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Union comments on EC NPRM.doc

October 1, 2007

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

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

Dear Mr. Katwan:

The American Federation of Labor and Congress of Industrial Organizations, the American Federation of State, County and Municipal Employees, the National Education Association and the Service Employees International Union respectfully submit these joint comments on the Commission's proposed rulemaking to conform its regulations to the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*").[1]

In *McConnell v. Federal Election Commission*, 540 U.S. 93, 205-06 (2003), the Court rejected a facial challenge to § 203 of the Bipartisan Campaign Reform Act (BCRA) of 2002, codified at 2 U.S.C. § 441b(b)(2), that prohibits unions and corporations from using their general treasury moneys to finance so-called "electioneering communications" ("ECs"), concluding that the constitutionally sufficient justifications for regulating express advocacy also apply to regulating ECs "to the extent that [ECs] are the functional equivalent of express advocacy." The Court tersely characterized such broadcasts as those that "are intended to influence the voters' decisions and have that effect," and then, turning to the plaintiffs' challenge to the prohibition on the basis of unconstitutional overbreadth, summarily concluded that "the vast majority of ads" in the record "clearly had" an "electioneering purpose"; the Court said nothing about their "effect." *Id.* at 206.

In *WRTL II*, the Court considered a § 501(c)(4) corporation's as-applied challenge to the EC proscription. In upholding that challenge, the controlling opinion by Chief Justice Roberts

[1] The AFL-CIO is the national federation of 55 national and international labor organizations that represent over 10 million working men and women. AFSCME is an international labor organization representing 1.4 million members who are public service employees in hundreds of occupations, from nurses to corrections officers, child care providers to sanitation workers. NEA is a national labor organization with over 2.7 million members, the majority of whom are employed by public schools, colleges and universities. SEIU is an international labor organization that represents 1.9 million workers in a wide variety of public and private sector occupations throughout North America.

Undersigned counsel for each organization respectfully requests the opportunity to testify at the Commission's public hearing on this matter.

and Justice Alito (referred to here as "the Court's" opinion) elaborated on these passages in *McConnell*. The Court pointed out that *McConnell* characterized the "vast majority" of the ads before it as evincing an "electioneering purpose," and *not* necessarily as constituting "the functional equivalent of express advocacy." *Id.* at 2670 n. 8. The Court observed that *McConnell* "did not explain that it was adopting a particular test for determining what constituted the 'functional equivalent' of express advocacy," and it rejected reliance on ascertaining either "the speaker's intent to affect an election" or "the actual effect speech will have on an election or on a particular segment of the target audience." *Id.* at 2665-66.

Instead, the Court explicitly reaffirmed the First Amendment analyses and values embraced by such seminal decisions as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and concluded that "a court 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 2665-67. The Court also made clear that any application of § 203 "is subject to strict scrutiny," with the burden on "the *Government* [to] prove that applying BCRA to [particular] ads furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2669.

I. The Commission Should Adopt a Version of Alternative 2

In its NPRM, the Commission identifies as the threshold issue whether or not its regulations implementing the statutory EC provisions should "incorporate the new exemption into the rules prohibiting the use of corporate and labor organization funds for electioneering communications in 11 CFR Part 114" or "incorporate the new exemption into the definition of 'electioneering communication' in 11 CFR 100.29." 72 Fed. Reg. at 50262. We submit that, as a matter of both law and policy, the Commission should do the latter.

At the outset, we believe that the Commission should not characterize the *WRTL II* holding as creating a "new exemption," for two reasons. First, that holding makes a *narrowing construction* of the statutory text itself; it does not accept that text and then identify an "exemption" from it, as do the explicit exemptions that are set forth in BCRA itself. See 2 U.S.C. § 434(f)(3)(B)(i-iii). Second, the holding is "new" only in the sense that the Court had not previously explicated the constitutionally permissible scope of § 203. *McConnell* addressed a facial challenge on a comparatively general level, and illustrated what is an "electioneering" or "functional[ly] equivalent to express advocacy" ad -- as *WRTL II* points out, arguably only the former – with but two examples, namely, the 1996 Montana "Yellowtail" ad and the hypothetical "Jane Doe" ad. See 540 U.S. at 127, 198. *McConnell* otherwise discussed no particular advertisement or formulation of advertisement, and it did not "resolv[e] the sharp disagreements about the evidentiary record" before it. *WRTL II*, 127 S. Ct. at 2665 n.4. As a matter of law, *WRTL II* defines the actual enforceable scope that § 203 has *always* had. And, of course, that scope governs how the Commission both must and may implement the EC provisions by regulation.

A. Alternative 2 Would Conform EC Reporting to That Required of Non-Registered Persons Under Other FECA Provisions

The Commission's task here is conceptually identical to that which Congress and the Commission confronted in the wake of the portions of the Court's decision in *Buckley* that, on First Amendment grounds, construed two phrases in the Federal Election Campaign Act (FECA) to mean express advocacy. Specifically, *Buckley* held that both the $1,000/yr. limit on (independent) expenditures by any person "relative to a clearly identified candidate" and the required reporting by individuals and groups other than political committees and candidates of their expenditures "for the purpose of …influencing" an election, constitutionally could reach only "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." See 424 U.S. at 40-44, 77-82. The *Buckley* Court imposed "the express advocacy limitation in both the expenditure and the disclosure contexts [as] the product of statutory interpretation rather than constitutional command" in order to save the challenged provisions from complete invalidation on constitutional grounds of excessive vagueness and overbreadth. *McConnell,* 540 U.S. at 191-92 (footnote omitted). Later, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 468 U.S. 238, 248-49 (1986), the Court made "a similar construction of the more intrusive provision that directly regulates independent spending [and] hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."

As a consequence of these decisions, the affected statutory and regulatory language either has been enforced in accordance with these judicial constructions of them or it has been revised in order to reflect them in so many words. Either way, express advocacy marks the scope of what public speech is both prohibited to unions and corporations, and is required to be reported by individuals and other groups that are not registrants under FECA.

Proposed Alternative 2 would conform the Commission's rules to *WRTL II* in a manner directly analogous to the legal history of FECA and the Commission's regulations concerning express advocacy. In contrast, proposed Alternative 1 would dictate reporting of ECs to the full literal reach of the EC definition, and not only by entities that are unaffected by its *prohibitory* reach – particularly individuals, qualified nonprofit corporations, unincorporated associations and partnerships (at least insofar as any of them do not utilize union- or corporate-provided funds) – but also by unions and corporations that are. And, the disclosure requirement would apply irrespective of the actual electoral nature of the particular EC.[2] However, BCRA itself, its legislative history, and the arguments made by the Commission and BCRA's principals sponsors in all of the Supreme Court litigation over the EC provisions, equate the scope of prohibitable and reportable speech and define the *sole* area of concern as the functional equivalent of express advocacy, *not* other topics of broadcast advocacy.

