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10/01/2007 06:08 PM

To wrtl.ads@fec.gov
cc
bcc
Subject Comments of CCP: Electioneering Communications NPRM

Dear Mr. Katwan:

Please find, attached, comments of the Center for Competitive Politics on the Commission's Notice of Proposed Rulemaking for Electioneering Communications.

If you have any questions, please do not hesitate to contact me.

Thank you,

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Comments of CCP Electioneering Communications 100107.doc

Center for Competitive Politics

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October 1, 2007

Mr. Ron B. Katwan
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VIA ELECTRONIC MAIL

Re: Comments of Center for Competitive Politics on *Notice of Proposed Rulemaking on Electioneering Communications*, 72 *FR* 50261 (Aug. 31, 2007).

Dear Mr. Katwan:

The undersigned submits the following comments on behalf of the Center for Competitive Politics ("CCP") a not-for-profit, educational organization whose mission is to educate the public on the actual effects of money in politics, and the results of a more free and competitive political process.

The Commission should be commended for taking quick notice of the opinion in *FEC v. Wisconsin Right to Life*, __ U.S. __ ; 127 S. Ct. 2652 (2007) ("*WRTL II*") and for quickly integrating *WRTL II* into its regulations. The Commission also should look to *WRTL II* as added justification for repealing its alternative definition of express advocacy at 11 CFR 100.22(b), which is unworkable and unconstitutional.

The Scope of the Rulemaking

The Commission asks two questions with regard to the scope of its proposed rulemaking. First, the Commission asks whether the scope of the *WRTL II* decision is limited to an as-applied challenge to BCRA's § 203 prohibitions, and second, whether the Commission has the authority to change its electioneering communications rules beyond what is required by the Supreme Court's decision. *Notice of Proposed Rulemaking on Electioneering Communications*, 72 *FR* 50261, 50262 (Aug. 31, 2007) ("NPRM"). The answer to the first question is yes, for the reasons stated below. The answer to the second is that the Commission may open a rulemaking on any part of its regulations at any time, subject to the standards of the Administrative Procedures Act. *See* 5 U.S.C. § 553(a). While the *WRTL II* opinion certainly gives the Commission a reason to conform its

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electioneering-communications regulations to the test set forth in the *WRTL II* opinion, the Commission may also address topics other than electioneering communications if those topics are properly noticed in the NPRM and if the law commands it.

Choosing between Alternative 1 and Alternative 2

The Commission notes that the choice between Alternative 1 and Alternative 2 would have implications for the disclosure of electioneering communications as well as for the Commission's rules on coordinated communications.

In *McConnell v. FEC*, 540 U.S. 93, 196 (2003), the Supreme Court held that "[b]ecause the important state interests identified in *Buckley [v. Valeo*, 424 U.S. 1 (1976)] … apply in full to BCRA, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of 'electioneering communications.'" To our knowledge, no plaintiff has challenged *McConnell's* interpretation of BCRA's reporting requirements for electioneering communications. Because the Commission has no new or additional basis for believing that electioneering communications run within the temporal windows cannot be subject to reporting, the Commission's rulemaking in response to *WRTL II* must address the application of BCRA § 203 to its regulations and not application of other parts of BCRA. This means the Commission has guidance from the Court only to amend 11 CFR Part 114.

In determining whether BCRA § 203's application to WRTL was constitutional, Chief Justice Roberts noted the following:

> That the ads were run close to an election is unremarkable in a challenge like this. *Every* ad covered by BCRA § 203 will by definition air just before a primary or general election. If this were enough to prove that an ad is the functional equivalent of express advocacy, then BCRA would be constitutional in all its applications.

WRTL II, *supra*, at 2668 (emphasis in original). As the Chief Justice notes, the question is not whether WRTL's ads fall within the definition of electioneering communication under the Act; the question is whether the Act is constitutional in each of its applications. The Commission knows, after *WRTL II*, that BCRA § 203 is unconstitutional as applied to WRTL's ads as well as to any ad that does not meet the no-other-reasonable-interpretation test. All that the Commission knows about the application of BCRA § 201 (disclosure) to the ads run by WRTL, and any similar advertising, is that § 201 was upheld against facial challenge in *McConnell*.

