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09/28/2007 03:42 PM

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bcc  
Subject Comments on NPRM 2007-16

Mr. Katwan:

Attached you will find comments from Professor Briffault and myself on the above-reference rulemaking.

Thank you for your consideration.

Rick Hasen

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September 25, 2007

Mr. Ron B. Katwan  
Assistant General Counsel  
Federal Election Commission  
999 E Street N.W.  
Washington, DC 20463

**VIA E-MAIL**

***Re: Comments on Rulemaking 2007-16, Electioneering Communications***

Dear Mr. Katwan and Commissioners of the Federal Election Commission:

Please consider these comments in connection with the Federal Election Commission Rulemaking 2007-16, Electioneering Communications. These comments are being submitted on behalf of Professor Richard Briffault and myself and they pertain solely to the question whether the FEC's rulemaking should extend the "as applied" exemption to BCRA's *disclosure* provisions under the Commission's "Alternative 2."

Professor Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, has written 17 articles on campaign finance law, some of which the Supreme Court has cited in its campaign finance cases. *See, e.g., Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 462 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J, dissenting). Professor Richard L. Hasen, the William H. Hannon Distinguished Professor of Law at Loyola Law School, has written 18 articles (or parts of books) on campaign finance law, is the co-author of an election law casebook, *Election Law—Cases and Materials* (Carolina Academic Press 3d ed. 2004, with Professor Daniel Hays Lowenstein), and the co-editor of the peer-reviewed quarterly publication, *Election Law Journal*. Each author has written two articles about the two *Wisconsin Right to Life* cases. See Richard Briffault, [WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law](#), 68 OHIO ST. L.J. 807 (2007); Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 ALBANY GOV'T L. REV. (forthcoming 2008); Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. (forthcoming April 2008) (draft available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003922)); and Richard L. Hasen, *Justice*

*Souter: Campaign Finance Law's Emerging Egalitarian*, 1 ALBANY GOV'T L. REV. (forthcoming 2008). The authors also jointly filed an amicus brief in the *WRTL* case, which is available at this link: <http://electionlawblog.org/archives/wrtl-briffault-hasen-amici.pdf>.

The Commission faces some difficult choices articulating a clear rule codifying the scope of an “as applied” exemption to BCRA’s requirement that corporations and labor unions use a separate segregated fund to pay for electioneering communications. The rule must follow the principal opinion of Chief Justice Roberts in *FEC v. WRTL*, 127 S.Ct. 2652 (2007). We express no opinion on the proposed scope of the “as applied” exemption set forth in the Notice of Proposed Rulemaking issued by the Commission.

Instead, we write to endorse Alternative 1 (NPRM at p. 8), which would create an “as applied” exemption solely to the separate segregated fund requirement applicable to corporations and labor unions. We strongly oppose Alternative 2 (NPRM at p. 8), which would apply whatever “as applied” exemption the Commission crafts to apply to BCRA’s *reporting requirements* as well. The result of adopting Alternative 2 would be to exempt *all persons* (and not just corporations and labor unions) spending over \$10,000 on electioneering communications from disclosure.

We believe the Commission should decline to extend any “as applied” exemption to BCRA’s disclosure rules for the following reasons:

(1) *The Supreme Court in WRTL did not reach the question of disclosure and the plaintiff in WRTL consented to disclosure without litigating the question.* The Supreme Court did not hold that an “as applied” exemption to the separate segregated fund requirement for corporations and labor unions had any relevance to the electioneering communication *disclosure* rules. Indeed, there is no discussion of disclosure issues in any of the three opinions in the Supreme Court’s *WRTL* case because the plaintiff did not challenge—and indeed consented to—the disclosure rules on electioneering communications imposed by BCRA. See *WRTL*, Brief for Appellee, no. 06-969 and 06-970, at p. 10 (“*WRTL* challenged the *prohibition* [on funding electioneering communications from the corporation’s general treasury funds], not the *disclosure*, and was prepared to provide the full disclosure required under BCRA.”), available at: [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-969\\_Respondent.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-969_Respondent.pdf) (original emphasis). It is therefore improper to read *WRTL* as authority for the Commission’s promulgation of new regulations exempting persons and other entities from the reporting requirements of BCRA.