B. Congress Intended That the EC Disclosure Provision Reach Only Electoral Messages That Unions and Corporations Could Not Finance

BCRA's EC provisions themselves reflect Congress's explicit intent that they reach only actual electoral messages. First, of course, they are called "*electioneering* communications". Second, the *same* definition of ECs applies to both what is prohibited to unions or corporations

[2] The other consequence of choosing Alternative 1 would be to narrow the scope of "ECs that are subject to the content standards of the Commission's coordination rules. See 11 C.F.R. § 109.21(c)(1). But there would be no practical impact in doing so, since all ECs are also subsumed within 11 C.F.R. § 109.21(c)(4).

and what is required of others to disclose. Compare 2 U.S.C. § 434(f) with § 2 U.S.C. §§ 441b(b)(2) and (c). Third, both the specific statutory exemptions to that definition, and the specific grant of further-exemption authority to the Commission likewise apply to prohibition and reporting without distinction. See 2 U.S.C. § 434(f)(3)(A)(ii)(B). Fourth, the statute requires a reporting entity to state "under penalty of perjury" "[t]he elections to which the electioneering communications *pertain*," an explicitly purposive concept. See 2 U.S.C. § 434(f)(2)(D).

The reason Congress adopted these EC requirements, of course, was that it equated all ECs with express advocacy: they were "sham issue ads" that deceptively exploited a "loophole" in FECA in order to evade the prohibition on union and corporate financing of express advocacy. *See generally McConnell*, 540 U.S. at 126-29, 193-194; *Id.* at 260-261 (Scalia, J., dissenting). As one Senate proponent put it:

> This legislation does not ban issue advocacy or limit the right of groups to air their views. Rather, the disclosure provisions in the bill require these groups to step up and identify themselves when they run issue ads which are clearly targeted for or against candidates.

147 Cong. Rec. S3236 (April 2, 2001) (remarks of Sen. Kohl).

Moreover, in the three rounds of Supreme Court litigation over these requirements, both the Commission and BCRA's chief sponsors have emphasized this equivalence as the justification for extending *Buckley* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), from the regulation of express advocacy to the regulation of ECs as well. And, of course, the Commission and BCRA's sponsors succeeded in persuading the Court in *McConnell* to embrace their principal legal proposition that express advocacy itself does not mark the constitutional boundary for regulation, so Congress may also prohibit union and corporate financing, and compel others to disclose, "the functional equivalent of express advocacy" if Congress adequately identifies such other speech. See 543 U.S. at 204-06. However, *WRTL II* has now provided specific guidance about what functional equivalence is, and, plainly, the literal reach of the EC definition goes too far.

In any event, it was Congress's explicit design that a union or a corporation acting in compliance with FECA would *never* have occasion to report an EC since it could never lawfully undertake one; unlawfulness for union and corporate speakers and reportability by other non-registrants went hand in hand. Congress wished to either restrict or expose only *certain electoral* communications if broadcast at particular times and places, and to do so within the framework of FECA, the federal statute that is exclusively concerned with the financing of and public disclosure concerning *elections*. *And, FECA nowhere else purports to regulate in any manner the non-electoral speech or activities of individuals and groups that are neither candidates nor political committees.*

Indeed, applying the EC disclosure requirements without regard to the *WRTL II* construction also would be inconsistent with Congress' more recent refusal to require private parties, including unions and corporations, to disclose their spending on grassroots lobbying

communications in the recent amendments to FECA and the Lobbying Disclosure Act enacted by the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 (Sept. 14, 2007). Both the House and the Senate defeated amendments that would have imposed such reporting and disclosure requirements; and, they did so not because they believed that BCRA already covered any of them, but due to concerns that such requirements would be burdensome and invasive and would undermine First Amendment rights. See H.R. REP. NO. 110-161, Part 1, at 41-45 (May 21, 2007).

C. Requiring Disclosure of Non-Electoral Communications Disserves First Amendment Principles

For reasons alone of vindicating congressional intent, then, the Commission should choose a version of Alternative 2. But that choice is also bolstered by significant constitutional considerations. The constitutionality of a statute that implicates First Amendment rights must be examined by considering both whether *and to what extent* it serves the actual governmental interests that underlay its enactment. *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 382, 390 (2000). In *McConnell*, 540 U.S. at 196-97, the Court upheld the EC disclosure provisions (with respect to individuals and groups other than union and corporations) solely on the basis of the congressional intent described above, that is, to reach "the use of purported 'issue ads' to influence federal elections"; in so holding, the Court quoted at length a passage of the district court's decision below that characterized the target of the new disclosure requirements in wholly electoral terms. See *id.* The Court reasoned that the EC disclosure law served the same governmental interests that the *Buckley* Court held justified FECA's disclosure requirements concerning *express advocacy*: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substitute electioneering restrictions…." *McConnell*, 540 U.S. at 196. These justifications, of course, pertain solely to the *electoral* nature of ECs: informing the "electorate," deterring "corruption" and enforcing other "electioneering" restrictions.[3] None suggests any governmental interest in compelling disclosure by *non*-registrants of *non*-electoral communications.

McConnell's explicit reaffirmation of *Buckley*'s constitutional treatment of disclosure further bolsters this conclusion when one revisits the *Buckley* Court's analysis. *Buckley* considered FECA's disclosure requirements concerning independent expenditures by individuals and groups (the latter were not then proscribed, as they are now, from financing independent expenditures, and *Buckley* elsewhere invalidated FECA's monetary limit on such spending by all private actors), and framed its analysis of these and other "compelled disclosure" requirements of FECA by stating that they could be upheld only if there were "governmental interests sufficiently important to outweigh the possibility of infringement" of "the exercise of First Amendment rights." 424 U.S. at 64, 66. The Court concluded that compelled disclosure of communications

[3] Although three other Justices who dissented from the Court's decision upholding the EC *prohibition* concurred with its decision upholding the main EC disclosure requirement, Justice Kennedy's terse and somewhat opaque concurrence with that holding, joined by Chief Justice Rehnquist and Justice Scalia, cannot be read to address *non*-electoral ECs. See 540 U.S. at 321 (Kennedy, J., concurring and dissenting in part). Justice Thomas's dissent from that decision reasoned that there is no governmental interest in compelling disclosure of even *electoral* communications. See *id.* at 275-77 (Thomas, J., dissenting).

"for the purpose of … influencing" an election must be confined to express advocacy under the following analysis.

