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cc
bcc
Subject Chamber of Commerce of the United States of America - Comments on NPRM: Electioneering Communications

Mr. Katwan,

Attached please find the comments for Chamber of Commerce of the United States of America in response to the FEC's NPRM Notice 2007-16.

In addition, as is noted in our comments, Mr. Jan Witold Baran respectfully requests the ability to testify at the Oct. 17, 2007, public hearing.

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October 1, 2007

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VIA EMAIL (*wrtl.ads@fec.gov*)

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

Re: Written Comments of the Chamber of Commerce of the United States of America (Notice 2007-16, Electioneering Communications) and Request to Testify

Dear Mr. Katwan:

The Chamber of Commerce of the United States of America submits the attached comments in response to the Notice of Proposed Rulemaking published at 72 Fed. Reg. 50261, *Electioneering Communications* (Aug. 31, 2007).

In addition, I respectfully request an opportunity to testify on behalf of the Chamber at the public hearing scheduled for October 17, 2007, on this matter.

Sincerely,

Jan Witold Baran

Counsel to the Chamber of Commerce of the United States of America

BEFORE THE FEDERAL ELECTION COMMISSION

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

COMMENTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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October 1, 2007

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I. ABOUT THE CHAMBER

The Chamber of Commerce of the United States of America ("Chamber") submits these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM"), Electioneering Communications, announced in the August 31, 2007, Federal Register. The Chamber was incorporated in 1916 in the District of Columbia. It is a non-profit, non-stock corporation exempt from taxation under I.R.C. § 501(c)(6). It is the world's largest not-for-profit business federation, representing three million businesses, 3,000 state and local chambers, 830 business associations, and 87 American Chambers of Commerce abroad. The Chamber's members include businesses of all sizes and industries from every corner of America. On their behalf, the Chamber involves itself in various lobbying, electoral, and litigation activities, in furtherance of which the Chamber is engaged daily in internal and public communications with legislators, regulators, and its own members about vital public policy issues.

II. SUMMARY OF COMMENTS

The FEC's NPRM announces the Commission's consideration of specific changes to the regulations governing what types of communications are to be regulated as an "electioneering communication." This rulemaking is a response to the U.S. Supreme Court's recent decision in *FEC v Wisconsin Right To Life* ("*WRTL II*") 127 S. Ct. 2652 (2007), which concluded that certain communications were not the functional equivalent of express advocacy and, therefore, may not be regulated as electioneering communications.[1] This rulemaking was initiated on August 31, 2007. *See Notice of*

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[1] The Chamber filed a brief amicus curiae in *WRTL II* as it did in the earlier case. Brief for Chamber of Commerce of the United States of America Supporting Appellant, *Wisconsin Right To Life v. FEC* ("*WRTL I*"), 546 U.S. 410 (2006) (No. 04-1581); Brief for Chamber of Commerce of the United States of America Supporting Appellee, *WRTL II*, 127 S. Ct. 2652 (2007) (Nos. 06-969 & 06-070).

Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (Aug. 31, 2007). The Chamber respectfully submits the following comments.

The Commission's proposed grassroots lobbying safe harbor, for speech that would be otherwise regulated as electioneering communications, is a positive step toward exempting such speech in light of *WRTL II*. However, the Commission's proposal fails to account for a number of legal principles first articulated by the Chamber and co-Petitioners in a request for rulemaking in 2006 on this same topic that now are required by *WRTL II*. Only after these principles are applied to the proposed grassroots lobbying safe harbor will it satisfy *WRTL II*.

WRTL II also informs two other questions that the Commission has posed in the NPRM. First, the Commission has promulgated two possible alternative locations for the grassroots lobbying safe harbor. This safe harbor should be located in the definition of "electioneering communication" itself to spare entities from having to file electioneering communication disclosure forms for those types of communications that fall within the grassroots lobbying safe harbor. Such communications are, by definition and judicial rule, neither express advocacy nor its functional equivalent, which are the only types of political speech the government has a compelling interest to regulate, either through disclosure or otherwise.

Second, the Commission has asked whether *WRTL II* mandates the repeal of any portion of the definition of express advocacy under 11 C.F.R. § 100.22. *WRTL II*'s use of a "reasonable interpretation" standard, along with its rejection of a test based on the effect of an ad upon a target audience, mandates that 11 C.F.R. § 100.22(b), which provides a separate "reasonable person" standard, must be repealed.

