FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF COMMISSIONER DONALD F. MCGAHN
ON ADVISORY OPINION 2012-19 (AMERICAN FUTURE FUND)

On June 7, 2012, the Commission met to consider a request from the American Future Fund ("AFF") seeking an advisory opinion to assess which, if any, of eight proposed advertisements constituted an "electioneering communication" under 2 U.S.C. § 434(f)(3)(A)(i). I write separately to explain why I supported Draft A, concluding that none of the proposed advertisements are electioneering communications.[1]

According to their advisory opinion request, "AFF wishes to speak out on issues of national policy significance with minimal government intrusion into its affairs."[2] Specifically, "AFF seeks to broadcast a series of television advertisements about American energy policy, the proposal to require religious institutions to pay for insurance policies that cover certain abortion-causing drugs (abortifacients), and the Patient Protection and Affordable Care Act in general," but "does not . . . want to subject itself to the burden of filing electioneering communications reports for these advertisements . . . [or] risk being compelled to violate its donors' privacy expectations as the result of ongoing litigation in *Van Hollen v. FEC*."[3]

[1] *See*, Federal Election Commission, Open Session, June 7, 2012, Agenda Doc. 12-24, Draft A.

[2] Advisory Opinion Request 2012-19 (American Future Fund) at 1.

[3] *Id.*

The proposed advertisements at issue did not include either a picture or the name of a federal candidate. The proposed communications did include references to "the administration," "the government," the "Obamacare" and "Romneycare" legislation, Health and Human Services Secretary Kathleen Sebelius, audio and visual references to "the White House," and audio clips of President Obama and the White House Press Secretary, without further identification.[4]

While some may believe that the proposed communications vaguely or implicitly identify a federal candidate, that is not the applicable standard under the statute and regulations. The legal standard for electioneering communications is whether a federal candidate is "clearly identified" and these proposed advertisements do not meet that standard.

1. Background on the Electioneering Communication Provisions

In McCain-Feingold, Congress defined an "electioneering communication" as:

> [A]ny broadcast, cable, or satellite communication which – (I) refers to a clearly identified candidate for federal office; (II) is made within – (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[5]

AFF stipulates that it plans to run its proposed advertisements within 30 days of upcoming primaries and 60 days of the general election, and that its advertisements will be broadcast on local and national television stations.[6] Therefore, the central question is

[4] *Id*, at 2-3, 12-19; *see also* Appendix A, Transcript of the Proposed Advertisements.

[5] 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(a) (defining "electioneering communication").

[6] Advisory Opinion Request 2012-19 (American Future Fund) at 1.

which, if any, of the proposed advertisements "refer[] to a clearly identified candidate for federal office."

a. McCain-Feingold did not change "clearly identified"

Prior to McCain-Feingold, the Federal Election Campaign Act of 1971, as amended (the "Act") defined the term "clearly identified" as meaning that "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference."[7] The FEC, through regulation, further defined "clearly identified" to mean:

> [T]he candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."[8]

A review of the legislative history of the electioneering communication statute demonstrates that Congress intended "clearly identified candidate for federal office" to remain unchanged, and continue to mean what it meant prior to the passage of McCain-Feingold. For example, as explained by Senator Feingold, "[i]n the bill, the phrase 'refers to' precedes the phrase 'clearly identified' candidate. That latter phrase is precisely defined in the Federal Campaign Election Act . . . ."[9] Similarly, during the course of the Commission's related rulemaking, the principal sponsors of the legislation and the electioneering communication provisions again made clear that this prior definition was to remain unchanged, as demonstrated by comments filed with the

[7] 2 U.S.C. § 431(18).

[8] 11 C.F.R. § 100.17.

[9] 148 Cong. Rec. S2144 (Mar. 20, 2002) (statement of Senator Feingold).

Commission: "We agree with the use of the Commission's existing rules concerning the term 'clearly identified candidate' in proposed 11 CFR § 100.29(b)(1),"[10] which mirrored the pre-McCain-Feingold rule.

In adopting the final rule, which is identical to its pre-McCain-Feingold definition,[11] the Commission explained that "[t]he final rule [defining 'clearly identified' in the context of an electioneering communication] tracks the language of the current rule in 11 CFR 100.17," an approach that "appears to be consistent with legislative intent."[12] Thus, in the context of electioneering communications, the phrase "refers to a clearly identified candidate for federal office" is defined by Commission regulation to mean:

> [T]hat the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for the Senate in the State of Georgia."[13]

Under the plain text of the regulation, a reference to a clearly identified candidate can be either visual or by name.[14]

b. Electioneering communications involve bright lines

The history surrounding the electioneering communication provision makes it readily apparent that Congress did not intend for it to be open to subjective interpretation.

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[10] Notice of Proposed Rulemaking 2002-13: Electioneering Communications, Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 3.

[11] *Compare* 11 C.F.R. § 100.17 *with* 11 C.F.R. § 100.29(b)(2).

[12] Explanation and Justification for Final Rules on Electioneering Communications, 67 Fed. Reg. 65190, 65192 (Oct. 23, 2002).

[13] 11 C.F.R. § 100.29(b)(2).

[14] *See* Robert F. Bauer, More Soft Money, Hard Law, 2d Ed. at 77 (2004) ("The definition of 'electioneering communication' does not include any particular content – other than that the ad 'refer' to a 'clearly identified candidate for federal office.' The reference may be visual, or by name.").

After all, the electioneering communication provision was not passed in a vacuum, but instead was a direct effort to avoid the sort of vagueness that plagued the post-Watergate FECA. The original post-Watergate FECA sought to regulate communications that were intended to "influence" federal elections. In analyzing broad disclosure requirements under the original FECA, the Court in *Buckley v. Valeo* opined that "[i]n its effort to be all-inclusive, however, the provision raises serious problems of vagueness."[15] In order to "insure that the reach of [the Act's disclosure requirements] is not impermissibly broad," the Court adopted a narrow definition of the term "expenditure," construing that term "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate,"[16] where the term "expressly advocate" was defined to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[17]

While it has been the subject of much debate, amongst reform advocates this narrow interpretation was viewed as the consequence of a poorly drafted law rather than a constitutional edict.[18] This perspective led to the conclusion that Congress could

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[15] 424 U.S. 1, 76 (1976).