First, the Court sought to identify the "legislature's purpose" and determined from the legislative history that Congress "wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of openness of the federal election process." *Id.* at 78.

Second, the Court identified its "task" to be to "construe" the disclosure requirement "in a manner that precisely furthers that goal." *Id.*

Third, the Court reasoned that, in contrast to candidates and political committees, the spending of individuals and groups is not "by definition, campaign-related," *id.* at 79, so "the relation of the information sought to the purposes of the Act may be too remote" if the disclosure requirement extended too broadly. *Id.* at 80.

Finally, the Court held that an express-advocacy construction was necessary in order that the disclosure requirements reach "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* (emphasis added). And, "as construed," this disclosure requirement served one governmental interest in particular, namely, it "increase[d] the fund of information concerning those who support the candidates" by "shed[ding] the light of publicity on spending that is unambiguously campaign related" but that otherwise would not be reported. *Id.* at 80-81.

Just like these independent-expenditure reporting requirements considered in *Buckley*, the EC disclosure requirements serve a legislative purpose that is solely electoral in focus. And, *WRTL II* emphatically rejects the notion that the anti-corruption interests that, it said, *McConnell* "arguably" applied in upholding the prohibition of "the functional equivalent of express advocacy" could also justify the prohibition of issue advocacy; rather, the Court concluded, the *Austin* anti-corruption rationale simply "has no application to issue advocacy," and strict-scrutiny analysis precludes regulating issue advocacy as a means to prevent the "circumvention" of restrictions on express advocacy. 127 S. Ct. at 2672-73.[4] Indeed, it is this portion of *WRTL II*

[4] This is not a novel constitutional notion. Forty-five years ago the Court construed a House of Representatives resolution regulating lobbying so as to exclude from its reach efforts to influence public opinion, because "deriving from [the resolution] the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." *United States v. Rumely*, 345 U.S. 41, 46 (1953). The Court referred favorably to the Court of Appeals decision below, see *id.*; and, that decision stated in part:

> It is said that lobbying itself is an evil and a danger. We agree that lobbying by personal contact may be an evil and a potential danger to the best in legislative processes. It is said that indirect lobbying by the pressure of public opinion on the Congress is an evil and a danger. That is not an evil; it is a good, the healthy essence of the democratic process. It is said that financing of extensive efforts to influence public opinion is an evil and a danger. As to that, generalities are inaccurate… [T]he case before us concerns … the formation of public opinion through the processes of information and persuasion. There is no evil or danger in that process.

that features the opinion's perhaps most arresting phrase: "Enough is enough." See *id.* at 2672. That declaration should be taken as apt guidance for the Commission's resolution of the threshold question it poses in the NPRM.

We submit, therefore, that *WRTL II* should be accommodated not by modifying Part 114 but by amending § 100.29. We suggest that the best approach would be to add a new subsection (4) to § 100.29(a), as follows: "Is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." That approach would be preferable to creating an "exemption" additional to those set forth in § 100.29(c), because, as discussed above, *WRTL II* adopted a *construction* of the EC definition itself. Nonetheless, we acknowledge that placement of this language instead in § 100.29(c) would produce the same practical result.

On this point, the NPRM asks about *WRTL II*'s impact on the Commission's ability to exercise its authority under 2 U.S.C. § 434(f)(3)(B)(iv) to adopt by regulation exemptions from the EC definition. See 72 Fed. Reg. at 50263. We submit that W*RTL II* does directly affect the Commission's authority to refrain from exempting communications that "promote," "support," "attack" or "oppose" (PSAO) a candidate. Because *WRTL II*'s constitutional holding supersedes any conflicting statutory requirement, this PSAO constraint is irrelevant to the Commission's scope of authority unless it defines a class of communications that lies *between* express advocacy and its functional equivalent (a category of speech that might be compared to the "dark matter" of the universe, except that the latter *does* seem to exist). To this day, there has been no satisfactory definition of PSAO: in *McConnell* the Court only conclusorily declared (in the context of political parties) that PSAO is not unconstitutionally vague, 540 U.S. at 170 n. 64, and in its first EC rulemaking the Commission provided no clarification of the phrase but acknowledged such apprehension about its breadth that the Commission declined to approve any of the numerous, quite reasonable suggestions for its exercise of exemption authority. See Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).

In the wake of *WRTL II*, it seems plain that those apprehensions were excessive. The best course now would be to harmonize the statutory exemption authority with *WRTL II* by construing PSAO to *mean* the functional equivalent of express advocacy. Doing so would salvage the statutory exemption language, accord it constitutionally secure meaning, and echo the Court's constructions in *Buckley* and *MCFL* of the various other FECA formulations to mean express advocacy itself.

Finally, drawing the line for disclosure where *WRTL II* does for prohibition – that is, at messages that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" – is the only *administrable* standard. Otherwise, the Commission would have to devise a different and broader definition of the scope of ECs to cover those that are predominantly or at least partly electoral – even though such ads, as *WRTL II* mandates, cannot also be prohibited. The NPRM nowhere suggests how such a class of communications might be defined, and, for all the reasons explain in these comments, we submit that the Commission should refrain from any such undertaking.

Rumely v. United States, 197 F. 2d 166 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953*). See also United States v. Harriss*, 347 U.S. 612 (1954).

II. If the Commission Adopts Alternative 1, It Must Revise Its Reporting Requirements to Exclude Certain Recipts as "Contributed" or "Donated" Funds

If the Commission adopts Alternative 1, and thereby requires for the first time that unions and corporations file disclosure reports concerning ECs, then the Commission should clarify the statutory requirements that a payor of ECs in excess of $10,000 during a calendar year disclose either (a) "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement" since January 1 of the preceding calendar year, see 2 U.S.C. § 434(f)(2)(F), or (b) the same information regarding U.S. citizens and lawful permanent residents whose funds were "contributed…directly" to and "solely" comprise a "segregated bank account" for ECs, see 2 U.S.C. § 434(f)(2)(E).

The Commission's current regulations use the terms "donor" and "donated" with respect to these requirements, see 11 C.F.R. §§ 104(c)(7) and (8), and the term "donated" in turn is defined to mean "a payment, gift, subscription, loan, advance, deposit, or anything of value given to a person" that is not a "contribution." See 11 C.F.R. §§ 104.21(a)(2), 300.2(e). The Commission should clarify its rules to make plain that this disclosure requirement does *not* pertain to membership dues, investment and other commercial or business income, and other funds that are not "contributed" or "donated" in the sense of being voluntarily provided and not paid as part of a transactional exchange or for some other consideration.