III. BACKGROUND

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right to petition the Government for a redress of grievances." In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court applied strict scrutiny to the language of the Federal Election Campaign Act ("FECA") in order to ensure that FECA was narrowly tailored to restrict no more core activity than truly necessary to achieve a compelling governmental purpose and precisely defined to avoid chilling core speech due to uncertainty. *Id.* at 41 n.48. To achieve those aims while still preserving several speech-regulating provisions of FECA, the Court construed those provisions to apply only to speech that used explicit words such as "vote for" or "defeat" to expressly advocate the election or defeat of a clearly identified federal candidate. *Id.* at 44 n.52; *FEC v. Mass. Citizens for Life, Inc*, 479 U.S. 238, 249-50 (1986) ("*MCFL*"). This narrowing construction simultaneously eliminated vagueness and tailored the provisions by establishing an objective brightline (because express advocacy inherently affects elections).

Congress concluded, however, that FECA was being circumvented by speech that lacked explicit language but was still the functional equivalent of express advocacy. Via the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress established an additional category of restricted speech called an "electioneering communication," to which it gave a detailed objective definition: speech broadcast via specified media to at least 50,000 voters within 30 days of a primary or 60 days of a general election that mentioned a candidate for federal office. 2 U.S.C. §§ 434(f)(3)(c), 441b(b)(2). The U.S. Supreme Court, in *McConnell v. FEC*, declined to strike down this new standard on its face. As to narrow tailoring, the Court found that most electioneering communications

would be "the functional equivalent of express advocacy" and that the plaintiffs in the case had not demonstrated that the new standard would encompass enough true grassroots lobbying or issue advocacy to render the standard facially invalid. 540 U.S. 93, 193-94, 206-07 (2003). As to preventing the chilling of core speech, the Court held that the new standard's precise and objective provisions avoided any facial vagueness challenge under *Buckley*. *Id.* at 194.

However, in contrast to the express advocacy test, the factors that define electioneering communication do not inherently constitute electoral advocacy. Thus, the Court cautioned that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. In *WRTL II*, the Court addressed just that situation. It held that communications that fall within the brightline definition of electioneering communications but are "susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" simply "are not the functional equivalent of express advocacy and therefore fall outside the scope of *McConnell*'s holding." 127 S. Ct. at 2667, 2670.

The Court did not disturb *McConnell*'s holding that the objective, detailed, and precise electioneering communication standard was *facially* sufficient to avoid vagueness under *Buckley*. Nevertheless, it held that the Court should also strive for precision when defining how the standard must be further tailored in its application. To preserve precision while tailoring the application of the electioneering communication test, the Court held that *only* a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" may be considered the "functional equivalent of express advocacy." *Id.* at 2667.

It is important to note that the phrase "functional equivalent of express advocacy" was merely a reference to the type of speech that the government has a compelling interest to regulate. It is too general and vague a phrase to be used independently to define regulated political speech. Clear and objectively defined terms like those used in *Buckley*'s so-called "magic words" standard of express advocacy, 424 U.S. at 43, and the electioneering communication provision itself, *see McConnell*, 540 U.S. at 194, are required to avoid any "chilling" effect on speech that is outside the narrow boundaries of speech that may be constitutionally restricted.[2]

WRTL II was clear that the core defect it sought to remedy was a lack of narrow tailoring in the application of the new standard:

> [The electioneering communication prohibition] can be constitutionally applied to WRTL's ads only if it is narrowly tailored to further a compelling interest. This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent.

WRTL II, 127 S. Ct. at 2671 (internal citations omitted). Thus, the "functional equivalent of express advocacy" language is a narrow tailoring concept. It is not intended to satisfy *Buckley*'s demand for a precise and objective primary test. Indeed, *WRTL II* explicitly noted that its tailoring standard "is only triggered if the speech meets all the brightline requirements of BCRA § 203 in the first place." *Id.* at 2669 n.7. But *WRTL II* demanded that even this further tailoring be clear. Thus, it demanded a further test — speech can be regulated only it is not "susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" *Id.* at 2667,

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[2] A "functionally equivalent" test would unconstitutionally inject too much vagueness and subjectivity if employed to define regulated political speech.

