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10/01/2007 02:43 PM

To "wrtl.ads@fec.gov" <wrtl.ads@fec.gov>
cc Michael Boos <Michaelboos@citizensunited.org>, "'davebossie@yahoo.com'" <davebossie@yahoo.com>
bcc
Subject Electioneering Communications Comments

History: This message has been forwarded.

Mr. Katwan,
Attached in pdf format please find a copy of Citizens United Comments and the cover letter that accompanies the Comments.

Michael Boos
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October 1, 2007

Via E-Mail: wrtl.ads@fec.gov
& Hand Delivery

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

Re: Comments on Proposed Exemptions from Electioneering Communications Definition (Notice 2007-16, 72 Fed. Reg. 50,261 (Aug. 31, 2007))

Dear Mr. Katwan:

Enclosed for the Commission's consideration are the Comments of Citizens United concerning the proposed exemptions from the definition of electioneering communications. As we note on page 2 of our Comments, we request that I be permitted to testify at the Commission's public hearing on this matter on October 17, 2007. Please contact me if you should have any questions concerning the enclosed Comments or the request to testify on this matter. Thank you.

Sincerely,

Michael Boos
Vice President &
General Counsel

Enclosure

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BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:	:
	:
ELECTIONEERING COMMUNICATIONS	: NOTICE 2007-16
	:

COMMENTS OF CITIZENS UNITED

CONCERNING PROPOSED REVISIONS TO RULES GOVERNING

ELECTIONEERING COMMUNICATIONS

SUBMITTED BY MICHAEL BOOS
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OCTOBER 1, 2007

INTRODUCTION

Citizens United ("CU") submits the following comments in response to the Federal Election Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM"), which seeks input from the public on proposed revisions to the rules governing electioneering communication in order to implement the Supreme Court's ruling in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007)("*WRTL II*"). *See* Notice of Proposed Rulemaking, 72 Fed. Reg. 50,0261 (August 31, 2007). We also request that I be permitted to testify on behalf of CU during the Commission's public hearing on October 17, 2007.

CU is a non-profit membership organization that is exempt from Federal income taxes under Section 501(c)(4) of the Internal Revenue Code. The organization is dedicated primarily to principles of limited government, belief in God, traditional family values, national sovereignty and rights secured under the United States Constitution. CU has previously commented on the Commission's electioneering communications rules, including proposals to exempt advertisements for movies, books and plays from the definition of electioneering communication. CU is the subject to Advisory Opinion 2004-30, which is referenced as a motivation for one of the proposals in the NPRM. In addition, CU filed *amicus curiae* briefs with the Supreme Court in support of Wisconsin Right to Life in both *WRTL I* and *WRTL II*.

CU uses a variety of formats to present its views and the views of its members on legislative and public policy issues to federal, state and local government officials, and the general public. Channels of communication frequently employed by the organization include direct mail, telemarketing, documentary films, handbills, internet, broadcast advertisements (*i.e.* television, cable, satellite and radio), print publications, court briefs and public forums.

With the exception of communications paid for by Citizens United Political Victory Fund (a separate segregated fund of CU, which is registered with the Commission as a Federal political committee), CU does not expressly advocate the election or defeat of Federal candidates for elective office in its communications with the public. Nevertheless, the organization's public communications, including documentary films and broadcast advertisements, often refer to public officials and candidates for elective office, including Federal candidates.

In 2004, Citizens United produced and distributed the documentary film *Celsius 41.11: The Temperature at Which the Brain Begin to Die.* The film was billed as a conservative response to Michael Moore's movie, *Fahrenheit 9/11,* and it included interviews, images, sound bites and commentary from a number of elected officials including President George W. Bush and Senator John Kerry, who, at the time, were the respective Republican and Democrat candidates for President.

Celsius 41.11 was released theatrically in October 2004, and played in approximately 120 theatres across the country during the two week period preceding the 2004 general election. The film was concurrently released (and remains available) in DVD format.