Under this approach, union dues payments would not be treated as "donations." Dues are required as a condition of membership and are not "donated," let alone "contributed," in any sense, and they are not provided in order to fund ECs or any other particular activity or communication. Rather, the decision to use general treasury money for a particular purpose such as spending for ECs is made by an organization's officials pursuant to internal processes. It would be both misleading and burdensome for the Commission to require unions to disclose the names and addresses of members whose dues happen to have accumulated to $1,000 since the beginning of the preceding calendar year. Nor should unions have to report the sources and amounts of investment and commercial income, which bear no meaningful relationship to the EC spending itself and are not "contributed" or "donated" either.

Moreover, the alternative disclosure requirement pertaining to a segregated bank account funded solely by individuals is not a meaningful alternative for a union; indeed, it undermines the very holding of *WRTL II* itself that union and corporate *treasury* funds – not just individuals or other groups that are funded solely by individuals – *may* be spent on communications within the literal reach of the EC definition. Again, the terms "contributed" and "donated" presuppose a volitional transfer of funds, not a membership fee or other transaction of any kind, and, especially if unions and corporation will have to report about the ECs they finance, these terms should be interpreted in a common sense manner that serves the actual purposes of disclosure.

The burden on a union to account for and report all sources of receipts of $1,000 or more as the literal price for undertaking ECs would be especially great, given that federal law otherwise obligates a union to report publicly, to the U.S. Department of Labor, only its receipt of $5,000 or more in the aggregate from a particular source during a particular calendar year.

See Instructions for Form LM-2, pg. 13. Treating all receipts as "contributed" or "donated" effectively would override that carefully reticulated disclosure requirement, and in a spectacularly inappropriate manner.

Plainly, whatever public purposes are served by EC disclosure are served by revealing only the actual "contributors" or "donors" for that purpose, and the EC spending itself. As for the latter, we submit that the Commission ought to revise 11 C.F.R. § 104.20(c)(4) and clarify the instructions for Form 9 and require that unions may report only the direct costs or portions of contracts associated with a particular grassroots lobbying communication, such as payments to outside vendors to draft the communication and payments to time buyers for broadcasting it. Unions should not be required to report in-house staff time spent planning grassroots lobbying communications or the allocated share of any consultant contract that relates to a particular reportable grassroots lobbying communication. And, the Commission should make clear that a union disclosing general fund disbursements for ECs that are grassroots lobbying communications may describe the purpose of the communication in appropriate non-electoral terms and eschew identification of any "election" to which the EC pertains. Without these changes to 104.20 and to FEC Form 9, the information provided to the public concerning the financing of electioneering communications will be confusing at best and misleading at worst.

III. The Commission's Proposed Safe Harbor for Grassroots Lobbying Communications Improperly Shifts the Burden of Proof to the Speaker and Is Unnecessarily Restrictive

The Commission seeks comment on its proposed safe harbor for grassroots lobbying communications.[5] The proposed safe harbor, which is included in both Alternative 1 and Alternative 2, incorrectly shifts the burden of proving whether a communication is the functional equivalent of express advocacy from the government to the speaker, and is otherwise unnecessarily restrictive.

A. The Proposed Safe Harbor Shifts the Burden of Proof from the Commission to the Speaker

It is the burden of the Commission—not the speaker—to demonstrate that the specific speech in question falls within an exception to the protections of the First Amendment and is therefore subject to regulation under BCRA. *See WRTL II*, 127 S.Ct. at 2663-64. In determining whether particular speech is subject to BCRA's ban (and thus a criminal act), the First Amendment "give[s] the benefit of the doubt to speech." *Id.* at 2674. In a close case, "the tie goes to the speaker, not the censor." *Id.* at 2669. The Commission acknowledges in its NPRM the scope of the *WRTL II* Court's decision, but the Commission's proposals to define "new" exceptions to BCRA's EC ban and to create very narrow "safe harbors" for certain speech, effectively turn the Court's central First Amendment holding "on its head."

In its proposed rules, the Commission calls upon the speaker to demonstrate that its communication falls within an exception to BCRA's EC ban. This burden-shifting is most

[5] The Commission also proposes a safe harbor for commercial and business advertisements. *See* NPRM, 72 Fed. Reg at 50269-70, 50274.

apparent in the Commission's proposed safe harbors for "grassroots lobbying communications" and "commercial or business advertisements." *See* 72 Fed. Reg. at 50274. After stating that an ad is not prohibited by the EC ban if it is "susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate," the Commission states that an ad "shall satisfy [this exemption] if it meets the requirements of [either of the safe harbors]." *Id.* Each safe harbor, in turn, is defined in an exceedingly restrictive manner. *See id*., setting out both proposed 11 C.F.R. § 114.5, and revised 11 C.F.R. § 100.29(c)(6). The result is that even when speech is not the functional equivalent of express advocacy, the speaker can be assured that the Commission will not bring an enforcement action against him only if it speaks precisely in the way Commission dictates it must. Not only does this shift the burden from the government to the speaker in clear contravention of *WRTL II*, it undoubtedly chills protected speech.

In order to remedy this critical defect in the Commission's proposed regulations, we urge the Commission to clarify—in the text of the regulation—that the communications covered by the safe harbors do not exhaust the categories of communications that may be susceptible of a reasonable interpretation other than as an appeal to vote for or against a candidate, and that the Commission's bears the burden on proof on the matter. Further, in broadening the safe harbor for grassroots lobbying communications, the Commission should note which factors it may and which factors it may not consider in determining whether speech is the functional equivalent of express advocacy.

B. The Proposed Safe Harbor is Unnecessarily Restrictive

In discussing the proposed safe harbor for grassroots lobbying communications, the Commission states that "[t]he safe harbor…would employ the same two-step approach that the Court used in *WRTL II* to determine whether a communication is a 'genuine issue ad.'" *Id.* at 50269. However, in *WRTL II*, the Court did not employ a two-step approach to determine that the plaintiff's ads were "genuine issue ads." In fact, the Court plainly rejected such an approach when it was suggested by the plaintiffs, and it did so because it preferred an approach that is "more protective of political speech." *See WRTL II* at 2669 n. 7. Instead, the Court employed its own *one*-step approach to the particular ads before it, and determined that they were susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate. See *id.* at 2666.

The Court never declared that, in order for an ad to be a "genuine issue ad," it must both possess certain characteristics and lack others. Instead, the Court observed that there were two noticeable traits about the particular ads before it that put them outside express advocacy or its functional equivalent. "First, their content is consistent with that of a genuine issue ad…. Second, their content lacks indicia of express advocacy…." *Id.* The Court never said that *both* traits must be present in order for an ad to be susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate or to qualify as a genuine issue ad. And, the Court certainly did not require that an ad possess all noted characteristics of an issue ad and lack all noted indicia of express advocacy in order to be a genuine issue ad. But, this is precisely what the proposed safe harbor would require.