This rulemaking seeks to implement *WRTL II*'s commands (i) that the "electioneering communication" standard must be applied *only* to speech that is the "functional equivalent of express advocacy," and (ii) that even this further tailoring be expressed in clear and objective terms.

IV. THE COMMISSION IS CORRECT TO UPDATE THE ELECTIONEERING COMMUNICATIONS REGULATIONS

In 2006, the Chamber joined the AFL-CIO, the National Education Association, the Alliance for Justice, and OMB Watch in petitioning the Commission to initiate a rulemaking to promulgate an exception to the electioneering communication provision for certain forms of grassroots lobbying. At the time, the Commission decided not to initiate a rulemaking, preferring instead to wait for judicial guidance. 71 Fed. Reg. 52295. Now that the Supreme Court has provided that guidance in *WRTL II*, the Commission is initiating this long sought-after rulemaking.

In its 2006 petition for rulemaking, the Chamber, along with the other parties named above, recommended an exception to the "electioneering communication" definition for a communication that satisfied the following principles:

1) The "clearly defined federal candidate" is an incumbent public officeholder;

2) The communication exclusively discusses a particular current legislative or executive branch matter;

3) The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;

4) If the communication discusses the candidate's position or record on the matter, it does so only by

quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;

5) The communication does not refer to an election, the candidate's candidacy, or a political party; and

6) The communication does not refer to the candidate's character, qualifications or fitness for office.

The Commission has proposed similar principles — in the form of a regulatory "safe harbor" — which, if satisfied, would exempt specific types of communications from the electioneering communication restrictions. Certain parts of the Commission's proposal do not track *WRTL II* and, therefore, must be adjusted. Moreover, and as the Chamber and its co-Petitioners first explained in the 2006 petition for rulemaking, the exemption should be part of the definition of electioneering communication, rather than constitute a separate and independent regulatory exemption, thereby exempting corporations that make permissible electioneering communications from the statutory reporting obligations.

A. The NPRM's Proposed Exemption Generally Focuses On The Correct Factors But Requires Numerous Adjustments To Be Consistent With *WRTL II*

While the Commission generally follows *WRTL II* in its proposed grassroots lobbying safe harbor, it has strayed in some problematic ways. The Commission also asks some important questions regarding the four prongs of its safe harbor that can be answered not only by adherence to *WRTL II*, but also by employing the Chamber's 2006 proposed grassroots lobbying principles.

1. *Factor 1: The Communication "Exclusively Discusses a Pending Legislative or Executive Matter or Issue."*

This first prong mirrors closely the second principle that the Chamber set forth in 2006: that the "communication exclusively discusses a particular current legislative or executive branch matter." A concern arises, though, with the Commission's usage of the word "pending." The Court in *WRTL II* specifically rejected the argument that, because the ads at issue were not run "near actual Senate votes on judicial nominees," they should be regulated. *WRTL II*, 127 S. Ct. at 2668. According to the Court, "a group can certainly choose to run an issue ad to coincide with *public interest* rather than a floor vote." *Id.* (emphasis added). The use of the term "pending" limits the scope of unregulated speech much more than *WRTL II* allows and, therefore, is inappropriate.

The examples that the Commission is considering do not do justice to the permissible scope either. An "initiative or undertaking proposed by the President . . . an issue that rises to prominence through events occurring in the States . . . [and] an issue that is given prominence by a Supreme Court decision," *see* 72 Fed. Reg. 50265, all require timing that is much more limited than *WRTL II*'s admonition that a group be allowed to run an ad within the electioneering communication window that "coincide[s] with the public interest." 127 S. Ct. at 2668. Grassroots lobbying is not and should not be limited to a reactionary position, requiring the presence of a specific event and a level of "prominence" before an entity is permitted to run an issue ad within the electioneering communication provision's blackout period. One may desire that a particular issue have more prominence than it already has and, therefore, disseminate a communication urging the public to contact their representatives demanding they address the issue. A public

communication may also address *past* legislative or official actions that, in the opinion of the speaker, need to be remedied.

Finally, the introduction of the term "pending" and the proposed examples merely add a layer of vagueness that is neither necessary nor warranted. *WRTL II* specifically refrained from requiring the amount of discovery that would be needed to determine if an issue were sufficiently "pending" or at a sufficient level of "prominence." 129 S. Ct. 2666-67. The term "pending" should be deleted.