[16] *Id.* at 80 (citations omitted).

[17] *Id*. at 44 n.52.

[18] *See, e.g.*, 147 Cong. Rec. S2456 (Mar. 19, 2001) (statement of Senator Snowe) ("We must recognize that, as a legal matter, Congress is not foreclosed from adopting a definition of 'electioneering' or 'express advocacy' that goes beyond the 'magic words' test [for or against] . . . as long as vagueness and overbreadth concerns are met.") (*quoting Five New Ideas to Deal With the Problems Posed by Campaign Appeals Masquerading as Issue Advocacy*, The Brennan Center (May 2000), *available at* http://www.brennancenter.org/content/resource/five_new_ideas_to_deal_with_the_problems_posed_by_campaign_appeals_masquera/); *Five New Ideas to Deal With the Problems Posed by Campaign Appeals Masquerading as Issue Advocacy*, The Brennan Center (May 2000), *available at* http://www.brennancenter.org/content/resource/five_new_ideas_to_deal_with_the_problems_posed_by_campaign_appeals_masquera/ ("When the Supreme Court devised the 'express advocacy' test in *Buckley*, it

essentially try again, and regulate communications that eschewed *Buckley*'s "magic words" of express advocacy but were nonetheless perceived as advocating for the election or defeat of a candidate for federal office.[19]

In enacting the electioneering communication provisions, Congress was self-consciously aware of the vagueness and overbreadth issues identified in *Buckley*, that it was regulating near the outer bounds of its authority,[20] and that it would certainly be challenged in court.[21] In order to avoid the deficiencies identified in *Buckley*, and in anticipation of a potential court challenge, supporters in Congress emphasized that the electioneering communication provisions were narrow, objective, and clear. For example, Senator Snowe, one of the sponsors of the electioneering communication provisions, stated that "[the electioneering communications] provision is narrowly and

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did so in the context of a poorly drafted statute whose definition of regulable electioneering contained problems of both vagueness and overbreadth.").

[19] *See generally* Notice of Proposed Rulemaking 2002-13: Electioneering Communications, Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 1 ("Congress's purpose in enacting Title II was very clear. The proliferation of 'sham issue ads' in the elections of 1996, 1998, and 2000 made plain the shortcomings of the current FECA as interpreted by the Commission and the courts . . . the electioneering communications provision of Title II . . . aimed to close loopholes that had developed in 2 U.S.C. § 441b."); Brief for the Federal Election Commission, *et al*. at 15, *McConnell v. FEC*, 540 U.S. 93 (2003) ("Subtitle A of Title II of BCRA reflects Congress's effort to identify, through precise and easily administrable standards, an important category of advertisements, 'electioneering communications,' that can be expected to influence federal elections, whether or not they contain 'express advocacy.'"); *Id*. at 24 ("The objective factors identified by Congress in BCRA § 201 will pose little or no obstacle to entities that are interested in financing 'genuine' issue advertisements, but are carefully calibrated to capture so-called 'sham' issue advertisements").

[20] *See, e.g.* 2 U.S.C. § 434(f)(3)(A)(ii) (providing an alternative definition of the term "electioneering communication" to become operative if the primary definition at 2 U.S.C. § 434(f)(3)(A)(i) were "held to be constitutionally insufficient by final judicial decision").

[21] *See* Bipartisan Campaign Reform Act of 2002 at § 403, PL 107-155, 116 Stat. 81 (Mar. 27, 2002) (providing expedited judicial review procedures in the event of a constitutional challenge).

carefully crafted," elaborating "[c]ertainly, this provision is not vague. We draw a bright line."[22]

As anticipated, McCain-Feingold was challenged in court, where these sentiments were echoed and amplified in representations made by the FEC and the sponsors of McCain-Feingold, acting as intervenor-defendants during litigation culminating in *McConnell v. FEC*.[23] The FEC itself represented in its briefing in *McConnell* that:

- "As a result of the care with which Congress carried out its legislative duties, BCRA's definition of electioneering communication is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners, . . . and therefore suffers from none of the vagueness that prompted the Court in *Buckley* to adopt the express advocacy construction";[24]

- "These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line";[25]

The FEC and the intervenor-defendants reiterated these assertions before the United States Supreme Court, representing that:

- The electioneering communication provisions sets forth "precise and easily administrable standards";[26]

- "BCRA's primary definition of 'electioneering communications' (§ 201) is clear and objective";[27]

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[22] 147 Cong. Rec. S2456 (Mar. 19, 2001) (statement of Senator Snowe).

[23] 540 U.S. 93 (2003).

[24] Brief of Defendants at 156, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

[25] *Id*. at 155.

[26] Brief for the Federal Election Commission, *et al*. at 15, *McConnell v. FEC*, 540 U.S. 93 (2003).

[27] *Id*. at 91.

- "BCRA's primary definition of electioneering communications presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria";[28]

- "In defining the 'electioneering communications' subject to BCRA's source limitation, Congress thus established a bright-line, readily administrable test that avoids the pitfalls that this Court identified in *Buckley*";[29]

- "Avoiding subjective judgments in individual cases is, of course, one principal reason Congress chose to enact an *objective* primary definition to define the coverage of Title II – a choice that honors this Court's emphasis on avoiding vagueness in regulations that touch on speech";[30]

- "Title II responds narrowly and objectively to the circumvention problem";[31] and

- "Title II of BCRA seeks to . . . supply[] an effective, objective standard for whether an ad is campaign-related."[32]

c. "Clearly identified" is also a bright line test

It is not surprising, and wholly consistent with Congress' stated desire to enact a bright-line, objective rule that would not be deemed vague, that Congress decided to maintain the pre-existing definition of "clearly identified." In *Buckley*, the Court discussed the definition of "clearly identified," stating that FECA:

> [D]efines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (*e.g.*, FDR), the candidate's nickname (*e.g.*, Ike), his office (*e.g.*, the President or the Governor of Iowa), or his status as a candidate (*e.g.*, the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).[33]

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[28] *Id*. at 109.