We offer the following specific comments on the prongs of the Commission's proposed safe harbor. First, the Commission requires that, to fall within the safe harbor, the ad must "exclusively discuss[] a pending legislative or executive matter or issue." 72 Fed. Reg. at 50274. This is unduly burdensome and restrictive of speech by organizations whose focus is an issue that, albeit important to the organization, may be viewed as eccentric or extremely unpopular and thus unlikely to ever be addressed by Congress or the Executive Branch. Nonetheless, the organization's speech on that issue should not be chilled by the Commission simply for that reason.

Second, as drafted, the proposed safe harbor applies only to ads urging an officeholder to take a particular position. *See* id. Again, the safe harbor is overly restrictive. Many organizations educate and lobby incumbents, challengers and candidates for open seats on issues of critical importance to the organization.[6] As discussed further below, there are valid and important reasons why these organizations choose to do so.

The third prong of the safe harbor only applies to an ad if it "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public…." See *id.* This prong, too, is overly restrictive of speech. Organizations that lobby both candidates to adopt the organization's position on an issue should be able to explain to the public that the identified persons are being lobbied because they are candidates for a public office and may be required to take some official action on the issue in the future. An ad asking the public to "call Senate candidates Ann Yee and Bob Zee, and tell them to support raising the minimum wage" no more advocates a vote for a specific candidate than would the same ad without the words "Senate candidates".

Under the fourth prong of the test, an ad only falls within the safe harbor if it "[d]oes not take a position on any candidate's or officeholder's character, qualifications or fitness for office." See *id.* Again, the proposal sweeps too broadly. There are also aspects of a candidate's character that an organization may decide to publicly comment on and to educate the officeholder's electorate about without that communication being the "functional equivalent" of express advocacy. For example, if an officeholder wears a mink coat to an event, an organization that supports animal rights may want, as part of its ongoing campaign against the fur industry, to run ads in that officeholder's home district urging the public to tell the officeholder that "wearing fur is wrong." The officeholder's personal choice of clothing may go to her character, but the ad in question is plainly a genuine issue ad.

Being mindful of the Court's principal opinion in *WRTL II*, we respectfully urge the Commission to adopt a broader safe harbor for grassroots lobbying that is "more protective of political speech." *WRTL II* at 2669 n. 7.

IV. The Commission May and May Not Consider Certain Factors in Determining Whether an Ad Is the Functional Equivalent of Express Advocacy

[6] *See, e.g.*, *Common Cause Magazine*, Winter 1992 at 27, describing Common Cause's "Anti-Corruption Campaign" in which the organization lobbied "congressional candidates to make a public commitment to bring about basic change of the political system by supporting real campaign finance reform."

In drafting a regulation implementing the Court's decision in *WRTL II*, the Commission should provide guidance by articulating those factors that it may consider and those that it may not consider in determining whether a particular communication falling outside the safe harbors is "the functional equivalent of express advocacy." A non-exhaustive list of such factors is outlined below:

A. Factors the Commission May Not Consider

In determining whether a particular communication constitutes "the functional equivalent of express advocacy" the Commission may not rely on any of the following factors:

1. Whether the speaker is a supporter or opponent of the candidate named in the communication

In considering the claim that the ads in question fell outside the protections of the First Amendment, the *WRTL II* Court clearly rejected the "intent and effect" test advocated by the Commission and the Intervenors. Citing *Buckley*, the Court stated that in order to safeguard the freedom of speech "the proper standard for an as-applied challenge to BCRA Section 203 must be objective, *focusing on the substance of the communication rather than amorphous considerations of intent and effect*." *Id.* at 2666 (emphasis added). Asked to place the ads in the context of the *WRTL II*'s opposition to the candidate referred to in the ad, the Court observed that "[e]vidence of this sort is therefore beside the point, as it should be. WRTL does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues." *Id.* at 2668.

2. The timing of the communication with respect to the election, the legislative session or the scheduling of a vote on the issue

The Court in *WRTL II* rejected the "contextual" argument that the timing of the ads supported an inference that they were the functional equivalent of express advocacy. An organization advocating regarding a specific policy proposal, or with respect to legislative or political action, should be free to choose the timing of its communication to best serve its needs. See, *e.g.*, *id.* ("a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote"). This is particularly true when the issue is ongoing, such as funding for health care, not tied to a specific piece of legislation, or dependent on executive action, such as the war in Iraq. The speaker may view the election period as the best time to draw attention to their issue, either from the incumbents directly, from individuals running for office who may be called upon to vote on the issue in the future, or from the public at large.

3. Whether the communication has a reference to a web site that may contain express advocacy or its functional equivalent

As stated above, the Court rejected the claim that the speaker's participation in express advocacy in other aspects of its work was relevant to an examination of the challenged communication. The Court also rejected the claim that a link appearing in the communication to a website that contained express advocacy was sufficient to render the communication the

functional equivalent of express advocacy. See *id.* at 2669-2670. In both cases, the Court based its analysis *on the communication itself, not on the intent of the speaker*, the speaker's other actions, or attenuated links to another communication by the same speaker.

4. Whether the communication discusses the candidate's public position or official actions with respect to an issue, including any actual or possible legislative or executive action, by quoting the candidate's own public statements or reciting the candidate's official actions, such as a vote on the matter, or whether it also describes the speaker's position on that issue

A statement of a candidate's positions or official actions with respect to an issue, and an argument by the speaker in support of, or in opposition to, those positions or official actions, are fundamental elements of constitutionally protected issue advocacy. Within the scope of this protected speech, the "speaker has the autonomy to chose the content of his own message." *Id. at 2671 n.* 9, quoting *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995).

It is true that sometimes, as the Commission has recognized, a discussion of the candidate's positions and official actions may become a discussion of the candidate's character, qualifications and fitness for office. 72 Fed. Reg. 50266. But a rule that allows a candidate's own statements to be quoted, or that relies upon a recitation of the candidate's own official actions with respect to an issue, strikes an appropriate balance between issue advocacy and the functional equivalent of express advocacy. Even then, however, because the Commission is intruding into an area of constitutionally protected speech it must tread carefully, recognizing that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 127 S.Ct. at 2669.