2. *Factor 2: The Communication "Urges an Officeholder to Take a Particular Position or Action with Respect to the Matter or Issue, or Urges the Public to Adopt a Particular Position and to Contact the Officeholder with Respect to the Matter or Issue."*

This second prong is similar to the third principle that the Chamber set forth in 2006: that the "communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so." Both limit the target of the communications to candidates who are sitting officeholders who can immediately act in their incumbent capacity on the subject matter of the communication.

This limitation, though, may not be necessary. Certainly, the immediate goal of grassroots lobbying may be to inform and influence those who are currently in a position to vote on or otherwise make decisions about a particular issue. However, the targets of grassroots advocacy can also be non-incumbent candidates who may become officeholders. There is real value in locking candidates into policy positions prior to their assumption of office. It is much easier to hold them to those positions if they have incorporated them into their campaigns.

As the Court in *Buckley* stated, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." 424 U.S. at 42-43. Limiting the target of grassroots lobbying only to incumbent officeholders would unnecessarily deprive groups of their right to petition all officeholders, current and future. The Commission should specify "candidate" not "officeholder."

3. *Factor 3: The Communication "Does Not Mention Any Election, Candidacy, Political Party, Opposing Candidate, or Voting by the General Public."*

This prong is similar to the fifth principle that the Chamber set forth in 2006: that the "communication does not refer to an election, the candidate's candidacy, or a political party." The Commission has added "opposing candidate" and "voting by the general public" to this list. While the first was included by the Court in *WRTL II*, the latter is a new inclusion. It is not at all clear that this last phrase is necessary or mandated by *WRTL II*. The Commission should refrain from attempting to move beyond the factors set forth by the Court. *WRTL II* clearly sets forth the "indicia" that speech lacking express advocacy is still its "functional equivalent." 127 S. Ct. at 2667. Voting by the general public is nowhere to be found. It would be perverse and contrary to settled First Amendment doctrine to set even more limits on constitutionally protected speech than those the Supreme Court has indicated are sufficient to justify a countervailing government interest. The phrase "voting by the general public" should be omitted.

4. *Factor 4: The Communication "Does Not Take a Position on Any Candidate's or Officeholder's Character, Qualifications, or Fitness for Office.*

This prong mirrors the sixth principle that the Chamber set forth in 2006. It also has some support in the statement in *WRTL II* that a communication that refrains from taking such a position "lacks indicia of express advocacy." *Id.* However, it goes too far in suggesting that this is a litmus test. *WRTL II* was clear that such content permit regulation only if it is sufficiently dominant that "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* And this test does not reach every ad containing "discussion" of such factors. *Id.* at 2669.

Correctly noting that "a discussion of an officeholder's position on a public policy issue or legislative record may be consistent with the content of a genuine issue advertisement," the Commission seeks guidance as to how it could "determine if an officeholder's past position on an issue is discussed in a way that implicates the officeholder's character, qualifications, or fitness for office." 72 Fed. Reg. 50266. The Chamber provided an appropriate starting point with its fourth prong from 2006. The fourth prong permitted a quotation of the candidate's own public statements or a recitation of the candidate's own official action, such as a vote, on the matter in question.

But more can and should be allowed. Discussion of a candidate's position cannot be deemed unambiguous express advocacy if it lacks either (a) a call to vote for or against candidates with certain positions or (b) imputations that are *per se* inconsistent with public office.

B. The Commission Should Implement Alternative 2 Which Would Also Exempt Grassroots Lobbying Communications From the Electioneering Communication Reporting Requirement.

The Commission has set forth two alternative locations for placement of its proposed grassroots lobbying safe harbor. The first would place the safe harbor outside the definition of "electioneering communication" in its own section of the regulations. This would allow entities to make such communications, but would still mandate that such entities file disclosure reports for those permissible communications. 72 Fed. Reg. 50262. The second alternative, by contrast, would place the safe harbor directly in the definition of "electioneering communication." In that location, a communication that fell within the safe harbor would not be considered an electioneering communication and, as such, would not be subject to disclosure requirements.