[29] *Id*. at 91.

[30] Brief for Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords at 71, *McConnell v. FEC*, 540 U.S. 93 (2003) (emphasis in the original).

[31] *Id*. at 56.

[32] *Id*. at 42.

[33] *Buckley*, 424 U.S. at 44 n.51.

The language of the Commission's pre-McCain-Feingold regulation defining "clearly identified" largely tracks the Court's interpretation.[34] The Court did not find this interpretation impermissibly vague.[35] Therefore, Congress avoided one potential vagueness challenge by incorporating the established definition of "clearly identified" into its electioneering communication provision.

By incorporating the established limited definition of "clearly identified," Congress understood that it was limiting that term to communications that reference a candidate by name or nickname, display their physical likeness, either through a photograph or drawing, or clearly and unambiguously identify a candidate through textual reference to their title, the office sought, or their status as a candidate.[36] As the sponsors themselves stated, an electioneering communication:

- "[M]ention[s] the name of a Federal candidate or show[s] a likeness of a Federal candidate";[37]
- "[M]ust mention a candidate's name or identify the candidate clearly";[38]
- "[M]entions a candidate's name or uses his or her likeness . . .";[39]

[34] *Compare* 11 C.F.R. § 100.17 *with Buckley*, 424 U.S. at 44 n.51.

[35] *See Buckley*, 424 U.S. at 43 ("The constitutional deficiencies [of vagueness and overbreadth] can be avoided only by reading [FECA's expenditure provisions] as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' . . . requires that an explicit and unambiguous reference to the candidate appear as part of the communication.").

[36] *See* 11 C.F.R. § 100.29(b)(2) ("Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'").

[37] 147 Cong. Rec. S2456 (Mar. 19, 2001) (statement of Senator Snowe).

[38] 144 Cong. Rec. S972 (Feb. 25, 1998) (statement of Senator Snowe).

[39] 144 Cong. Rec. S992 (Feb. 25, 1998) (statement of Senator McCain).

- "[M]entions the name of a candidate . . . ."[40]

In other words, Congress intended that a communication must actually reference the candidate either through express language or a picture to be an electioneering communication.

When McCain-Feingold was challenged in court, a number of studies of various advertisements were offered in support of the electioneering communication provisions to prove that advertising could serve an electioneering purpose even if it lacked the sort of express advocacy required under FECA. These studies reflected the established narrow understanding of "clearly identified."[41] For example, studies conducted by the Brennan Center for Justice cited by the government as empirical support for the electioneering communication provisions[42] determined whether an advertisement referenced a candidate based upon whether a candidate was "[m]ention[ed] by name in the text of an ad," "[p]ictured in the ad," or both.[43] Communications that reference "the White House," "the

[40] 144 Cong. Rec. S993 (Feb. 25, 1998) (statement of Senator Chafee).

[41] *See* Robert F. Bauer, More Soft Money, Hard Law, 2d Ed. at 77 (2004) ("The reference may be visual, or by name.").

[42] *See, e.g.*, Opposition Brief of Defendants at 67-76, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003) (examining the "Buying Time" reports to provide support for the proposition that "[t]he empirical evidence proves that BCRA is not substantially overbroad"); Defense Exhibit: Amended Expert Report of Kenneth M. Goldstein at 6 n.4, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003) ("The Brennan Center published two reports, entitled *Buying Time: Television Advertising in the 1998 Congressional Elections* ('*Buying Time 1998*') and *Buying Time 2000: Television Advertising in the 2000 Federal Elections* ('*Buying Time 2000*'),which used databases prepared under my supervision, upon which I relied in part to prepare this report.").

[43] Jonathan S. Krasno and Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections at 193, 196, Brennan Center for Justice (2000) (an advertisement mentions a candidate for office if a coder determines that it mentions their name, includes their picture, or both); *see also* Craig B. Holman and Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections at 99, Brennan Center for Justice (2001) (asking coders to identify if a favored candidate is "Mentioned," "Pictured in the ad," "Both mentioned and pictured in the ad," "Not identified at all," or if the question is "Not applicable," and asks if their opponent is "Mentioned by name in the text of an ad," "Pictured in the ad," "Both mentioned and pictured in the ad," "Not identified at all," or if the question is "Not applicable").

administration," "the government," or common names of legislation would not have met these requirements.

The arguments offered in court to support McCain-Feingold drew the same distinction – that the electioneering communication provisions hinged on the unambiguous reference to a clearly identified candidate, either by name or by picture. For example, before the Supreme Court, the government made clear that if an advertisement did not use the candidate's name or image, it would not be an electioneering communication. During oral arguments in the *McConnell* case, Justice Souter asked:

> **Question:** And doesn't – *doesn't the primary definition today, in effect, give a corporation or a union that wants to run an issue ad a safe harbor simply by virtue of not mentioning the name?* Say, let's hear it for nuclear power and don't let anybody tell you otherwise. That's safe, isn't it?

And Mr. Clement, on behalf of the government, responded:

> **Mr. Clement:** *That's exactly right. That is safe,* Justice Souter, and that's why all of the evidence before the district court that looks at retrospective ads running previous cycles has to be read in the light that one of the virtues of clarity with which Title II defines electioneering communications is that a corporation can avoid the trigger and that similar to current law, under current law as we pointed out in our brief, the NRA put together two ads in the 2000 election cycle. They were virtually identical, except one of them finished with the tag line, vote for Bush. Now, the NRA –[44]

Mr. Clement went on to reiterate that corporations could act outside of the strictures of the electioneering communication restrictions by avoiding mention of the name of a particular federal candidate in at least two further exchanges:

> **Question:** I agree with you. You want us to say just what Justice Kennedy said, that the distinction is ephemeral, right? Now, we've heard the distinction is ephemeral. And if you can ban the express, you can ban

[44] Oral Argument Transcript at 164-165, *McConnell v. FEC*, 540 U.S. 93 (2003) (emphasis added).

the issue ad which mentions the name. And now there were two, I thought, safe harbors.

