201 and 203 that addresses an issue of general public importance and does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office, as in the fourth prong of the proposed grassroots lobbying safe harbor in the NPRM. Since PSAs are frequently used to educate the public about a health or other important problems, it should not be necessary to include a specific call to action, as in the second prong of the proposed grassroots lobbying safe harbor. Furthermore, a communication that addresses the importance of registering to vote or voting should not be excluded from the safe harbor, as it would be under the proposed third prong in the NPRM.¹²

A safe harbor for charitable promotions and events should apply to any electioneering communication within the meaning of BCRA §§ 201 and 203 which advertises the services of a charitable or other similar organization.¹³ As with the PSA safe harbor, there is no reason to require a particular call to action, as in the second prong of the NPRM.

¹¹ As the Court made clear in *McConnell*, the purpose of BCRA's reporting requirement is to prevent organizations and individuals who support electioneering communications from hiding behind fictitious names that mask the supporters' true identities. The three-judge district court relied on the same interest in upholding the statute's requirement to disclose donors. 251 F. Supp. 2d at ____ (“Without disclosure of donors, it is difficult, if not impossible for the voting public to know who is sponsoring political advertisements under amorphous and nondescript pseudonyms.”) Even if BCRA § 201 is ultimately found to be constitutional as applied to issue advertisements in general, this purpose is not served by broadly requiring disclosure of every relatively small contribution to the reporting organization made as much as a year and a half before the issue ad is disseminated.

¹² Referring to an individual's candidacy does not serve this purpose and therefore could be a reasonable basis for exclusion from the safe harbor.

¹³ The safe harbor should not be limited to fundraising for IRC § 501(c)(3) organizations, even though this is likely to be its most frequent application. Fundraising for IRC § 501(c)(4) and other nonprofit entities should also be included.

VI

The Commission Should Amend The QNC Regulation To Include Organizations Exempt From Taxation Under Section 501(c)(3) of the Internal Revenue Code

With one minor exception, the NPRM does not propose any changes in the current regulation defining Qualified Nonprofit Corporations (“QNCs”). See NPRM, at 50272 (“The Commission is not proposing any changes to its regulations concerning QNCs at section 114.10.”) The decision in *WRTL II*, however, highlights the need for the Commission to amend the QNC regulation in at least one respect.¹⁴

Under the current regulation, a nonprofit corporation may not qualify for status as a QNC unless it is described in IRC § 501(c)(4). Reg. § 114.10(c)(5). IRC § 501(c)(3) organizations, therefore, are not eligible. This omission was of little concern when the QNC regulation was first issued in 1995, since IRC § 501(c)(3) organizations could not pay for independent expenditures as a matter of federal tax law and this was the only type of communication which QNC status then permitted. See Final Rule, “Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures,” 60 Fed. Reg. 35292, 35296 (July 6, 1995).

The adoption of BCRA’s prohibition on corporate electioneering communications and the Supreme Court’s recognition of an *MCFL*-type exemption for nonprofit corporations in BCRA § 203 changed the situation significantly. In contrast to independent expenditures which expressly advocate the election or defeat of a candidate, IRC § 501(c)(3) organizations may conduct electioneering communications under certain circumstances.¹⁵ See Rev.Proc. 2004-06, 2004-6 I.R.B.328. However, the regulation’s limitation of QNC status to IRC § 501(c)(4) organizations means that IRC § 501(c)(3) corporations may not take advantage of this ruling even where they satisfy all of the other qualifications in the QNC regulation. Since IRC § 501(c)(3) organizations raise the same constitutional considerations as are applicable to IRC § 501(c)(4)s, the Commission should amend the regulation to broaden the scope of nonprofit organizations eligible for QNC status.