Television and cable advertisements for *Celsius 41.11* were initially produced to include brief images and sound bites of President Bush and Senator Kerry. Before airing, however, the advertisements that were paid for by CU had to be altered by removing those images and sound bites in order to comply with the Commission's electioneering communications rules. We believe those changes would have been unnecessary if, at the time, the Commission had in place an appropriate rule exempting broadcast advertisements

for movies, books, plays and similar works from the definition of electioneering communications.

Since the release of *Celsius 41.11,* CU and its sister organization, Citizens United Foundation ("CUF")[1], have released several more documentary films, each of which include references to public officials, including persons who from time to time may be Federal candidates for elective office. Films released in 2005 and 2006 included: *Broken Promises: The United Nations at 60* (released in September 2005), *Border War: The Battle Over Illegal Immigration* (released September 2006) and *ACLU: At War With America* (released December 2006).

Two of the films, *Broken Promises* and *Border War,* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festival. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival and best feature documentary film honors from the American Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences demanding criteria for nomination to the 79th Academy Awards in February 2007.

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[1] CUF is an exempt from Federal income taxes under Section 501(c)(3) of the IRC. Although the prohibition against electioneering communications by IRC Section 501(c)(4) organizations such as CU has been in force since enactment of the so-call Bipartisan Campaign Reform Act of 2002 (Pub. L. No. 107-155, 116 Stat. 81), until recently IRC Section 501(c)(3) organizations such as CUF were specifically exempted from the prohibition by regulations. That exemption, however, was found lacking by the district court in *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004), and subsequently repealed. *See* FEC Final Rules, 70 Fed. Reg. 75,713 (Dec. 21, 2005). CU and CUF are related to one another in the sense that their governing bodies are composed of the same individuals, and the two groups share office space and staff.

Later this year, CU will release a documentary film on the life and career of Senator Hillary Rodham Clinton, and CUF will release a documentary film based on the book *Revisiting God in America,* which was authored by former House Speaker Newt Gingrich. A book version of the Hillary Clinton documentary is also expected to be published by early 2008. Marketing for both films and the book is expected include broadcast advertising, and, given the topics addressed by the works, there is a very good chance that some of the ads would include references to one or more candidates for Federal elective office.

Since 2004, CU and CUF have spent in excess of $1 million per year on film-making and marketing activities. These activities are so extensive and routine that CU has formed a documentary film production and marketing arm called Citizens United Productions.

DISCUSSION & ANALYSIS

CU believes the Supreme Court's decision in *WRTL II* obligates the Commission to revise the rules governing electioneering communications, and we are pleased that as part of those revisions the Commission is proposing to address general advertising for businesses, products and services (hereinafter referred to as the "business exemption"), which would cover such things as broadcast ads for books, films, plays and similar works. In CU's view, Alternative 2, which exempts broadcast ads that are not the functional equivalent of express advocacy from the definition of electioneering communications, is the better of the two alternatives put forth in the NPRM.

CU is also of the view that the safe harbor provisions put forth in the NPRM are to narrow, and would be rendered unnecessary if the Commission were to: (a) revise its definition of "expressly advocating" as recommended in these comments, and (b) adopt a

definition of "promote, support, attack or oppose" that comports with the Supreme Court's functional equivalent of express advocacy test.

A. The Exemption Should Apply To Ads For Businesses, Products & Services

CU supports the concept of including a business exemption within the scope of the proposed exemption. We have long sought an exemption that covers advertisements for movies, books and plays, and we believe that an appropriate business exemption would by definition cover those type works. CU also believes that a general business exemption would be fully consistent with the Supreme Court's decision in *WRTL II,* and that the Commission has authority to adopt such an exemption.

CU's involvement with this issue began in 2004 when we requested an advisory opinion concerning a book we were distributing and a documentary film we were producing. In Advisory Opinion 2004-30, the Commission concluded that proposed broadcast ads for the book and film would qualify as electioneering communications and that the ads would not be exempt from the definition under the news media exemption. Later that year, CU submitted comments to the Commission urging it to act favorably on a Rulemaking Petition that was submitted by Robert F. Bauer. And in September 2005, CU submitted comments on a proposed exemption for ads promoting movies, books and plays. In each instance, CU urged the Commission to exempt the ads as part of the news media exemption set forth at 2 U.S.C. § 434(f)(3)(B)(i).