The Commission recently struck that appropriate balance in its resolution of an as applied challenge to the application of the electioneering communication ban in *Civic Christian League of Maine v.* FEC, 443 F. Supp. 2d 81 (D.D.C. 2006). In that case the Commission filed a joint motion asking the Court to hold that an ad that identified votes taken by two incumbent Senators met the *WRTL II* standard for protected speech. The key language in the ad made a critical reference to the Senators' official actions, stating "[u]nfortunately, your senators voted against the Marriage Protection Amendment two years ago." See 72 Fed. Reg. 50268. The fact that an organization challenges an individual's actions or position on a public policy issue and declares that action or view to be wrong should not be equated with communicating about an individual's character or fitness or qualifications to hold office. It is one thing to say "Senator X's position on No Child Left Behind is wrong"; it is entirely another to say that "Senator X is morally corrupt or too ignorant to serve."

5. Whether the public communication regarding an issue refers to the position of a candidate who is not an incumbent officeholder

Prior to the Supreme Court's decision in *WRTL II*, numerous organizations, including two filing these comments, asked the Commission to recognize an exception to the EC ban for "grassroots lobbying activities." See Petition for Rulemaking: Electioneering Communications

and Grassroots Lobbying Exemption, February 16, 2006, available at <http://www.fec.gov/pdf/nprm/lobbying/ orig_petition.pdf.>. The petitioners proposed an exception to the ban that was limited to references to candidates who were incumbent public officeholders. Similarly, in the instant rulemaking the Commission proposes a "safe harbor" exception to the EC ban that is so limited. However, that limitation fails to acknowledge the full range of constitutionally protected issue advocacy recognized by the Court in *WRTL II*.

In *WRTL II*, the Court emphasized that the *timing* of a communication, with respect to whether the Congress is in session, a bill is pending, or if a bill may be introduced in the future, is irrelevant to a consideration of whether the communication itself constitutes the functional equivalent of express advocacy. Similarly, the Court rejected a claim based on the identity of the issue discussed in the communication, stating that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 127 S.Ct. at 2669. We submit that the fact that a communication comments on a position taken by an individual who is a candidate, but not a current officeholder, similarly should be irrelevant.

During an election campaign there is a heightened awareness of and debate concerning public policy issues. All candidates express their views on these issues, and where they do not they are often called upon to do so by groups and organizations with an interest in the issue. Organizations do so because they want to get the candidate on record in support of their legislative and public policy positions so that if the candidate is elected he or she will have already committed to acting in accordance with the organization's views. It would take a warped interpretation of the scope of the First Amendment protections articulated in *WRTL II* for the Commission to limit grassroots lobbying communications to only those urging a policy position on current officeholders and not on persons who may be officeholders when the time arises for legislative or executive action.

B. Factors the Commission May Consider.

In determining whether a particular communication constitutes "the functional equivalent of express advocacy" the Commission may consider the following factors:

1. Whether the ad mentions the election

It would be reasonable for the Commission to consider whether a communication's actual discussion of an election renders a communication susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. An ad that mentions both a candidate and an election is more likely to be the functional equivalent of express advocacy than an ad that refers to a candidate and not an election. But, we note that a reference to an election does not make a communication the functional equivalent of express advocacy, *per se*. For example, an ad that states: "In November, you will go to the polls and cast your vote for President. But will your vote even be counted? Call Congressman Doe and tell him every voter deserves a paper receipt when they cast their ballot," discusses an upcoming election, but is obviously focused on a policy issue and not the outcome of the election.

2. Whether the ad mentions an individual's candidacy

As discussed above, there are legitimate non-electoral reasons an organization may wish to discuss an individual's candidacy in a lobbying communication. For instance, an organization lobbying challengers as well as incumbents might have a more successful lobbying campaign if the organization told the public that the reason they are being asked to call the referenced candidate is precisely because the person is a candidate for office. But, again, it would not be unreasonable for the Commission to consider this portion of an ad's content when considering whether the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a candidate.

3. Whether the ad explicitly asks the voter to factor a candidate's position on an issue into their voting decision

The Commission may consider whether an ad's explicit direction to factor a candidate's policy position into their voting decisions renders an ad the functional equivalent of express advocacy. We acknowledge that there are circumstances where tying a specific candidate's position to casting a ballot may make an ad susceptible to being reasonably interpreted as an appeal to vote for or against a candidate. We stress, however, that such content does not require the Commission to consider the ad susceptible to *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate. Many organizations distribute non-partisan voter guides that, while providing each referenced candidate's position on issues important to the organization, do not advocate for or against any candidate. There is no reason an organization should not be permitted to distribute this information via radio or television.

4. Whether the ad takes a position on the candidate's character, qualifications, or fitness for office

In determining whether an ad is the functional equivalent of express advocacy, it would be appropriate for the Commission to consider whether the ad takes a position on a candidate's character, qualifications or fitness for office. As the Commission has noted, there may be some circumstances where a discussion of policy issues merges into discussions of a candidate's character. However, an ad that takes a position on a candidate's character, qualifications or fitness for office may be more likely to fall into the category of the functional equivalent of express advocacy than an ad that focuses entirely on issues unrelated to the candidate's personal qualities.

V. ***WRTL II* Requires the Revision of Other Commission Regulations**

The Commission seeks comment on whether *WRTL II* requires revision of the Commission's definition of express advocacy and what, if any, effect the decision has on the Commission's coordinated communications regulations. We submit that *WRTL II* necessitates revisions to both of these. Further, the Commission must revise 11 C.F.R. § 106.6 to bring its allocation regulations within the bounds of the *WRTL II* limits on the restrictions of political speech. With the 2008 election year swiftly approaching, we respectfully urge the Commission to revise these regulations forthwith – if not during the instant rulemaking, then immediately thereafter.

A. The Commission's Definition of "Expressly Advocating" Is Unconstitutionally Overbroad Because It Includes Speech that Is Not Express Advocacy

The Commission's definition of "expressly advocating" is unconstitutionally overbroad and must be revised. While the Commission's regulatory reach encompasses express advocacy at all times, it only encompasses communications made independently of candidates and their committees and which do not contain "explicit words of advocacy" during the 30 and 60-day EC periods. Even during those 30 and 60-day periods, the Commission's authority is limited to those television or radio ads that both fit the statutory definition of EC and are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 U.S. at 2667. "Expressly advocating," as defined by the Commission at 11 C.F.R. § 100.22,[7] purports to sweep within its ambit and subject to regulation by the Commission at all times communications that are either never within the Commission's jurisdiction or are only regulable by the Commission during certain statutorily defined time periods. For these reasons, the Commission's definition must be revised.