Of course, it is evident that once a communication is determined, through the no-other-reasonable-interpretation test of *WRTL II*, not to be the functional equivalent of express advocacy, there is no constitutionally recognized interest in compelling its disclosure. The *Buckley* Court says that unambiguously campaign-related speech can be regulated only for certain purposes. Those purposes are to "provide the electorate with information … to aid the voters in evaluating those who seek federal office"; "deter

actual corruption and [its] appearance … by exposing large contributions and expenditures to the light of publicity," and "gather[] the data necessary to detect violations of the contribution limitations." *Buckley* at 66-68. Disclosing disbursements for issues speech, however, will not "provide the electorate with information [on] those who seek federal office." Disclosing disbursements for issue advocacy will not "expos[e] large contributions and expenditures to the light of publicity." It will not help the government "gather[] the data necessary to detect violations of the contribution limits."[1] As James Bopp, Jr. and Richard E. Coleson rightly point out, once the nature of the ad is properly categorized as something other than unambiguously campaign related, there will remain little or no constitutional bases for requiring disclaimers on the ad or disclosure of its funding.

Nevertheless, the next case that WRTL, or some other similarly situated plaintiff, must bring is to challenge the application of the disclosure requirements of § 201 for ads already exempt from § 203 by operation of *WRTL II*. Bopp and Coleson's constitutional arguments are unassailable: Chief Justice Roberts did address WRTL's advertising, not WRTL's structure or source of funds (though the Court was invited to do so) and was more interpreting a definition (of electioneering communication) than interpreting a prohibition. Regrettably, however, there must be a next case. All that the Commission knows of the constitutionality of BCRA § 201, even after *WRTL II*, is that the section survived a facial challenge in *McConnell v. FEC*, and that the application of the provision has yet to be challenged by any plaintiffs elsewhere.[2]

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[1] Professors Richard Briffault and Richard Hasen assert at page 4 of their comments that:

> 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, disclosure requirements advance First Amendment values by providing voters with useful information.

But Professors Briffault and Hasen ignore the context of those holdings. In *McConnell* itself, the Court held that electioneering communications are regulable to the extent the communications are the "functional equivalent of express advocacy." *McConnell*, 540 U.S. 93, 206 (2003). Said the Court: "The justifications for regulating express advocacy [which are the justifications found in *Buckley* and cited by Briffault and Hasen, above] apply equally to those ads [electioneering communications] *if* they have an electioneering purpose, which the vast majority [but not all] do." *Id.* (emphasis added). But WRTL's ads do not have an electioneering purpose; they are genuine issues ads. *See WRTL II, supra*. Therefore, the relevant jurisprudence for determining the constitutionality of compelled disclosure of WRTL's ads, or similar ads by any other organizations, is the jurisprudence for compelled disclosure and/or regulation of funding for issue advocacy. *See Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[2] As a matter of jurisprudence, the Commission knows little more about the constitutionality of applying the coordinated communications provisions (BCRA § 202) to electioneering communications deemed genuine issue ads by WRTL II than it does about applying BCRA's disclosure provisions (BCRA § 201). Like its knowledge of § 201, the Commission knows that § 202 was upheld against a facial challenge in

Until some plaintiff challenges the application of § 201 to ads exempt from § 203 by operation of *WRTL II*, however, the Commission should integrate the *WRTL II* decision within its regulations by addressing the regulatory implications of BCRA § 203. This, in the main, will require the Commission to amend Part 114 of its regulations, and not Part 100.

The Commission should repeal its alternative definition of express advocacy at 11 CFR 100.22(b).