Safe harbor number 1 is what Justice Souter said, don't mention the name of the candidate 60 days before election. Safe harbor number 2, which I had been discussing before, which I wanted your response to, was the PAC. Now, I thought it wasn't too tough, say, for Phillip Morris or Ciba Geigy, if they really want to mention the candidate's name, to set up a PAC.

Now, I've heard that that's not so, that I was wrong about that. And the reason that I was wrong, I've just been told, as you heard too, is because it's going to be hard for these big corporations and the labor unions to raise the money through the PAC to run the very ad with the name of the candidate in the last 60 days.

I would like your view about that. Do you think that's right and not just subjectively, is there any evidence about it?

Mr. Clement: Justice Breyer, the simple answer is you were right all along. The separate – [45]

And

Question: One of the briefs argues that frequently these issues are before Congress almost at the same time the election comes up, because the Congress is catching up perhaps on things that it didn't do earlier in the session.

And so it's not the corporation's voluntary choice to put it up there. That's the time it has to do it, if it's going to do any good.

Mr. Clement: *Again, and the safe harbors that we talked about earlier are still available in that situation. And they are, as Justice Breyer pointed out, twofold.*

One, if all the corporation is really concerned about is a pending legislative issue, it doesn't need to make a reference to the candidate and it can run the issue through treasury funds. On the other hand, if they want to make a specific reference to the candidate, tie that legislative issue to the broader context of the campaign, then they're free to do so as long as they do so through their separate segregated fund. [46]

In sum, "clearly identified" means the use of a candidate's name or nickname, image, or clear and unambiguous reference to an identifying title or status as a candidate.

[45] *Id*. at 169-170 (emphasis added).

[46] *Id*. at 180 (emphasis added).

The Act itself says as much – the candidate must be "clearly identified," and not merely suggested or inferred. Legislative history supports this reading. Certainly, Congress was cognizant of the issues raised by the Court in *Buckley*, and sought to avoid the shoals of vagueness by tying the application of the electioneering communication provisions to a bright-line, objective standard that required a clear and unambiguous reference to a candidate. The evidence offered by the government in support of the law drew precisely the same distinction – the use of the name or picture of a candidate – and in defending the law in court, the government went so far as to claim that by simply not using the name of the candidate a speaker could easily avoid the reach of the electioneering communication provision.

2. Analysis of AFF's Proposed Advertisements

While the factual scenario posited by AFF presents a series of close calls (as most thoughtful advisory opinion requests do), none of the advertisements come within the reach of the electioneering communication provisions, because none clearly identify a federal candidate.

a. The "Government"

Requestor asks whether a reference to the "government" is a reference to a clearly identified candidate. It is not. Certainly, at a minimum, it encompasses large swaths of the executive branch, including political appointees and career civil servants, all of whom are statutorily barred from standing as candidates for federal office while in their current roles.[47] Generally, however, the term "government" is even much broader than this, and refers to the entirety of the federal government, including the executive, legislative, and

[47] *See* 5 U.S.C. § 7323(a)(3) (prohibiting public employees from becoming candidates in partisan elections).

judicial branches.[48] Of course, the President is but one person in the much, much larger government.

Remarkably, one commenter claimed that a reference to the government is an unambiguous reference to candidate Barack Obama.[49] This commenter, which happens to be President Obama's re-election committee, claimed that "[i]t is unambiguously clear that the reference [to the government] is not to thousands of executive branch 'officials who are not candidates for reelection'" but to the President.[50] Other commenters disagreed. For example, comments filed by Democracy 21 and the Campaign Legal Center took the view that "generically" referring to the government is not a reference to a clearly identified federal candidate.[51] The requestor's own comments made the point more directly: "Only in a dictatorship does the term 'government' unambiguously refer to a single person."[52]

While the President is a highly visible and influential actor in government, and some critiques of government actions may be read by some as critiques of his decisions and policies, the two are not synonymous. Despite his campaign's claims to the contrary,

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[48] *See, e.g.*, Bryan A. Gardner, *et al*., Black's Law Dictionary, Ninth Edition at 764 (2009) defining "government" as "1. The structure of principles and rules determining how a state or organization is regulated. 2. The sovereign power in a nation or state. 3. An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed . . . . *In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with*.") (emphasis added).

[49] *See* Advisory Opinion 2012-19 (American Future Fund), Comment on Advisory Opinion Request 2012-19 from Obama for America; Advisory Opinion 2012-19 (American Future Fund), Comment on Draft Advisory Opinion 2012-19 from Obama for America.

[50] Advisory Opinion 2012-19 (American Future Fund), Comment on Draft Advisory Opinion 2012-19 from Obama for America at 1-2.

[51] Advisory Opinion 2012-19 (American Future Fund), Comment on Advisory Opinion Request 2012-19 from Democracy 21 and the Campaign Legal Center at 1 n.1.

[52] Advisory Opinion 2012-19 (American Future Fund), Comment on Draft Advisory Opinion 2012-19 from American Future Fund at 4.

the President is not "the government"; therefore references to "the government" are not unambiguous references to a clearly identified federal candidate. All six Commissioners disagreed with the Obama campaign on this issue, and agreed that "the government" is not a reference to a candidate.

b. "The administration" and "the White House"

Neither "the administration" nor "the White House" are the names of a candidate. After all, one cannot place "the administration" or "the White House" on the ballot – the law of all fifty states requires that a candidate be named, and not merely referenced by inference.[53] Instead, both "the administration" and "the White House" refer to elements of the executive branch generally. For example, according to the official U.S. government website of the White House, "the Obama-Biden administration consists of thousands of individuals in a variety of departments."[54] Likewise, "the White House" can also be a reference to the executive branch generally, just as depictions of the Capitol Building and Supreme Court chamber are often short-hand representations for the legislative and judicial branch, respectively.