1. *The Supreme Court Has Never Allowed Disclosure Requirements For Speech That Cannot Be Otherwise Regulated.*

The Court in both *Buckley* and *McConnell* determined that the government has an interest in both providing the public with information about who spends money during a particular election and preventing the appearance of corruption linked to large expenditures and contributions. *Buckley*, 424 U.S. at 66-67; *McConnell*, 540 U.S. at 194-97. The Court has explained that these interests are sufficiently important to require disclosure of certain spending for political speech provided that the disclosure is narrowly tailored to apply only to speech that is unequivocally campaign-related, e.g., express advocacy. *See Buckley*, 424 U.S. at 80 ("To ensure that the reach of [the disclosure requirement] is not impermissibly broad, we construe "expenditure" for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."). *WRTL II* simply extends this logic

so that compelled government disclosure of political speech may only be required of that which constitutes express advocacy or its "functional equivalent."

According to the Court in *Buckley*, "disclosure requirements, as a general matter, directly serve substantial governmental interests." *Id.* at 68. The Court, however, limited the scope of the statutory disclosure requirement that applied to expenditures made "for the purpose of . . . influencing an election" to only those that contain express advocacy. *Id.* at 79-80. By so doing, "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81. *Buckley* expressly premised disclosure of political speech on the requirement that the government have a compelling interest to regulate such speech. Under *Buckley*, only express advocacy qualified.

McConnell applied *Buckley*'s reasoning to the disclosure requirements associated with electioneering communications. 540 U.S. at 196. While it relied on the factual record, which demonstrated "that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public," *id.*, and rejected the argument that such disclosures created an unconstitutional burden on the First Amendment right to freely associate in order to support a particular cause, *id.* at 197-98, it did not stray from *Buckley*'s linkage of disclosure requirements and the need to limit such requirements to only speech that the government has a compelling interest to regulate. The electioneering communication disclosure obligations satisfied this requirement because, the *McConnell* decision reasoned, electioneering communications are the "functional equivalent of express advocacy." *Id.* at 195-96.

In *WRTL II*, the Court held that certain ads were *not* the functional equivalent of express advocacy even if they met the objective test for "electioneering communications" contained in BCRA. 127 S. Ct. at 2670. Therefore, there is no compelling government interest to justify their restriction. Because the Court has never decoupled communications subject to regulation generally from those subject to disclosure, and *WRTL II* specifically disallowed regulation of the types of grassroots lobbying communications that are the subject of this NPRM, the Commission would be acting contrary to judicial command by refraining from including the safe harbor in the definition of "electioneering communication."

2. *The Commission Is Not Restricted From Creating An Exception To The Definition Of Electioneering Communication By Any Provision of Federal Law.*

The Commission's concerns regarding its ability to create an exemption to the definition of "electioneering communication" under 2 U.S.C. § 434(f)(3)(B)(iv) are unfounded. That section provides that the Commission may promulgate regulations exempting certain communications from the definition of electioneering communication so long as the exempt communications do not meet the definition of "Federal election activity" under 2 U.S.C. 431(20)(A)(iii): public communications that "refer to a clearly identified candidate for Federal office . . . and that promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)," otherwise known as PASO.

The Court in *WRTL II* clearly stated that "[t]his Court has never recognized a compelling interest in *regulating* ads . . . that are neither express advocacy nor its functional equivalent" and provided the various factors to determine whether political

speech qualifies as such. 127 S. Ct. at 2671 (emphasis added). Construing PASO to apply to speech that is not the functional equivalent of express advocacy would fly in the face of *WRTL II* and raise serious constitutional problems. So long as the Commission is defining what is "functionally equivalent to express advocacy," its regulation will be consistent with a constitutional meaning of PASO.

3. *If the Commission Does Implement Alternative 1, Then It Must Limit Disclosure To Only Those Who Directly Contribute To Electioneering Communications.*

If the Commission determines that compelled disclosure of grassroots lobbying is indeed permissible and adopts Alternative 1 as a result, the constitutional concerns and narrow tailoring considerations just discussed require that the disclosure obligations be limited. In *Buckley*, the Court limited the independent reporting requirements for non-candidates and non-political committees to the following instances: to expenditures "that expressly advocate the election or defeat of a clearly identified candidate" and to contributions "earmarked for political purposes." 424 U.S. at 80. Likewise, Alternative 1 should limit disclosure to those contributions "earmarked" for electioneering communications through solicitations that specifically request donations for the purpose of making grassroots lobbying electioneering communications. In other circumstances, Commission regulations carve out exceptions that allow for such specific solicitations. Federal candidates, for example, are permitted to make "specific solicitations" on behalf of tax-exempt organizations for voter registration, voter identification, GOTV activity and "generic campaign activity." 11 C.F.R. § 300.52(b); *see also id.* § 300.65(b). Any disclosure per Alternative 1 should utilize a similar type of limitation so that only those donations solicited by independent organizations for the express purpose of making

permissible federal electioneering communications fall within the disclosure requirements.