Instead of adopting an exemption, the Commission announced in December 2005 that it was deferring any further action on the proposed exemption until after it completed the rulemakings required by the District Court and Court of Appeals rulings in *Shays v. FEC. See* 70 Fed. Reg. 75,713, 75,716 (Dec. 21, 2005)(Explanation & Justification, Final Rules,

Electioneering Communications). Those rulemakings have now been completed. Thus, the pending rulemaking is an appropriate forum in which to address an exemption covering advertising for movies, books, plays and similar works.

Throughout the rulemaking process, CU has consistently maintained that the Commission should formally recognize that ads for movies, books and plays fall under the news media exemption, and we continue to hold that view. The Commission has recognized that documentary films and educational program fall within the scope of that exemption. *See* Explanation and Justification for Electioneering Communications, Final Rules, 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002)("The Commission interprets 'news story, commentary, or editorial' to include documentaries and educational programming in this context."). Including ads for movies, books and plays works within the scope of the news media exemption would be consistent with the exemption covering documentary films, as well as court precedent on the scope of the news media exemption. *See e.g. Federal Election Commission v. Phillips Publishing, Inc.*, 517 F. Supp. 1207 (DDC 1981).

But we also recognize that certain ads, such as those for movies, books, plays and similar works, might fall under more than one possible exemption. Thus, we look favorably upon a general business exemption, because such an exemption, by definition, would include ads for those type works.

B. The Business Exemption Should Be As Broad As The Grass Roots Lobbying Exemption

In CU's view, the Commission is correct in proposing that the scope of the business exemption be as broad as the proposed exemption covering grass roots lobbying communications.

Throughout his opinion in *WRTL II*, Chief Justice Roberts clearly indicates that the Court's rationale in striking down the ban on Wisconsin Right to Life's grass roots lobbying advertisements is fully applicable to advertisements for businesses, products and services. For example, in rejecting the government's principal argument that issue advocacy may be regulated because express election advocacy may be regulated, the Chief Justice emphasizes that such an argument is no more valid than a contention that commercial corporate speech could be banned because business corporations could be prohibited from expressly advocating the election or defeat of political candidates. On this point, the Chief Justice states:

> At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and "the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy." *McConnell, supra,* at 205. This greater-includes-the-lesser approach is not how strict scrutiny works. **A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less "core" than corporate speech about an election, which we have held may be restricted.** A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy; the McConnell Court itself made just that point. *See* 540 U.S., at 206, n. 88. Such a greater-includes-the-lesser argument would dictate that virtually all corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. That conclusion is clearly foreclosed by our precedent. *See, e.g., Bellotti, supra,* at 776-777.

WRTL II, 127 S. Ct. 2652, 2671-72 (2007)(emphasis added).

Later in the opinion, the Court rejected a request by certain *amici* to distinguish Wisconsin Right to Life's ads from those of a business corporation due to Wisconsin Right to Life's nonprofit status. Because the group's ads were funded, in part, by commercial business

interests, it applied the same First Amendment analysis and standards that it would have applied had the organization been a commercial business corporation. *Id.* at 2673, n. 10.

Contrary to the concerns raised in the NPRM, the Supreme Court does not apply an intermediate scrutiny test to speech by business corporations when addressing content-based restrictions. Rather, strict scrutiny applies in evaluating the constitutionally of such laws. *See United States v. Playboy Entertainment Group, Inc.* 529 U.S. 803, 813 (2000) (Since § 505 [of the Telecommunications Act of 1996] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny."); *see also, Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 572 (2001)("when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'")(Thomas, J., concurring).

Campaign finance restrictions are certainly not subject to a lesser standard of scrutiny. In case after case, the Supreme Court has consistently applied strict scrutiny to campaign finance laws that restrict expenditures by corporations, irrespective of whether the corporation is organized as a non-profit political/advocacy group or a commercial enterprise. *See First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982); *FEC v. National Conservative Political Action Committee,* 470 U.S. 480 (1985); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); and *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

The leading campaign finance case involving speech by commercial business enterprises is *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), where the Court applied strict scrutiny in striking down a Massachusetts statute that prohibited banks and business corporations from making expenditures to influence the vote on referendum

proposals. Writing for the Court, Justice Powell explained that the constitutionality of the statute turned on:

> whether it can survive the **exacting scrutiny** necessitated by a state-imposed restriction on freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing.