In passing BCRA, Congress grafted the electioneering communications provisions onto FECA; adding to, not altering, FECA's structure. This means, as a matter of jurisprudence, that the Court could not reach, and therefore, could not have disturbed its earlier judicial interpretations of "expenditure" in deciding the facial validity of BCRA's electioneering communications in *McConnell*. "Both the concept of express advocacy and the class of magic words were born of an effort to avoid constitutional problems of vagueness and overbreadth *in the statute before the* Buckley *Court."* *McConnell*, 540 U.S. 93, 192 (2003) (emphasis added). The statute before the *Buckley* Court, of course, was FECA, including its definition of "expenditure." FECA was not before the Court in *McConnell*. Therefore, nothing said by the *McConnell* Court could have altered the judicial gloss on FECA's core terms.[3] Moreover, the *McConnell* Court made plain that *Buckley's* judicial gloss still applies to FECA's terms. *Id.*

If the *McConnell* Court had said that electioneering communications now mark the outer bounds of express advocacy, or are a kind of express advocacy, that would be one thing. But it was the *McConnell* Court that denigrated the strictures of express

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McConnell. It also knows that once the electioneering communication under the statute is viewed as a genuine issue ad under the Constitution, there remains little constitutional reason for subjecting the ad to BCRA's coordinated communication provisions. But the Commission may speculate that it will somehow fare better in future litigation if it applies the reasoning of *WRTL II* to § 202 but not to § 201. This, however, is more a tactical decision the Commission must make, and less a decision wholly informed by the language of *WRTL II*. Make no mistake, CCP believes that the regulation of coordinated issue advocacy is every bit as abhorrent as compelled disclosure of issue advocacy. But there is nothing in *WRTL II* and nothing in *McConnell*, once we agree that WRTL's ads are genuine issue advocacy, to justify saving coordinated issue advocacy from regulation while subjecting genuine issue advocacy to compelled disclosure.

[3] In a recent rulemaking, however, the Commission says that "The Commission was able to apply the alternative [express advocacy] test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a magic words test was not constitutionally required." *See Supplemental Explanation and Justification, Political Committee Status*, 72 *FR* 5595 (Feb. 7, 2007). It is odd indeed that the Commission or reformers would invoke the *McConnell* Court's discussion of electioneering communications to resuscitate a failed definition of express advocacy at 11 CFR 100.22(b). BCRA specifically forbade the *McConnell* Court from reaching the constitutionality of 100.22(b) while reviewing the constitutionality of "electioneering communications." *See* 2 U.S.C. § 434f(3)(A)(ii) ("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.") This means that nothing said in *McConnell* about the constitutionality of electioneering communications can, as a matter of law, affect the validity of two federal court opinions that hold that the definition at 11 CFR 100.22(b) is unconstitutional.

advocacy partly to justify its upholding of Congress's need to regulate electioneering communications. *McConnell*, 540 U.S. 93; 157 L. Ed. 2d 491 (2003). Vague terms such as those found at 11 CFR 100.22(b) would not have survived a review by the Court in *McConnell*; that is, not even the *McConnell* Court would not have called 11 CFR 100.22(b) "express advocacy."

In *WRTL II*, Chief Justice Roberts wrote that, "[r]esolving [*WRTL II*] requires us first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a 'genuine issue a[d].'" 127 S. Ct. at 2659. Invoking the phrase "functional equivalent of express advocacy" necessarily implies, first, that there is a concept "express advocacy", and, second, that its "functional equivalent" is something other than express advocacy. In short, the functional equivalent of express advocacy is not a kind of express advocacy. This means that the no-other-reasonable-interpretation test marks the outer bound of "electioneering communications" as implicated in 2 U.S.C. §441b, and does not now mark the outer bound of "expenditure" at 2 U.S.C. § 431(9) or "independent expenditures" at 2 U.S.C. § 431(17). Indeed, there are statutory concerns in conflating the constitutional test for expenditures or independent expenditures, on the one hand, and the test for electioneering communications, on the other. Expenditures and electioneering communications are mutually exclusive concepts under BCRA and the Act. *See* NPRM at 50263. Indeed, we know from *WRTL II* that the factors listed in 11 CFR 100.22(b) -- purportedly designed to define express advocacy – are even less rigorous than the factors required to meet the "functional equivalent of express advocacy" standard, a standard even more broad in its scope than true, *Buckley*-inspired, part (a), express advocacy. *See* Comments of Bopp and Coleson at 20-21.

