"Bauer, Bob (Perkins Coie)" <RBauer@perkinscoie.com>
Sent by: "Lovecchio, Donna (Perkins Coie)" <DLovecchio@perkinscoie.com>

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To <wrtl.ads@fec.gov>
cc
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Subject Comments on Notice 2007-16: Electioneering Communications

<<Joint Comments Bauer-Hebert on NPRM 2007-16.pdf>>
Attached please find the joint comments of Robert Bauer and the Campaign Legal Center on Notice 2007-16.

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October 1, 2007

By Electronic Mail (wrtl.ads@fec.gov)

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

Re: Supplemental Comments on Notice 2007-16: Electioneering Communications

Dear Mr. Katwan:

These supplemental comments are submitted jointly by Robert F. Bauer and the Campaign Legal Center in response to the Notice of Proposed Rulemaking (NPRM) on "Electioneering Communications." *See* NPRM 2007-16, 72 Fed. Reg. 50261 (August 31, 2007). The Commission requests comments on proposed revisions to its rules governing electioneering communications, in order to implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). Although we have submitted to the Commission separate, more detailed comments in response to NPRM 2007-16, and while we find ourselves on other occasions in disagreement on certain issues, we wanted to take this opportunity to highlight for the Commission one issue on which we agree, strongly.

The Commission is seeking public comment on two alternative proposed approaches to implementing the *WRTL II* decision—the first of which would incorporate the new exemption into the rules prohibiting the use of corporate and union treasury funds to pay for electioneering communications; the second of which would exempt *WRTL II*-type ads not only from the corporate/union source restrictions at 2 U.S.C. § 441b(b)(2), but also from the electioneering communication disclosure requirements at 2 U.S.C. § 434(f). 72 Fed. Reg. at 50262.

The NPRM correctly acknowledges that the "plaintiff in *WRTL II* challenged only BCRA's corporate and labor organization funding restrictions and did not contest either the definition of 'electioneering communication' in section 434(f)(3), or the reporting requirement in section 434(f)(1)." 72 Fed. Reg. at 50262 (*citing WRTL II*, 127 S. Ct. at 2658-59; *and* Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in *Wisconsin Right to Life, Inc. v. FEC* (D.D.C. No. 04-1260)).

Because plaintiff in *WRTL II* did not challenge either the definition of "electioneering communication" in section 434(f)(3), or the reporting requirement in section 434(f)(1), the

Supreme Court did not consider whether the ads at issue in the case could constitutionally be subject to the section 434(f) reporting requirement. For this reason, as well as those detailed in our separate comments, we urge the Commission to promulgate a rule limiting any new exemption to the corporate/union funding restrictions, and retaining the existing disclosure requirements for all ads that meet the statutory definition of "electioneering communication."

The Commission instituted this proceeding to conform its rules to the constitutional requirements specified by the Court in *WRTL II*. On the schedule the Commission has adopted, on the eve of the election cycle, the Commission should avoid adding issues—major constitutional, regulatory and policy issues—that is not compelled to address. Whatever the variety of views held about the proper role of disclosure, it is an issue of great consequence. The time to consider it is not now; the forum for its consideration is not this proceeding.

We appreciate the opportunity to submit these supplementary comments.

Respectfully,

/s/ Robert F. Bauer

Robert F. Bauer
Perkins Coie LLP
607 Fourteenth St. NW
Washington, DC 20005

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center
1640 Rhode Island Ave. NW
Suite 650
Washington, DC 20036