1. "Express Advocacy" Is a Bright-Line Test

Buckley and its progeny have established a bright-line rule as to what communications may be regulated outside of those that are ECs. *Buckley* very particularly describes those communications to which the Commission's authority under FECA extends. It is not enough that a communication is "'advocating the election or defeat of' a candidate." *See 424 U.S.* at 42. Communications within the reach of the Commission must "include *explicit words* of" or "in *express terms*" or "*expressly*" advocate the election or defeat of a clearly identified federal candidate. *See id.* at 43, 44, 80 (emphasis added). The Court even provided examples of explicit words and express terms: they are words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject." *Id.* at 44 n.52. It so limited FECA's reach "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 41 n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

[7] The Commission defines "expressly advocating" to mean: "any communication that—

(a) Uses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in 94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22.

The Court has never strayed from its bright-line test. In *MCFL*, the Court reaffirmed that *Buckley*'s express advocacy test requires literal language of an "exhortation[] to vote for particular persons." *MCFL*, 479 U.S. at 249. *McConnell* made it apparent that the "magic words" test is still the law: "As a result of [the *Buckley* Court's] strict reading of the statute, the use or omission of 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe' marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'" 540 U.S. at 126. Indeed, the ad set apart in *McConnell* as a "striking example" of an ad that had "evade[d] the [express advocacy] line by eschewing the use of magic words" was the Yellowtail Ad. *See id.* at 194. This makes clear that "express advocacy" means what it says.

2. 11 C.F.R. § 100.22(a) May Be Read to Include Speech that Is the "Functional Equivalent of Express Advocacy"

Section 100.22(a) of the Commission's definition of "express advocacy," while employing "magic words" that satisfy *Buckley*'s bright-line test, also subjects the determination of express advocacy to an audience's contextual interpretation of a communication's reasonable meaning. *See* 11 C.F.R. § 100.22.[8] This is one of the "constitutional deficiencies" that *Buckley*'s bright line express advocacy test sought to remedy:

> "'(W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation…. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.'"

Buckley, 424 U.S. at 42, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Recognizing this, *WRTL II*, largely prohibited contextual inquiries to determine whether a communication falls within the broader category of speech that is "the functional equivalent of express advocacy." *See WRTL II*, 127 S.Ct. at 2669 n.7. It did so even though such speech lacks the overt facial exhortations to vote for or against a candidate required to meet *Buckley*'s bright-line test. And, even under *WRTL II*'s test for functional equivalency, it "is not enough to establish that [speech] can only reasonably be viewed as advocating or opposing a candidate in a federal election." *Id.* at 2669. This is precisely what § 100.22(a) permits, and, in so doing, it might include speech that is neither express advocacy nor its functional equivalent.

For these reasons, the Commission should revise § 100.22(a) to make it apparent that express advocacy "unequivocally require[s] 'express' or 'explicit' 'words of advocacy of election or defeat of a candidate.'" *See FEC v. Christian Action Network, Inc.*, 110 F. 3d 1049 (4th Cir. 1997) ("*CAN* II") at 1055 (quoting *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 10-12 (D. Maine 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996) ("MRLC").

[8] "Expressly advocating means any communication that – (a) uses phrases… or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)…[.]"

3. 11 C.F.R. § 100.22(b) Includes Issue Advocacy and Must Be Repealed

Every court that has addressed the constitutionality of § 100.22(b) has declared it unconstitutional. *See Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); ("*VSHL*"); *MRLC*, 98 F. 3d 1; *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) ("*RLDC*"). The basis underlying those courts' decisions is that § 100.22(b) extends beyond express advocacy to encompass issue advocacy – the precise problem *Buckley*'s express advocacy standard was designed to remedy. Because the Commission's definition of "expressly advocating" as set forth at 11 C.F.R. § 100.22(b) impermissibly treads upon issue advocacy, it is unconstitutional and the Commission must repeal it.

There was a reason the *Buckley* Court's limited FECA's reach to explicit words of election advocacy:

> FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues…. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited."

MRLC, 914 F.Supp. at 12.

Section 100.22(b) fails to sufficiently protect the First Amendment interest identified by the Court in *Buckley*. As the Commission has drafted § 100.22(b),[9] "expressly advocating" means a communication that "[w]hen taken as a whole ... could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)...." This "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer. This is precisely what *Buckley* warned against and prohibited…. In no event, the Court said, could the distinction depend on the understanding of the audience." *VSHL*,263 F. 3d at 391-92 (internal citations omitted).

Yet, the Commission does not require that a communication falling within § 100.22(b) include "'express' or 'explicit' words of advocacy of election or defeat of a candidate." *RLDC*, 6 F. Supp. 2d at 253-54. The result is that § 100.22(b) reaches "substantially more communication than is permissible pursuant to the statute, as narrowed by the Supreme Court…." *Id.* at 254. Thus, § 100.22(b) is unconstitutional, and we respectfully urge its repeal.

B. The Commission Should Revise Its Coordinated Communications Regulations

[9] The FEC purports to have drafted § 100.22(b) to parallel *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). But, as the Fourth Circuit explained in *CAN II*, "the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech…and ignored those portions of *Furgatch*…which focus on the words and text of the message." 110 F. 3d at 1054 n.5.

In light of *WRTL II*, the Commission should revise its coordination regulations to exempt communications that are neither "express advocacy" nor its "functional equivalent" from the content prong of 11 C.F.R. § 109.21.[10] The exemption should be based directly on the statutory language at 2 U.S.C. § 441a(a)(7).

The Supreme Court, in its decisions from *Buckley* through *WRTL II*, has established that some restrictions on campaign speech are justified by the government's compelling interest in preventing real and apparent corruption. But, without addressing the issue head-on, the *McConnell* Court noted that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 n.88. In squarely addressing whether there are justifications for regulating such ads, the *WRTL II* Court found none. See *WRTL II*, 127 S. Ct. at 2673.

We acknowledge the argument that although issue ads themselves do not present a risk of real or apparent corruption, the coordination of such ads with candidates may increase the chances that such a risk will arise when the ads are more closely related to a candidate's campaign than to government action. We propose that, in crafting an issue advocacy exemption to the Commission's coordination regulations, the Commission rely on the characteristics noted by Chief Justice Roberts as indicating whether a communication is a genuine issue ad or indicative of express advocacy.