435 U.S. at 786 (emphasis added). The Court flatly rejected the state's argument that the commercial nature of the businesses affected by the law allowed for a lesser level of scrutiny in evaluating the statute's constitutionality. On that point, the Court emphasized that the state's position had "no support in the First or Fourteenth Amendment, or in the decisions of this Court." *Id.* at 784.

In short, the intermediate scrutiny test announced in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,* 447 U.S. 557 (1980), has no applicability in the field of campaign finance regulation. Instead, the Supreme Court has clearly articulated that in the strict scrutiny applies. Thus, the Commission is correct in proposing a business exemption that is as broad in scope as the exemption for grassroots lobbying.

C. Alternative 2 Is By Far The Better Choice

Of the two alternative proposals set forth in the NPRM, CU believes Alternative 2 is by far the better choice. It is more consistent with the reasoning that underlies the Supreme Court's decision in *WRTL II,* and it is fully consistent with the Commission's authority to adopt exceptions to the definition of electioneering communications. Also, from a practical standpoint, we believe the disclosure requirements of Alternative 1 would be extremely difficult to implement because ads for products and services are often financed by investment capital and sales revenues, not reportable contributions.

1. Alternative 2 Is More Consistent With The Supreme Court's Reasoning

CU believes Alternative 2, which exempts certain grass roots advertising and business advertising from the definition of electioneering communications, is more consistent with the reasoning underlying the decision in *WRTL II* then is Alternative 1. Throughout his strict scrutiny analysis, the Chief Justice stressed the absence of a compelling justification for **regulating** Wisconsin Right to Life's ads.

> 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 (emphasis added).

> At the outset, we reject the contention that issue advocacy may be **regulated** because express election advocacy may be, and the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy.

Id. at 2672 (emphasis added).

> A corporate ad expressing support for the local football team could not be **regulated** on the grounds that such speech is less "core" than corporate speech about an election, which we have held may be restricted.

Id. (emphasis added).

> But to justify regulation of WRLT's ads, this interest must be stretched yet another step to ads that are not the functional equivalent of express advocacy. Issue ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify **regulating** them.

Id. (emphasis added).

> We hold that the interest recognized in Austin as justifying **regulation** of corporate campaign speech and extended in McConnell to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by WRIL.

Id. at 2673 (emphasis added).

We believe the Chief Justice deliberately stressed the absence of a compelling justification for **regulating** the ads – as opposed to banning them – in order to signal the broad implications of the decision. The Court's clear message is that advertising that does not contain either express advocacy or its functional equivalent should not be regulated at all. Alternative 2 comports with that message, but Alternative 1 fall well short. Under Alternative 1, issue advocacy ads and ads for products and services would be permitted, but the ads would still be heavily regulated because they would remain subject to burdensome disclosure and reporting requirements.

2. Alternative 2 Is Fully Consistent With The Commission's Authority

Alternative 2 is consistent with the Commission's authority to adopt exemptions to the definition of electioneering communications. There are two statutory sources for the Commission's authority to adopt electioneering communications regulations. One source is the Commission's general authority to adopt regulations necessary to carry out the provisions of the Federal Election Campaign Act, which is set forth at 2 U.S.C. § 437(d)(a)(8). The other source is a particularized grant of authority to exempt certain advertising from the definition of electioneering communication, which is set forth at 2 U.S. 434(f)(3)(B)(iv). We believe the Commission has authority under both sources to adopt Alternative 2.