V. THE COMMISSION MUST REVISE THE DEFINITION OF EXPRESS ADVOCACY TO ELIMINATE THE VAGUE AND OVERBROAD STANDARD CONTAINED IN 11 C.F.R. § 100.22(b).

WRTL II not only affects the definition of "electioneering communication." It also impacts the definition of "express advocacy" found at 11 C.F.R. § 100.22. As discussed above, *WRTL II* concerned how to tailor application of the BCRA standard already held to provide a brightline that met *Buckley*'s *facial* standards for precision. Thus, the further tailoring by *WRTL II* did not have to fully achieve the same high degree of precision that is necessary when providing a facially adequate primary brightline standard. But, any test that falls short of the precision demanded by *WRTL II a fortiori* will fall short of *Buckley.*

Section (a) of 11 C.F.R. § 100.22 includes 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!"

Section (b) is broader, written to include any communication that:

> (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.

WRTL II renders section (b) of 11 C.F.R. 100.22 invalid and, as such, that section of the definition of "express advocacy" must be repealed.

Chief Justice Roberts did not simply hold that the electioneering communication standard had to be tailored to apply only to the functional equivalent of express advocacy. Instead, to assure that the tailoring was sufficiently clear, he held that the facially adequate brightline established by the electioneering communication test must be further limited to a communication that "is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667. (emphasis added). As the Commission correctly notes, this standard "bears considerable resemblance" to 11 C.F.R. § 100.22(a), which includes 1) *Buckley's* direct "magic words" advocacy; 2) the marginally less direct but no less explicit advocacy that urges a vote in favor of a particular policy position and specifies candidates holding that position; and 3) "posters, bumper stickers, and advertisements" and similar items consisting of slogans or words, such as "Nixon's the One" or "Mondale!" that "in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." 72 Fed. Reg. at 50263; 11 C.F.R. § 100.22(a). In short, section (a) mandates an objective analysis of the words used. Significantly, the "no reasonable interpretation" standard draws further objective context from the electioneering

communication standard it supplements. Thus, a stringent reading of section (a) appears consistent with *WRTL II.*

Section (b), on the other hand, includes communications of any form that "[w]hen 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)." (Emphasis added). It leaves much more room for interpretation and does not demand an objective construction of specific words. This is nothing like the standard set forth in *WRTL II.* In fact, the Court's use of a "reasonable *interpretation*" standard instead of section (b)'s "reasonable *person*" standard is a critical difference. (Emphasis added). This is doubly concerning since, unlike the *WRTL II* standard, section (b) stands alone, rather than supplementing and operating within an objective brightline test.

First, section (b) begins by mandating "reference to external events, such as the proximity to the election" in any review of a communication. It says this reference should be "limited," but does not spell out the limitation, leaving it to the regulator's unguided post hoc discretion. *WRTL II* cautioned against such considerations, warning that "contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry." 127 S. Ct. at 2669. Those factors included (1) other communications in which support for or opposition of the re-election of the officeholder referenced in the ad was voiced; (2) the timing of the ads; and (3) a reference in the communication to a website that contained express advocacy. *Id.* at 2668-69. Prominent in those factors that the Court disapproved is the timing of the ad, which is the only factor — proximity to an election — that exists in section (b). There is a clear inconsistency

between a rule that opens by calling for consideration of context and one that says context "seldom" should be significant.[3]

Second, the primary instances where a "reasonable person" standard is used — police seizures, *see Brendlin v. California*, 127 S. Ct. 2400, 2406-07 (2007), civil liability for constitutionally impermissible conduct, *see Hope v. Pelzer*, 536 U.S. 730, 739 (2002), and sexual harassment, *see Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) — require the decisionmaker to step into the guise of that reasonable person and consider all of the facts relating the situation at issue. *See, e.g., Brendlin*, 127 S. Ct. at 2405 (noting that the Court, in a seizure situation, was to consider, "all of the circumstances surrounding the incident to determine if a reasonable person would have believed that he was not free to leave") (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)). This runs counter to *WRTL II*'s exhortation that reviewers not look beyond the four corners of the advertisement in question other than for a review of its "basic background information." 551 U.S. 2669.