While the President is certainly closely associated with the White House (obviously, it serves not only as his home, but houses the Executive Office of the President), it is not an unambiguous reference to candidate Barack Obama personally. After all, the Executive Office of the President is headed by the White House Chief of Staff and includes thousands of employees ranging from political appointees close to the

[53] *See, e.g.*, Cal. Elec. Code § 8040 (requiring a candidate to state their name as part of a declaration of candidacy); Tex. Elec. Code § 141.031 (requiring a candidate's application for a place on the ballot to include a candidate's name); Commonwealth of Virginia – Declaration of Candidacy, Virginia State Board of Elections, *available at* http://www.sbe.virginia.gov/cms/documents/CAN_DECLARATION.pdf (requiring a candidate to state their name as part of their declaration of candidacy).

[54] The Administration, http://www.whitehouse.gov/administration.

President to career civil servants in organizations such as the Office of Management and Budget.[55] Thus, there is a difference between the White House and the President, a distinction previously recognized by the FEC in the enforcement context. For example, while investigating MURs 4407 and 4544, the Commission issued a number of subpoenas. One went to the Executive Office of the President and certain named individuals to seek "White House materials."[56] A separate subpoena was addressed specifically and personally to the President by name.[57] Thus, in other contexts, the Commission has already determined that the White House generally is not the same as the President individually.

This distinction is also found in common usage. For example, around the time of the consideration of this advisory opinion request, Senator John McCain charged that leaks of national security information to the *New York Times* "appear[] to be a broader effort by the *administration* to paint a portrait of the *President of the United States* as a strong leader on national security issues," drawing a clear distinction between the "administration" and the person of the President.[58] Later, in response to comments from the White House Press Secretary, Senator McCain stated "[t]he *White House* today claimed that my criticism of the *Administration's* involvement in, and culpability for, leaks of sensitive and classified information is 'grossly irresponsible,'" using the term

[55] *See* Executive Office of the President, http://www.whitehouse.gov/administration/eop (naming 11 offices, councils, and staffs that are part of the Executive Office of the President, including 35 different offices, sub-offices, and councils that exist within the "White House Office").

[56] MURs 4407 & 4544 (Clinton/Gore '96 Primary Committee), Response from the White House (Mar. 5, 1998) at 1.

[57] *Id.*; *see, e.g.*, MURs 4407 & 4544 (Clinton/Gore '96 Primary Committee), First General Counsel's Report at 47 (recommending the Commission issue separate subpoenas to President Clinton personally, and the Executive Office of the President).

[58] 158 Cong. Rec. S3718 (June 5, 2012) (statement of Senator McCain) (emphasis added).

"White House" to refer to the White House Press Secretary, not President Obama, and distinguishing between "the White House" and the "administration."[59]

To illustrate the shortcomings of Draft B's treatment of the "White House" and the "administration," and its assumption that such references are, as a matter of law, always a reference to candidate Barack Obama, I offered a few examples during the deliberation of this request. Say an advertisement concerns the controversial prosecution of former Senator John Edwards, and concludes with the following call to action: "Call the White House and tell them to drop their prosecution of John Edwards." Assume that this call to action is followed by the phone number for the Department of Justice. Is that a reference to a clearly identified federal candidate, namely candidate Barack Obama? Even though the decision to prosecute originates with the prosecutors within the Department of Justice? Is this the sort of "sham issue ad" that Congress sought to ban or

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[59] Michael Calderone, *New York Times Scoops Spurs Calls for Investigation, White House Responds*, Huffington Post (June 6, 2012), *available at* http://www.huffingtonpost.com/2012/06/06/new-york-times-leaks-white-house_n_1574499.html (emphasis added). The use of such terms in this manner is not an isolated occurrence. *See, e.g.*, Lawrence Morris, *Catholic University's Lawsuit Against the Federal Government is a Matter of Religious Liberty*, Wash. Post (May 24, 2012), *available at* http://www.washingtonpost.com/local/catholic-universitys-lawsuit-against-the-federal-govt-is-a-matter-of-religious-liberty/2012/05/24/gJQASkiPnU_story.html ("*[T]he administration* has refused to take seriously our profoundly held conviction that *the mandate from the Department of Health and Human Services* intrudes on our constitutionally protected religious liberty . . . .") (emphasis added); John M. Broder and Clifford Krauss, *New and Frozen Frontier Awaits Offshore Oil Drilling*, Pittsburgh Post-Gazette (May 24, 2012), *available at* http://www.post-gazette.com/stories/news/science/new-and-frozen-frontier-awaits-offshore-oil-drilling-637416/ ("There were skeptics within *the administration*, including *[Carol] Browner*, who left the *White House* before the critical decisions were made.") (emphasis added); *see also* Jodi Kantor, *Wearing Brave Face, Obama Braces for Health Care Ruling*, N.Y. Times (June 24, 2012), *available at* http://www.cnbc.com/id/47937056 (treating President Obama and the White House as separate and distinct, and making clear a reference to the White House is not the same as a reference to President Obama personally: "Since then, Mr. Obama *and* the White House have put on brave *faces*, insisting that the law and the mandate at its center will be upheld when the court rules this month. In private conversations, *they* predict that the bulk of the law will survive even if the mandate requiring Americans to buy health insurance does not. But even if the White House is a fortress of message discipline, it cannot disguise the potential heartbreak for Mr. Obama, who managed to achieve a decades-old Democratic dream despite long odds and at steep cost.) (emphasis added); Keith Koffler, *The White House Jumps the Shark*, Politico (June 25, 2012), *available at* http://www.politico.com/news/stories/0612/77807.html ("*The White House*, which on a near daily basis has been ladling out credulity-straining explanations for *President Barack Obama's* actions, finally jumped the shark.") (emphasis added).