It is long settled law that "the courts are the final authorities on issues of statutory construction." *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981). Once the Supreme Court construes a statute, that construction "becomes the law and must be given effect." *Faucher v. FEC,* 928F.2d 468, 471 (1st Cir. 1991). "It is not the role of the FEC to second-guess the wisdom of the Supreme Court." *Id.*

The essence of the Supreme Court's holding in *WRTL II* is that the statutory term "electioneering communication" includes only those communications that are the functional equivalent of "express advocacy." That construction is now the law of the land, and it is not the role of the Commission to second-guess it. In adopting rules governing electioneering communications, the Commission is bound by the Supreme Court's construction of that terminology irrespective of whether it is acting under its general grant of authority to adopt rules necessary to carry out the provisions of the Federal Election Campaign Act or its more particularized authority to create exemptions to the definition of electioneering communications.

Also, please see Section D.2 of these comments, where we discuss the need to adopt a rule defining "promote, support, attack or oppose" in a way that is consistent with the Supreme Court's functional equivalent of express advocacy test.

3. <u>Disclosure Requirements of Alternative 1 Would Be Difficult to Implement</u>

As explained in the NPRM, under Alternative 1, corporate ads for products and services that include references to Federal candidates would not be prohibited electioneering communications, but would still be subject to the Act's disclosure and reporting requirements. *See* NPRM, 72 Fed. Reg. at 50,262. While it might be possible (but probably not feasible) for a business corporation to report its electioneering communications disbursements in accordance with the rules, reporting the "name and address of each donor who donated an aggregate amount of $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year," 11 CFR § 104.20(c)(7) and (8), would likely prove difficult, if not impossible. The difficulties of compliance would be most acute where revenues are generated through sales, investment capital or a combination thereof,

which is generally the case with a commercial business. At the very least, this particular reporting requirement would probably impose such a high burden that it would in practical effect amount to a ban on the ads for some businesses. Thus, Alternative 1 would raise serious First Amendment concerns if adopted. *See United States v. Playboy Entertainment Group, Inc.* 529 U.S. 803, 812 (2000)("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.")

D. The Commission Needs to Narrow Its Definition of Express Advocacy, Adopt A Definition for "Promote, Support, Attack or Oppose" and Revisit The Rules Governing Coordinated Communications

In the NPRM, the Commission asks for comments on whether the *WRTL II* decision has implications beyond the rules governing electioneering communications. Among other things, the Commission asks if either the court decision or the adoption of Alternative 2 requires it to modify its rules governing independent expenditures or coordinated communications. *See* NPRM, 72 Fed. Reg. 50,261, 50,263 (Aug. 31, 2007). CU believes the decision in *WRTL II* unquestionably requires the Commission to narrow its definition of express advocacy. We also believe the decision requires the Commission to modify its rules governing electioneering communications by adopting a definition of "promote, support, attack or oppose" ("PASO") that comports with the Court's functional equivalent of express advocacy test. In our opinion, making these two changes to the rules would alleviate the concerns raised with respect to adoption of Alternative 2.

We also urge the Commission to revisit and modify its rules governing coordinated communications because the decision in *WRTL II* clearly has implications for those rules, too.

1. Independent Expenditures & Express Advocacy

The NPRM points out that the Commission's rules governing independent expenditures include within the definition of express advocacy "communications that 'in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates,'" 72 Fed. Reg. at 50,263 quoting 11 CFR § 100.22(a), and any communication:

> 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 candidates 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 candidates (s) or encourages some other kind of action.

Id. quoting 11 CFR § 100.22(b). The Commission asks for comments on whether these parts of the definition of "expressly advocating" cause the definition to subsume all speech that would also qualify as the functional equivalent of express advocacy under the *WRTL II* test.

CU is of the firm view that the above-quoted parts of the definition do, in fact, subsume all speech that qualifies as an electioneering communication under the *WRTL II* functional equivalent test. There is no difference between communications that "in context can have no other reasonable meaning other than to urge the election or defeat of one or more clearly identified candidate(s)," 11 CFR § 100.22(a), and communications that are "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. The definition and test are synonymous

with one another. Similarly, every communication that qualifies as the functional equivalent of express advocacy under the *WRTL II* test will also fit the definition of "expressly advocating" under 11 CFR § 100.22(b). Every ad that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," must, at a minimum, include an electoral portion that "is unmistakable, unambiguous, and suggestive of only one meaning," and be such that "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates(s) or encourages some other kind of action."