(2) *In McConnell, eight Justices voted to uphold BCRA’s requirement of the disclosure of electioneering communications against constitutional challenge.* Although the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003) split 5-4 on the constitutionality of BCRA’s separate segregated fund requirement for corporations and unions, it voted 8-1 to *affirm the constitutionality* of the disclosure requirement. See *McConnell*, 540 U.S. at 196 (upholding section 201); *id.* at 321 (Kennedy, J., joined by C.J. Rehnquist and J. Scalia) (voting with majority to uphold section 201 except as to its “advanced disclosure” requirement). The Court in *McConnell* strongly recognized the constitutionality of BCRA’s disclosure provision, and

nothing in any of the opinions in *WRTL* hints that any of the Justices are reconsidering their position on this issue.

(3) *BCRA's disclosure requirement does not raise the constitutional concerns that led the WRTL majority to create an "as-applied" exemption to BCRA's limits on corporate and union expenditures for electioneering communication.* The *WRTL* principal opinion repeatedly expressed the concern that BCRA's limits infringe on First Amendment values because they operate to "censor," "suppress," or "ban" campaign speech. See, e.g., 127 S.Ct. at 2659, 2669, 2671, 2673, 2674. See also *id.* at 2674 (concurring opinion of Justice Alito). But BCRA's disclosure requirement does nothing to "censor," "suppress," or "ban" speech. Quite the opposite. As the Supreme Court has repeatedly recognized, see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976), disclosure requirements advance First Amendment values by providing voters with useful information.

(4) *An "as-applied" exemption from reporting requirements will lead again to a proliferation of issue ads by entities with misleading names, thereby confusing the public.* The Supreme Court in *McConnell* noted that Congress passed the reporting requirements of BCRA to prevent the sponsors of issue ads from using "misleading names to conceal their identity," such as "Republicans for Clean Air" active in the 2000 presidential primaries. *McConnell*, 540 U.S. at 128. Five Justices in *McConnell* recognized BCRA's reporting provision as necessary to deter corruption and provide valuable information to voters. Three additional Justices voted to uphold the provision under an information-producing rationale. *McConnell*, 540 U.S. at 196 (upholding section 201); *id.* at 321 (Kennedy, J., joined by C.J. Rehnquist and J. Scalia). Together, eight Supreme Court Justices recognized that disclosure serves valuable purposes and does not significantly deter political speech.

(5) *There already is a constitutionally-mandated exemption from disclosure rules for persons who can demonstrate they face threats of harassment or reprisal through making contributions or expenditures to unpopular candidates.* In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), the Court applied an exemption from general—and constitutionally sound—campaign disclosure requirements for minor political parties that can demonstrate that disclosure of contributors' names would have an unusually severe chilling effect on the parties' and contributors' First Amendment activities. *McConnell* specifically recognized the possibility of that form of as applied exception for BCRA disclosure as well. See *McConnell*, 540 U.S. at 199 & n. 83. The Commission therefore need not create additional exemptions from disclosure in this rulemaking. The existing exemption from the disclosure rules gives ample First Amendment breathing space to those who would consider engaging in election-related activities.

We note that the James Madison Center's comments to the Commission at pages 9-10 (posted at: <http://www.jamesmadisoncenter.org/Finance/MadisonCenterCommentsReWRTLII.pdf>) advocate adopting "Alternative 2" without any discussion of the merits of extending the "as-applied" exemption to disclosure requirements. We believe that such a serious step should not be taken by the commission without a serious examination of the merits of such a proposal. On the merits, "Alternative 2" should not be adopted.

Mr. Ron B. Katwan  
Federal Election Commission  
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We hope these comments will assist the Commission in its rulemaking. Thank you for your consideration.

Very Truly Yours,

A handwritten signature in blue ink that reads "Richard L. Hasen". The signature is written in a cursive style with a long horizontal flourish at the end.

Richard L. Hasen