¹⁴ A number of courts have found fault with the current QNC regulation in other respects. See *FEC v. National Rifle Ass’n*, 254 F.3d 173, 191-93 (D.C. Cir. 2001); *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 292-94 (2d Cir. 1995); see also *Colorado Right To Life Committee, Inc. v. Coffman*, Nos. 05-1519 and 05-1538 (10th Cir. August 21, 2007), slip op. at 23; *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994). While AFJ urges the Commission to address these more fundamental issues in another QNC rulemaking, we recognize that these issues are beyond the scope of this rulemaking.

¹⁵ Although the IRS has permitted IRC § 501(c)(3) organizations to disseminate electioneering communications under limited circumstances, such organizations remain subject to the basic statutory prohibition against political campaign intervention, thereby limiting the benefits of QNC status in this context.

VII

The Constitutional Standard Announced in *WRTL II* Should Apply To Communications Which Are Not Electioneering Communications

The NPRM asks whether the decision in *WRTL II* also provides guidance regarding the constitutional reach of other provisions of FECA. *See* 72 Fed. Reg. at 50263. The answer to this question must surely be yes. If a nonprofit corporation's broadcast ad is constitutionally protected under the "functional equivalency" test when it is disseminated within the 30/60 day windows for electioneering communications, it follows *a fortiori* that the same message disseminated outside of the 30/60 windows, or to a different audience, or in another medium, must also be protected from regulation as express advocacy under the First Amendment. If a communication is not the functional equivalent of express advocacy, it most certainly cannot be found to be express advocacy.

WRTL II, therefore, requires the Commission to reconsider at least whether its current definition of "expressly advocating" is consistent with the Supreme Court's standard. AFJ believes that certain aspects of section 100.22(a) as well as the alternative definition in 100.22(b) include communications that are protected under the First Amendment and should not be enforced in their current form. We do not, however, recommend that the Commission undertake to amend its current regulation as part of this rulemaking for two distinct reasons.

First, as noted at the beginning of these comments, we are concerned that the Commission will be unable to address even those issues most directly raised by *WRTL II* in the short time available before BCRA's ban on corporate and union electioneering communications takes effect for the 2008 election cycle. A revision of the definition of express advocacy would merely add to the burden on the Commission and possibly delay even further badly needed guidance under BCRA §§ 201 and 203.

Second, before reaching the question whether Reg. § 100.22 is consistent with the constitutional standard announced in *WRTL II*, the Commission should first consider whether the regulation, particularly Reg. § 100.22(b), is defensible as a matter of *statutory* interpretation in light of *WRTL II*, *McConnell*, and other recent Supreme Court decisions. The term express advocacy has been interpreted in those cases to mean communications that include the so-called magic words first articulated in *Buckley v. Valeo*. Thus, while the Court in *McConnell* held that Congress could go beyond the magic words test as a matter of constitutional law, and the Court in *WRTL II* then limited how far Congress could go by adopting the functional equivalency test, neither decision questioned the Court's longstanding interpretation of "express advocacy" as meaning magic words.¹⁶ *See, e.g., McConnell*, 540 U.S. at 126 ("As a result of [*Buckley*']s strict

¹⁶ If the Commission were to adopt this view of express advocacy, then the conundrum raised in the NPRM would disappear. If the definition of independent expenditures is limited to communications using the magic words, then it would not subsume all electioneering communications and effectively nullify BCRA § 434(f). If anything, the discussion in the NPRM points out why a more limited definition of express advocacy is more consistent with FECA's statutory scheme.

reading of the statute, the use or omission of ‘magic words’ ... marked a bright statutory line separating ‘express advocacy’ from ‘issue advocacy.’”¹⁷ Since the current regulation’s consistency with the statute was not raised in the current NPRM, we recommend that the Commission immediately initiate a separate rulemaking to consider both the statutory and constitutional issues presented by the current regulatory definition of express advocacy after *WRTL II*.