The decision in *WRTL II* confirms CU's long held view that the Commission overreached when it opted to follow the contextual analysis employed by the 9th U.S. Circuit Court of Appeals in *FEC v. Furgatch,* 801 F.2d 857 (9th Cir. 1987), in adopting its definition of "expressly advocating" back in 1995.[2] There is, however, a very simple solution to this quandary. The Commission should rescind 11 CFR § 100.22(b) in its entirety, and it should also revisit and modify that portion of 11 CFR § 100.22(a) that refers to communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." By doing so, the Commission will eliminate the overlap in the

[2] While several court decisions prior to adoption of the rule limited the definition to communications containing so-called "magic words," *see FEC v. Christian Action Network,* 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, No. 95-2600, 1996 WL 431996 (4th Cir. Aug. 2, 1996); *Faucher v. FEC,* 928 F.2 468 (1st Cir. 1991); *FEC v. National Organization of Women,* 713 F. Supp. 428 (D.D.C. 1989); and *FEC v. Cent. Long Island Tax Reform Immediately Comm.,* 616 F.2d 45 (2nd Cir. 1980)(*en banc)*, the Commission adopted a more expansive definition that follows the *Furgatch* court's contextual analysis.

For nearly ten years the definition went unenforced in several states where the courts had struck it down. *See Virginia Society for Human Life v. FEC,* 263 F.3d 379, 386 (4th Cir. 2001)(noting that the FEC had adopted a policy of not enforcing 11 CFR § 100.22(b) in the Fourth Circuit due to the court's earlier ruling in *Christian Action Network*). That policy was apparently withdrawn following the Supreme Court's ruling in *McConnell v. FEC.*

communications that qualify as express advocacy under the Commission rules and those that qualify as the functional equivalent of express advocacy under the *WRTL II* test.

Such action would also eliminate the need for additional changes to the definition of express advocacy should the Commission adopt the exemption to the definition of electioneering communications put forth in Alternative 2. CU believes the overlap concerns raised with respect to Alternative 2 are identical to those presented by the Court's decision in *WRTL II.* In our view, solution we recommend with respect to the *WRTL II* decision cures the overlap concerns applicable to Alternative 2.

2. Defining PASO

In discussing whether the Commission has authority to adopt Alternative 2, the NPRM asks for comments on whether "*WRTL II's* functional equivalent test [is] a reasonable statutory construction of PASO?"

CU believes the *WRTL II* functional equivalent test is a reasonable statutory construction of PASO. Indeed, we believe the test is mandated by the Supreme Court's decision, and that the Commission would be well advised to adopt a formal rule that defines PASO as a communication that is the functional equivalent of express advocacy.

While administrative agencies such as the Commission have broad gap filling authority were a statute is silent or ambiguous as to the meaning of a statutory term, "the Supreme Court is the final authority with respect to statutory construction; therefore, an interpretation given a statute by the Supreme Court becomes the law and must be given effect." *Faucher v. FEC,* 928 F.2d 468, 471 (1st Cir. 1991), citing, *Chevron v. NRDC,* 467 U.S. 837, 843 n. 9 (1984).

In *WRTL II,* the Supreme Court narrowed the scope of communications that qualify as an electioneering communication to include only those communications that are the "functional equivalent of express advocacy," *WRTL II,* 127 S. Ct. at 2667, and the Court defined functional equivalent of express advocacy to mean a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* Since PASO is part of the terminology that defines an electioneering communication, it necessarily follows that the narrowing construction that the Supreme Court has imposed on the definition of electioneering communication applies with equal force to the definition of PASO.

In our opinion, a rule defining PASO ought to include the language employed by the Supreme Court in defining functional equivalent of express advocacy.

3. Coordinated Communications

The NPRM points out that under Alternative 1 and Alternative 2 certain communications that would be permissible under the *WRTL II* test might nevertheless be prohibited in-kind contributions under the rules governing "coordinated communications." In light of the *WRTL II* ruling, we believe the definition of coordinated communications is likely too broad to withstand an as applied First Amendment challenge. It seems unlikely to us that an ad that cannot be regulated as an electioneering communication could be prohibited as a coordinated communication. We therefore encourage the Commission to make this concern the topic of a future rulemaking.