At least two appellate courts have held that the Commission's part (b) definition of express advocacy is not express advocacy as contemplated by *Buckley*, and is unconstitutional. *See FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996); *Maine Right to Life Committee, Inc. v. FEC,* 98 F.3d 1(1st Cir. 1996). Nothing in the *McConnell* opinion changes the import of those appellate court decisions.

The Commission also asks whether "*WRTL II*'s functional equivalence test can be a reasonable statutory construction of PASO?" NPRM at 50263. First, CCP notes that the "functional equivalence" standard enunciated by the Supreme Court in *McConnell* is, after the *WRTL II* opinion, now determined by the "no-other-reasonable-interpretation" test. (Functional equivalence is no longer the test, but the standard). Whatever PASO means, it cannot serve, after *WRTL II,* to place ads within the strictures of BCRA § 203 if there is no reasonable interpretation other than that the ad calls for the election or defeat of a candidate.

Language of the Rule and E&J.

Whatever else the Commission does, it must craft a rule that allows for a determination of whether the ad is subject to BCRA § 203 without the need for extensive discovery, production of evidence, or expert testimony. Any test the Commission adopts should be workable.

The Commission should follow *WRTL II's* no-other-reasonable-interpretation test that implements the functional equivalence standard first enunciated in *McConnell*. The Commission does this in proposed regulation 114.15(a), and should not depart from placing this language directly into its rule.

The Commission should attempt to list any information it believes it will consider in placing an ad in context, *see WRTL II*, 127 S. Ct. at 2666, so that the Commission can constrain itself now before determining the outcome of future advisory opinion requests or enforcements matters later. Some examples of information the Commission may want to consider in placing an ad in context are: the legislative calendars of the House or Senate; the policy plans of the Executive branch; recent news stories or editorials on those and other topics in the various press outlets. Since the Court in *WRTL II* said that, in any tie between the speaker and the censor the tie goes to the speaker, the Commission should attempt to notify the regulated community of sources the Commission will be consulting while still leaving the requestor or respondent, as the case may be, to cite other data to show that the ad was about issues not elections.

The E&J should include examples of ads that escape regulation under BCRA § 203, including the text of the grassroots lobbying ads in *WRTL II* ("Wedding," "Waiting," and "Loan"), and the other cases, which include the CCPA ad, Crossroads ad, PBA ad, and Barker ad, as well as the genuine issue ads recognized by Judge Leon in *McConnell*, 251 F. Supp. 2d at 914-18. As Courts have approved these ads, the Commission should not craft a rule any narrower than the text of these ads. If the Commission is going to place examples in the E&J, it should mention where to find the listing in the text of the rule itself. This list, of course, should be non-exhaustive.

There is no reason the Commission should not promulgate safe harbors for business communications and grassroots lobbying ads so long as it is clear in the text of the rule itself that the safe harbors merely provide minimal guidance to the regulated community and do not mark the outer boundaries of permissible speech.

CCP also agrees with Bopp and Coleson that the protection afforded speakers extends beyond grassroots lobbying:

> E&J should expressly state that *WRTL II* created a test for protecting 'genuine issue ads,' *see, e.g.*, 127 S. Ct. at 2669 (WRTL's ads were "genuine issue ads"), not just a test for grassroots lobbying. Grassroots lobbying is a subset of the much larger class of genuine issue ads. So *WRTL II's* no reasonable-interpretation test, *id.*, at 2667, is designed not

> only to protect grassroots lobbying but also other kinds of genuine issue ads, such as ads lobbying candidates to take a position on an issue (whether or not it is currently before the legislative or executive branch, as would typically be the case with grassroots lobbying) and communications that provide relevant information to voters about the position of a candidate on an issue.

Madison Center at 12.

Finally, there are no "advertisements that describe issues in such inflammatory terms that merely to recite the candidate or officeholder's position is to comment on the individual's character, qualifications, or fitness for office." *See* NPRM at 50267. If the position is the candidate's, there is no reason the citizens should not be able to speak about the ramifications of that position should it become policy, or that side of a legislative or policy issue.

Conclusion

We appreciate the opportunity to submit these comments and respectfully request the opportunity to testify at any subsequent oral hearings on this matter.

Sincerely,

/s/ Stephen M. Hoersting

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