VIII

The Commission Should Reconsider The Impact of *WRTL II* On The Definition of Coordinated Communications In A Separate Rulemaking

As the NPRM makes clear, if the Commission adopts the approach in Alternative 2 of the proposed regulation, electioneering communications that are not the functional equivalent of express advocacy would no longer fall under the first content standard used to define coordinated communications, *see* Reg. § 109.21(c)(1), but might still fall under the second and fourth content standards. *See* Reg. §§ 109.21(c)(2) & (c)(4). If, on the other hand, the Commission adopts Alternative 1, then even permissible electioneering communications would continue to fall under the first content standard, as well as the second and fourth content standards.

While these conclusions follow from the language of the current coordination regulation, they are not necessarily an appropriate response to the decision in *WRTL II*. As the Commission itself recognized when it adopted the current definition of coordinated communications, all four content standards serve “to limit the new rules to communications whose subject matter is reasonably related to an election.” Final Rules, “BCRA Reporting; Coordinated and Independent Expenditures,” 68 Fed. Reg. 421, 427 (Jan. 3, 2003). Similarly, in reviewing the regulation’s fourth content standard under the Administrative Procedure Act, the Court of Appeals for the District of Columbia Circuit recognized that it serves the permissible purpose of “leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign.” *Shays and Meehan v. FEC*, 414 F.3d at 99.

WRTL II makes clear that not all communications within the definition of electioneering communications have an election-influencing purpose. Given the purpose of the content standards to limit coordinated communications to election related communications, this holding raises questions whether permissible electioneering communications should continue to fall within the first content standard of the current coordination regulation, as they would under Alternative 1, or whether they should even continue to fall within the fourth content standard, as they would under Alternatives 1 and 2. We recognize, however, that answering these questions has been complicated by the recent decision of the district court in *Shays v. FEC*, C.A. No. 06-

¹⁷ Lower courts have similarly understood that FECA’s use of “express advocacy” is meant to incorporate the magic words test. *See, e.g., Shays and Meehan v. FEC*, 414 F. 3d 76, 80 (D.C.Cir. 2005) (“Due to its reliance on specific phrases like ‘vote for’ and ‘vote against,’ the express advocacy standard became known as the ‘magic words’ test.”)

1247 (CKK) (D.D.C. Sept. 12, 2007), invalidating the fourth content standard in part and remanding to the Commission for further proceedings. Rather than delaying the current rulemaking until the Commission determines its response to the district court's decision, we recommend that the Commission not address these questions in the current rulemaking and save them for another separate rulemaking at a later date.

IX

The Commission Should Address the Impact of *WRTL II* on the Allocation Regulations.

In *WRTL II*, the Commission argued that a corporation or labor organization asserting an as-applied challenge to BCRA § 203 should be required to demonstrate that it was unable to fund its advertisements through a federal political committee. The effect of this argument, had it been accepted, would have been to require corporations and unions to use federal funds to pay for their electioneering communications. The Supreme Court rejected this argument, thereby calling into question any requirement by the Commission that corporations and unions use federal funds to finance communications that are not the functional equivalent of express advocacy.

The Commission's allocation regulation, however, does just that, and even more. Nonconnected committees and separate segregated funds are required to use federal funds to pay at least 50%, and in some cases more, of the cost of any public communication that refers to one or more clearly identified candidates, and voter drives that refer to one or more clearly identified candidates. *See* Reg. § 106.6(f). Since this regulation is not limited to broadcast communications that are disseminated within the 30/60 days periods before an election and are targeted to specific populations, it has an even broader reach than the FEC's position in *WRTL II*, and it cannot stand in light of that decision.

The Commission did not raise the allocation issue in the NPRM. Furthermore, the constitutionality of the allocation regulation after *WRTL II* has been challenged in *Emily's List v. FEC*, C.A. No. 05-00049 (CKK) (D.D.C.) (plaintiff's motion for summary judgment filed Sept. 14, 2007). In light of these facts, we do not recommend that the Commission address the allocation regulation as part of this rulemaking; if the district court fails to resolve this issue in *Emily's List*, however, the Commission should initiate a separate rulemaking to address this important question.

Respectfully submitted,



Nan Aron