otherwise regulate? Draft B seems to think so. Another example is an advertisement that discusses the FCC's recent rules requiring broadcasters to put their political advertising files on-line. The advertisement concludes with the following call to action: "Call Congress and tell them to oppose the Administration's efforts to harass broadcasters," which is followed by the general number for the U.S. Capitol. Given that the House recently considered a bill to undo the FCC's regulations, is this advertisement the sort of "sham issue ad" contemplated by McCain-Feingold? Of course not – it is a garden-variety issue advertisement, protected by the First Amendment. As the ad illustrates, simply referencing the administration is not the same as referencing candidate Barack Obama; in fact, this ad is talking about the FCC.[60]

Certainly, "the administration" or "the White House" may plausibly be read as relating to those appointed or retained by the current President. It certainly relates to the President, and perhaps certain viewers or listeners could subjectively surmise that such references are really intended to talk about President Obama. But this is nothing new, and McCain-Feingold and the Commission's regulations require more than such inferential reference, tied to the subjective impression of viewers and listeners. "Avoiding subjective judgments in individual cases is, of course, one principal reason Congress chose to enact an *objective* primary definition to define [electioneering

[60] This example also illustrates that administrative agencies continue to engage in consequential rulemaking and regulatory decisions irrespective of the federal election calendar. For better or worse, administrative agencies have their own timetables and their own institutional inertia that extends well beyond the person of the President or even high level appointees. *See generally New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (the NLRB unsuccessfully argued that a rump board could continue to exercise authority once the board's membership fell below the statutory quorum). *See also* Advisory Opinion 2007-32 (SpeechNow.org) (advisory opinion request considered by two Commissioners, each of whom issued their own opinion, while FEC lacked statutorily-mandated quorum of four).

communications] – a choice that honors this Court's emphasis on avoiding vagueness in regulations that touch on speech."[61]

Although "the White House" and "the administration" have been common distinguishing terms for years and years, the Commission's own regulation does not include such terms in its list of examples. Instead, the reference needs to be more precise: "the President," or "the Democratic presidential nominee." Similarly, Congress was well aware that the reach of the electioneering communication provisions could be avoided, but such is the price paid for the desire to articulate a clear, objective rule.[62] Most compelling is that the FEC and the sponsors of the legislation maintained this position before the Supreme Court. There, simply not mentioning the name of the candidate was characterized as a safe harbor that precluded the application of the electioneering communication provisions. The FEC cannot now change course and

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[61] Brief for Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords at 71, *McConnell v. FEC*, 540 U.S. 93 (2003) (emphasis in the original).

[62] In fact, Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with clear and narrowing wording which strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness:

> We are concerned about being substantially too broad and too overreaching. The concern that I have is it may have a chilling effect. The idea is that people are designing ads, and they need to know with some certainty without inviting the constitutional question that we have been discussing today as to whether or not that language would affect them as to whether or not they air those ads.
>
> That is why we became cautious and prudent in the Senate language that we included and did not include the *Furgatch* [the case upon which 100.22(b) is based] for that reason because it invites ambiguity and vagueness as to whether or not these ads ultimately would be aired or whether somebody would be willing to air them because they are not sure how it would be viewed in terms of being unmistakable and unambiguous. That is the concern that I have.

147 Cong. Rec. S2713 (March 22, 2001) (statement of Senator Snowe); *see generally FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 498 (2007) (Scalia, J., concurring in part and concurring in judgment) ("Indeed, *any* clear rule that would protect all genuine issue ads would cover . . . a substantial number of ads prohibited by § 203 . . . .") (emphasis in the original).

decide that it changed its collective mind after taking such a position in court; staking out an agency position in legal briefs has legal consequences.[63]

c. Audio clips of the President's voice

The use of the President's voice without further identification in the second proposed advertisement presents a straightforward question: is such audio, standing alone, included in the definition of "electioneering communication" (specifically, "clearly identified"), as currently written? It is not. Certainly, the President has a distinctive voice, which, after nearly four years in office, is recognizable to many Americans. Ultimately, however, the language and history of the statute and regulation do not make this a clear and unambiguous reference to a federal candidate.

That the voice of our President is widely recognizable is nothing new. As one of my colleagues demonstrated during our Open Meeting deliberations on this matter, Presidents' voices have enjoyed widespread recognition going back at least as far as President Franklin Delano Roosevelt.[64] Many could identify his voice saying "the only thing we have to fear is fear itself." Similarly, many could identify President Kennedy's voice saying "ask not what your country can do for you – ask what you can do for your country," and President Reagan saying "Mr. Gorbachev, tear down this wall!"[65]

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[63] *See generally, Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2261 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'") (*quoting Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880, 881 (2011)); *Auer v. Robbins*, 519 U.S. 452 (1997) (granting deference to a regulatory interpretation articulated by an agency in an *amicus* brief).

[64] *See* Open Meeting of June 7, 2012, Agenda Item IV. Draft Advisory Opinion 2012-19 (American Future Fund) (statement of Commissioner Weintraub).

[65] Of course, what my colleague missed was that the identification of the speaker could just as easily be due to the content of the quoted passages themselves. The text of all three of these quotes is common in high school study guides. *See* Krista Dornbush, A.P. U.S. History 2012 at 309, 327, Kaplan (2011) (including President Kennedy and President Reagan's excerpts in its review materials for the advanced placement U.S.