Third, the Court in *WRTL II* specifically rejected analyzing ads "in terms 'of intent and of effect.'" 551 U.S. 2665 (quoting *Buckley*, 424 U.S. at 43). An intent-based test "would chill core political speech by opening the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Id.* at 2665-66. As for reviewing the effect of an ad, "[s]uch a test puts the speaker . . . wholly at the mercy of the varied understanding of his hearers. It would also typically

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[3] *WRTL II*'s use of "seldom" allows room for the context necessary under section (a) to identify communications as "posters, bumper stickers [or] advertisements" and their brief contents as "campaign slogans" or the like.

lead to a burdensome, expert-driven inquiry, with an indeterminate result." *Id.* at 2666. The reasonable person test requires that the effects of an action on that reasonable person be assessed. *See Brendlin*, 127 S. Ct. at 2406-07 (reviewing the officer's actions during a traffic stop in terms of determining their effect on a reasonable person as to whether that person would feel free to leave); *Faragher*, 524 U.S. at 787-88 (providing that the standard mandates a review of the effect of the work environment on a reasonable person). An inquiry that focuses on the effect of an ad, which section (b)'s reasonable person standard necessarily does, therefore, is improper under the Court's explicit admonition in *WRTL II.* According to the Court, such a standard would "unquestionably chill a substantial amount of political speech." 127 S. Ct. at 2666.

Finally, section (b) has been held unconstitutional by every federal court that has reviewed it. *See, e.g., Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).[4] In fact, the U.S. Court of Appeals for the Ninth Circuit case that served as the model for section (b), *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987),[5] has been roundly rejected by every sister circuit to have addressed it. *See Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 193-95 (5th Cir. 2002) (collecting cases). Indeed, the Ninth Circuit itself has reined in the reach of its *Furgatch* decision. In *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003), after describing *Furgatch* as "standing apart from other

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[4] These decisions were all based on *Buckley* and *MCFL.* The Supreme Court's decision in *McConnell* did not affect the validity of the Court's reasoning in *Buckley* and *MCFL* as it relates to section (b). *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

[5] *See* 60 Fed. Reg. 35,292, 35,295 (July 6, 1995).

circuit precedent," the panel sought to reduce the disharmony by ruling that *Furgatch* actually holds that "express advocacy must contain some explicit words of advocacy." The panel also noted that "introducing context and ... not tethering express advocacy to explicit words of advocacy ... raises serious First Amendment concerns." 328 F.3d at 1097-98.

In sum, *WRTL II* rejects the use of a "reasonable person" standard even when used to supplement and tailor the facially sufficient precision of the electioneering standard. The Court refrained from utilizing a "reasonable *person*" standard, preferring instead to implement a "no reasonable *interpretation*" standard. The two standards have starkly different applications. The Court in *WRTL II*, in fact, explicitly denounced the elements inherent in a "reasonable person" standard. Further, numerous courts have already determined that section (b) is unconstitutional. For all of these reasons, the Commission's regulation of political speech that employs a "reasonable person" standard must be repealed.

Importantly, we are talking here about how much discretion a government agency should have to impute forbidden meanings to core political speech. The Supreme Court always has understood that this is an area in which an inch of leeway quickly becomes a mile and, even if judicial review is available, the burden on speakers makes the mile the practical standard. The Commissioners may well feel that they will interpret with restraint and prudence, but regulations are not to be written for present personalities. The definition of "express advocacy" must be valid for Commissions to come, and for the state and local authorities that will adopt the same standard. Section (b) simply is not valid.

VI. CONCLUSION

For the foregoing reasons, the Chamber respectfully urges the Commission to implement the grassroots safe harbor, with the modifications the Chamber has outlined above, directly to the regulatory definition of "electioneering communication." Moreover, the Commission must repeal 11 C.F.R. § 100.22(b), which provides an additional definition of express advocacy, the elements of which *WRTL II* found to violate the First Amendment.

Additionally, Jan Witold Baran respectfully requests an opportunity to testify on behalf of the Chamber at the public hearing scheduled for October 17, 2007, on this matter.

Respectfully submitted,

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