E. The Proposed Safe-Harbors Are Too Narrow And Unnecessary

CU believes the proposed safe-harbors are way too narrow to be of significant benefit to the regulated community. We also believe the safe-harbors would be unnecessary if the

Commission were to adopt our recommendation for amending the definition of "expressly advocating."

1. **Grassroots Lobbying Safe-Harbor**

The proposed safe-harbor for grass roots lobbying is way too narrow because it will apply only in the most obvious cases. As explained in the NPRM, under the *WRTL II* test an advertisement will qualify as the functional equivalent of express advocacy only if it 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. But the standards required to meet the proposed safe-harbor basically amounts to the converse of that test. In our view, the proposed safe-harbor is far too narrow to be of any significant benefit to the regulated community now that the *WRTL II* decision has been rendered. It amounts to little more than a modified version of the settlement offer made by Wisconsin Right to Life following the District Court's decision in the case. *See* Letter of March 23, 2006 from Wisconsin Right to Life Counsel to FEC Counsel (available at www.jamesmadisoncenter.org). While the safe-harbor might have benefited the regulated community had it been adopted in the absence of the Supreme Court's landmark ruling, it is of little benefit now because the range of ads that will be permitted under the Court's far reaching decision is far broader than the range of ads that will fall within its scope.

Example 4 in the NPRM is a prime example of why the safe-harbor is way too narrow. The ad is clearly not the functional equivalent of express advocacy under the *WRTL II* test, because it focuses on air pollution and legislative matters that have been proposed to address this concern. But the ad just as clearly fails the safe-harbor test. In particular, it fails to meet the first and fourth prongs of the standards set forth in the proposed rule. The ad fails the first

prong because it does not **exclusively** discuss a **pending** legislative or executive matter or issue; rather, it includes a discussion of an incumbent office holder's votes on a prior legislative matter and the possible motives for his vote. The ad fails the fourth prong because it does, in fact, discuss an officeholder's character, qualifications or fitness for office." Specifically, the ad questions Rep. Ganske's character and integrity by stating that he votes with big corporations who release cancer causing pollutants into the air because they give him thousands of dollars in contributions.

In our opinion, a safe harbor that fails to include Example 4 within its reach is of little benefit to the regulated community, because Example 4 is clearly not an ad that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against" Rep. Ganske.

2. Business Exemption Safe-Harbor

CU is also of the view that the proposed safe-harbor for the business exemption is far too narrow. We are chiefly concerned with the second prong of the safe-harbor standards, but we also have reservations with the third and fourth prongs.

When the Commission was considering an exemption for ads for movies, books and plays back in 2005, it requested comments on whether the exemption should be limited to only those entities that promote these type works "within the ordination course of business of the person that pays for such communications." NPRM, 70 Fed. Reg. 49,508, 49,514 (Aug. 24, 2005). Back then we spoke out against the proposed "ordinary course of business standard" as a requisite to qualify for the exemption, and we reaffirm our opposition to such a standard today, even though it would apply only to the safe-harbor and not necessarily the exemption itself.

CU opposes the "ordinary course of business" standard for two main reasons. First, as we stated back in 2005, it is an inherently subjective standard. In Advisory Opinion 2004-30, the Commission purported to apply the standard in denying CU a news media exemption for broadcast ads that would have promoted the documentary film *Celsius 41.11*. Although *Celsius 41.11* was not CU's first documentary film, the Commission nevertheless concluded the film was not produced in the organization's ordinary course of business. Since then, CU and CUF have produced and marketed several other documentary films, two of which have won awards from the motion picture industry. CU and CUF routinely spend in excess of $1 million per year on film production, marketing and distribution, and CU has formed a film making and distribution arm called Citizens United Production. Thus, it is clear to us that we produce and market documentary films in the ordinary course of business, but given the absence of any objective test for determining an entity's ordinary course of business, we are concerned that the Commission might conclude that our film making and distribution activities are still not extensive enough to meet the proposed safe-harbor's undefined standards of ordinary course of business.