Characteristics that may be indicative of genuine issue ads include whether an ad "focus[es] on a legislative issue, exhort[s] the public to adopt that position, and urge[s] the public to contact public officials with respect to the matter." *Id.* at 2667. Indicia of express advocacy (consequently making it more likely that the ad is directed at an election rather than government action) include mentioning an election, candidacy, political party, or challenger, or taking a "position on a candidate's character, qualifications, or fitness for office." *Id.*

The reasoning in *WRTL* should apply to issue advocacy communications that are coordinated between grassroots lobbying groups and officeholders. A group that takes a position on an issue of public importance may wish to coordinate a communication with an elected official solely to educate the official's constituency about that issue, and to urge them to take action relating to it. Take the following example. People for a Higher Minimum Wage runs a television ad within 30 days of a midterm primary election that features Senator Smith, a respected voice on economic issues who is a sponsor of a bill to increase the federal minimum wage. In the ad, the Senator informs her constituents that Congress has just passed a bill to increase the minimum wage, but that President Jones has threatened to veto the bill. The Senator urges her constituents to make their voices heard by contacting the White House and telling President Jones not to veto the bill.

[10] We recognize that the District Court's recent decision in *Shays v. FEC*, ---F.Supp.2d--- , 2007 WL 2616689 (DDC 2007) ("*Shays III"*) requires the Commission to undertake a new rulemaking on coordinated regulations or better explain its current regulations. If the Commission opts for a rulemaking, we encourage the Commission to include an issue advocacy exemption in that rulemaking. If the Commission chooses either to better explain its current rules or to appeal the District Court's decision, we urge the Commission to undertake a rulemaking with respect to § 109.21 to address this narrow topic.

Assuming that this ad meets the conduct and payment requirements, under the current regulations it would constitute a coordinated communication. In this case, the hypothetical ad features the content described in *WRTL II* as being characteristic of a genuine issue ad. It also lacks indicia of express advocacy. Where an elected officeholder and an organization stand together on an issue of public importance, they should be free to work together to achieve their common goals relative to that issue. As the District Court noted in its opinion in *WRTL II*, "it is the absence of [the link between the words and images used in the ad and the fitness…of the candidate for public office] which obviates the likelihood of political corruption and public cynicism in government where the ad, on its face, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for public office." 466 F. Supp. 2d 195, 209 (D.D.C. 2006).

FECA provides that "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). Thus, "any purchase, payment distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office" that is coordinated with a candidate is treated as a contribution to the candidate. 2 U.S.C. § 431(9).

Where an ad on its face relates only to genuine issues of public concern, and bears no relationship to an election or a campaign (other than to discuss an issue of public concern that may or may not arise during the campaign), it is not "made for the purpose of influencing any election to Federal office," and is not an expenditure. Hence, regulation of such an ad as a coordinated communication cannot be justified by the government's interest in "preventing corruption or the appearance of corruption." Accordingly, the Commission should revise its coordinated communications regulations to exempt issue ads from the content prong.

C. The Commission Must Revise Its Allocation Regulations

We also respectfully urge the Commission to revise its allocation rules at 11 C.F.R. § 106.6 in light of *WRTL II*. The Supreme Court's decision in that case makes it apparent that the Commission's allocation regulations are unconstitutional.

The essence of the principal opinion in *WRTL II* is that the First Amendment prohibits Congress from requiring a union or a corporation to use its connected federal PAC to fund speech that merely refers to a specific federal candidate and is susceptible of a reasonable interpretation other than as an appeal to vote for or against that candidate. *See WRTL II*, 127 S. Ct. at 2674. But, that which *WRTL II* prohibits is precisely what 11 C.F.R. § 106.6 effectuates.

Section 106.6 of the Commission's regulations pertains to allocation of costs of various activities undertaken by organizations that either sponsor or consist of both a federal PAC and one or more non-federal accounts, including those non-federal accounts registered with one or more states as a state PAC. The activities governed by these regulations include public

communications, generic voter drive activities, and (for non-connected committees) fundraising costs and administrative expenses. *See* 11 C.F.R. § 106.6(b).

Under these regulations, organizations with both federal and non-federal accounts are prohibited from paying for a public communication that merely *refers* to a clearly-identified federal candidate, or *refers* to a political party *without referencing* a candidate unless they pay some portion (and sometimes all) of the communication with federal funds. *See* 11 C.F.R. § 106.6. This is true even if the public communication is susceptible of an interpretation other than as an appeal to vote for or against a specific candidate.[11] *See* id. And, it is true when the communication is not distributed to a single member of the referenced candidate's electorate. *See* FEC Adv. Op. 2005-13. In fact, at least 50% federal funds must be used when the communication refers to one or more political parties, refers to no candidate and is distributed only in a jurisdiction where there will not be a federal candidate on the ballot in the forthcoming election. *See* 11 C.F.R. § 106.6(c).

Also, under the regulation generic voter drive activity must always be paid for with at least 50% federal funds. *See* id. This applies even to a GOTV drive that urges voters to "support candidates… *associated with a particular issue, without mentioning a specific candidate,*" even if the GOTV drive relates to an election featuring no federal candidate on the ballot. *See* id (emphasis added).

This "reference" standard is much broader than the one that *WRTL II* concluded was unconstitutional. The EC definition whittled down in *WRTL II* required a reference to a clearly identified federal candidate, was limited to ads aired during short time periods immediately before the referenced candidate's election, and applied only to radio and television ads distributed to the candidate's electorate. Yet, the Court concluded that even this limited definition must be narrowed. The allocation regulations at § 106.6 are not so limited. They apply at all times, and to all public communications and generic voter drive activities meeting the reference standard. And, for non-connected committees, they apply to all administrative and fundraising costs.

In short, the Commission's allocation rules purport to do exactly what *WRTL II* said Congress has no authority to do—require certain organization to use a federal PAC to fund communications that contain neither express advocacy nor its functional equivalent. *See WRTL II,* 127 S. Ct. at 2671 n.9. If it is unconstitutional for Congress to burden protected speech in such a manner, then it is also unconstitutional for the Commission to do so.

The Court's holding in *WRTL II* is clear: the government has no interest sufficiently compelling to justify requiring use of a PAC to fund political speech that may be "reasonably interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 2670-71. Thus, a regulation imposing such a burden is unconstitutional. *See id.* at 2673. This

[11] For instance, if a union planned to use a non-federal account to fund advertisements in 2007 to advocate the election of a specific candidate for mayor of Albuquerque, NM, the Commission's regulations would require the union to use funds from its federal PAC to pay for a portion of the costs of the advertisements if they mentioned that the candidate had served as presidential candidate and Governor Bill Richardson's Secretary of the Environment.

is true whether the speaker is a union or corporation with a federal PAC or a union or corporation with both federal and non-federal PACs.

The 2008 election is upon us. Rather than leaving these important matters in limbo or forcing the implementation of *WRTL II* through litigation, we respectfully request that the Commission address these matters either in this rulemaking or, if that is not feasible, in a rulemaking that follows immediately upon the conclusion of this one.

Thank you for your consideration of these comments.

Respectfully submitted;

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