Yet, despite a long history of the appealing voices of Presidents, when Congress adopted 2 U.S.C. § 431(18), defining "clearly identified" with reference to a candidate's name, image, or other clear, unambiguous reference, it made absolutely no reference to identifiable voices. Certainly, it could have explicitly included candidates' voices along with their name and image. It did not. Congress had a second opportunity to express its opinion on the definition of "clearly identified" during the debate over McCain-Feingold. At that time, Senator Feingold referenced and summarized the definition of "clearly identified" as it was used in the electioneering communications provision of McCain-Feingold, stating:

> In the bill, the phrase "refers to" precedes the phrase "clearly identified" candidate. That latter phrase is *precisely* defined in the Federal Campaign Election Act to mean a communication that includes the name of a federal candidate for office, a photograph or drawing of the candidate, *or some other words or images that identify the candidate by "unambiguous reference*."[66]

As this statement by one of the law's principle sponsors illustrates, McCain-Feingold is not triggered simply because some could identify audio representations of a candidate's voice. Instead, it requires "words or images."[67]

History test); Kenneth Senter, Barron's SAT Subject Test: U.S. History at 303, Barron's (2012) (including the excerpt of President Roosevelt's speech in a description of President Roosevelt under the heading "Top 20 Things to Know" about the stock market crash and Great Depression for the U.S. History Subject Test). These excerpts are also common in pop culture. *See* Living Colour, "Cult of Personality," Epic, CBS/Sony (1988) (song includes audio clips of same excerpts of President Kennedy and President Roosevelt, as well as Malcolm X).

[66] 148 Cong. Rec. S2144 (Mar. 20, 2002) (statement of Senator Feingold) (emphasis added).

[67] This is wholly consistent with past Commission action, or more particularly, inaction with respect to this issue. I have been unable to locate a single MUR, audit, or similar authority where the Commission determined that a voice is sufficient to render a candidate "clearly identified." The closest I came was MUR 1830 (National Republican Congressional Committee). There an advertisement included an actor who mimicked the actual candidate. The FEC did not pursue this matter. Despite this matter, and the long-standing reality that there are a number of ways to indirectly suggest the identity of a candidate, neither the statute nor the regulations incorporated the sort of "know it when you see it" standard suggested by some in MUR 1830 (but not adopted by the Commission), and used by Draft B.

Congress was certainly aware that national figures can and often do have highly recognizable voices, but chose not to include auditory representations in its statutory definition of a clearly identified candidate. Where Congress has chosen not to act, it is not the role of an independent regulatory agency to act in its place.[68] This admonition towards caution is reinforced by the history of the electioneering communication provisions before Congress and the courts. As previously noted, both in the halls of Congress and the chambers of the courts, supporters of McCain-Feingold's electioneering communications provision have represented that it is a narrow, objective standard, and not one that is tied to "self-serving *ex post facto* rationalization,"[69] or that "entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners."[70]

Certainly, it is very tempting to assert that because Barack Obama's voice may be widely recognized, this advertisement clearly identifies a federal candidate. But like the statute, the regulation does not include recognizable voice within the meaning of "clearly identified."[71] In fact, the regulation lists examples of what is meant by an "unambiguous

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[68] *See generally Van Hollen v. FEC*, No. 1:11-cv-00766-ABJ at 2 (D.D.C. 2012) (Memorandum Opinion) ("When the agency determined in this instance that the statute should be revised in light of legal developments, it undertook a legislative, policymaking function that was beyond the scope of its authority . . ."). *See also EMILY's List v. FEC*, 581 F.3d 1, 21-22 (D.C. Cir. 2009) (holding that certain Commission regulations were unconstitutional and "exceed the FEC's statutory authority."); *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) ("conclud[ing] that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC"); *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*") (holding that certain Commission regulations were contrary to the statute); *Shays v. FEC*, 528 F.3d 914, 917 (D.C. Cir. 2008) ("*Shays III*") (rejecting certain Commission regulations as "contrary to the Act or arbitrary and capricious.").

[69] Brief for the Federal Election Commission, *et al*. at 109, *McConnell v. FEC*, 540 U.S. 93 (2003).

[70] Brief of Defendants at 156, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

[71] An advisory opinion is not the proper vehicle to alter the existing rule of law. Per the Act, advisory opinions are to merely apply existing law, and the Commission cannot use them as pseudo-rulemakings. *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures

reference": "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee," or "the Republican candidate for the Senate in the State of Georgia." All these are examples of *language* that would trigger the application of the provision. None concern in any way pure audio.

Contrary to what one Commissioner suggested during the discussion of this request, the use of the phrase "such as" prior to a list of examples does not grant the Commission license to rewrite the regulation to encompass communications never thought to be included previously. As courts have explained: "The English phrase 'such as' in the regulation may without difficulty be read as having the same effect as the Latin phrase *ejusdem generis*" where the latter "'is the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"[72] Thus, the examples only reinforce that identification occurs by the

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established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section."). Also, as I have repeatedly said, announcing a new rule in a method other than a rulemaking also raises serious due process concerns. *See, e.g.*, MUR 6037 (Democratic Party of Oregon), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Matthew S. Petersen and Donald F. McGahn at 1-2; MUR 5625 (Aristotle International), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 12 n.58 (*citing* to *CBS Corp. v. FCC*, 535 F.3rd 167 (3d Cir. 2008) and *FCC v. Fox Television Stations, Inc*., 129 S. Ct. 1800 (2009), among other authorities); MURs 5712 & 5799 (Senator John McCain), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 9; MUR 5835 (Quest Global Research Group a/k/a Democratic Congressional Campaign Committee), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 9; MUR 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 2; MUR 5642 (George Soros) Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II at 4, 4 n.20 (*citing* to *CBS Corp. v. FCC*, 535 F.3d 167,174 (3d Cir. 2008)). The Supreme Court recently confirmed that due process requires that administrative agencies give prior notice of its rules and policies. *FCC v. Fox Television Stations, Inc*., -- S. Ct. --, No. 10–1293 (2012).