Second, an ordinary course of business standard is inconsistent with the Chief Justice's admonition that the lawfulness of an advertisement cannot turn on factors outside the four corners of the advertisement itself, such as the speaker's intent.

> A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.

WRTL II, 127 S. Ct at 2666. That type of "bizarre result" is precisely what could occur if the Commission were to set an ordinary course of business standard for the business exemption safe-harbor. A noted film maker such as Michael Moore would undoubtedly meet the

ordinary course of business standard, but a start-up film maker such as former Vice President Al Gore, whose first film won an Oscar and an Emmy, might be subject to criminal prosecution for running the same movie ad that Moore would be permitted to run. We submit that a safe-harbor standard that does not cover ads by start-up film makers is way too narrow.

Prongs three and four could also have a stifling effect on ads for documentary films and books that are about political candidates or elections. By definition these type works include references elections, political parties, opposing candidates or voting by the general public, and they will often include discussion of the subject's character, qualifications or fitness for office. We submit that many potential ads for such works would be ineligible for the safe-harbor because they would not satisfy prong three or four of the standards, yet they would fall well short of being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

3. Safe-Harbors Are Unnecessary

Finally, we believe the proposed safe-harbors will be unnecessary if the Commission takes appropriate action to modify its definition of "expressly advocating," and adopts a rule defining PASO that comports with the functional equivalent of express advocacy test announced by the Supreme Court in *WRTL II.*

In *WRTL II,* the Court laid out a very clear standard for delineating the kind of ads that can be regulated under the guise of campaign finance regulation. Congress can regulate "express advocacy" ads and it can regulate ads that are the "functional equivalent of express advocacy." An ad that is the functional equivalent of express advocacy qualifies as an "electioneering communication." And an ad will qualify as the functional equivalent of

express advocacy only if it 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.

If the Commission were to amend its definition of "expressly advocating" as we recommend in Section D.1 of these Comments, and adopt a definition of PASO that comports with the *WRTL II* test for determining whether an advertisement is the functional equivalent of express advocacy (see Section D.2 of these Comments), it will not be necessary for the Commission to adopt safe-harbors under either the grassroots lobbying or business exemption.

CONCLUSIONS

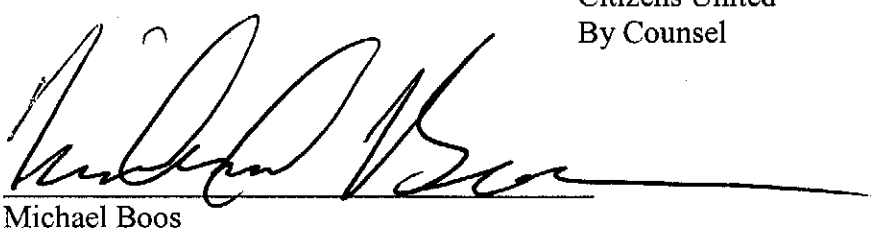
For the reasons stated herein, CU supports the adoption of rules implementing the Supreme Court's decision in *WRTL II.* We support an exemption for grass roots advertising, as well as one for ads promoting businesses, products and services. We believe Alternative 2 is by far the better of the two options proposed in the NPRM.

CU calls on the Commission to modify its rules defining "expressly advocating" by (i) rescinding 11 CFR § 100.22(b), and (ii) narrowing that part of the definition in 11 CFR § 100.22(a) that refers to communications that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly indentified candidates." We also urge the Commission to adopt a definition of "PASO" within its regulations governing "electioneering communications" that comports with the Supreme Court's functional equivalent of express advocacy test. By making these changes the Commission will eliminate the overlap between ads that qualify as independent expenditures and those that qualify as electioneering communications.

At some point in the near future, the Commission should open a rulemaking on coordinated communications to explore changes to those rules required by the *WRTL II* decision.

Finally, we urge the Commission to shelve the proposed safe-harbors for corporate-sponsored electioneering communications as too narrow to be of any significant benefit to the regulated community.

Respectfully Submitted,
Citizens United
By Counsel



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