[72] *Johnson v. Horizon Lines, LLC*, 520 F. Supp. 2d 524, 532 n.7 (S.D.N.Y. 2007) (*quoting Wojchowski v. Daines*, 498 F.3d 99, 108 n.8 (2d Cir. 2007)). Senator Feingold's remarks that the term "clearly identified"

language used, and not by methods that are dissimilar in nature, such as stand alone audio.

That audio of someone's voice was not included in the Act or the regulation makes sense when one realizes that a uniform rule needs to apply to all candidates, not just the more well-known ones. It makes little sense for a voice that is unrecognizable to the vast majority of listeners to be considered "clearly identified" for statutory purposes. To claim that a voice can be sufficiently recognizable merely begs the pertinent questions: at what point is a voice sufficiently recognizable and on what principle do we draw that line?

The electioneering communication provisions and the definition of a clearly identified candidate do not apply solely to the President. Congress knew that in some respects presidential elections are different than other elections, and reflected that difference by imposing different voter targeting requirements for Presidential and other federal elections.[73] But it made no such distinction with respect to referencing a candidate; this provision applies to all candidates for federal office. While it is easy to imagine that most Americans may recognize President Obama's voice, how many of even the most politically active Americans would recognize their own Congressman's voice? What about their Senator? Even in localities where one might recognize a long-time incumbent Congressman or Senator, how many voters would clearly recognize the

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requires a communication to "include[] the name of a federal candidate for office, a photograph or drawing of the candidate, *or some other words or images that identify the candidate by 'unambiguous reference*'" also reflect the application of the statutory cannon of *ejusdem generis*. 148 Cong. Rec. S2144 (Mar. 20, 2002) (statement of Senator Feingold) (emphasis added). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (*ejusdem generis* is the principle that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (*quoting* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)).

[73] *See* 2 U.S.C. § 434(f)(3)(A)(i)(III).

challenger? In *Davis v. FEC*, the Court evinced a deep suspicion of laws that treated challengers and incumbents differently,[74] therefore, it is difficult to imagine a standard differentiating between incumbent and challenger's voices passing muster.

Perhaps one could draw a line separating presidential candidates from other candidates for federal office. After all, it is easy to imagine that many Americans would recognize Governor Romney, the presumptive Republican nominee's voice. But how many Americans would recognize Gary Johnson, the Libertarian Party's nominee for President,[75] or Virgil Goode, the Constitution Party's nominee for President?[76] What about the numerous candidates who participate in the primaries? For the purposes of federal election law, the President is not special, and not a *sui generis* abnormality in the election law fabric that requires special dispensation.

Ultimately, once the text of the statute, its intent, and the language of the regulation are ignored, clearly identifying federal candidates by voice dissolves into the precise type of amorphous "know it when I see it" test (or here, the even more fluid "know it when I hear it" test) the FEC explicitly disavowed in the *McConnell* litigation.[77]

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[74] 554 U.S. 724 (2008).

[75] *See* Timothy Pratt, *Libertarians Nominate ex-Governor Gary Johnson for President*, Reuters (May 5, 2012), *available at* http://www.reuters.com/article/2012/05/06/us-usa-libertarians-idUSBRE8440BZ20120506.

[76] *See Constitution Party Selects Presidential Nominee*, C-SPAN (Apr. 21, 2012), *available at* http://www.c-span.org/Events/C-SPAN-Event/10737430045/.

[77] *See, e.g.*, Brief for the Federal Election Commission, *et al*. at 109, *McConnell v. FEC*, 540 U.S. 93 (2003) ("BCRA's primary definition of electioneering communications presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria"). The Court has evinced a deep skepticism towards "know it when I see it" tests. *See generally FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 469, 470 n.6 (2007) (rejecting Justice Souter's contention that "anyone who heard the Feingold ads . . . would know that WRTL's message was to vote against Feingold" and asserting that "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect[,] . . . entail minimal if any discovery, . . . [and] eschew 'the open-ended rough-and-tumble of factors,' which

It may be a difficult determination for some, but without further identification, an audio clip does not clearly identify a candidate for federal office. To say otherwise is to ignore the intent of Congress to enact a clear, objective test that is not tied to the effect on the listener. Worse, it is to ignore what the Commission has already claimed to be the rule before the Supreme Court. Ultimately, it turns what was thought to be a clear rule of law into an *ad hoc* exercise in bureaucratic arbitrariness.[78] "This 'heads I win, tails you lose' approach cannot be correct."[79]

d. Obamacare/Romneycare

References to Obamacare and Romneycare are difficult questions because, as the request observes, "'Obamacare' . . . of course includes the name 'Obama.'"[80] The same may be said of "Romneycare" and the name "Romney." Both Obama and Romney are candidates for federal office, and in both cases, the associated popular monikers for legislation referenced by AFF are derived from the names of the particular candidates. This is enough for four Commissioners to conclude that these advertisements name a federal candidate, and thus constitute electioneering communications.[81] I do not believe the analysis is that simple.

'invit[es] complex argument in a trial court and a virtually inevitable appeal.'") (*quoting Id*. at 525 (Souter, J., dissenting); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

[78] *See Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) ("the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests . . . [t]his is an unprecedented governmental intervention into the realm of speech."); *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 469 (2007) (the proper standard under the First Amendment "must eschew 'the open-ended rough-and-tumble of factors'").

[79] *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 471 (2007).

[80] Advisory Opinion Request 2012-19 (American Future Fund) at 10.

[81] *See* Advisory Opinion 2012-19 (American Future Fund) at 3 ("Thus, under Commission regulations, the name of a candidate, even in the context of a bill or law, is nonetheless a reference to that candidate.").

While the terms "Obamacare" and "Romneycare" include the name of a particular candidate, they are not the "candidate's name."[82] Neither "Obamacare" nor "Romneycare" will appear on the ballot in November; "Obamacare" and "Romneycare" are not proper names, or even recognized nicknames, of President Obama and Governor Romney. As the terms are used in the proposed advertisements, the terms "Obamacare" and "Romneycare" refer to specific pieces of legislation rather than President Obama or Governor Romney.

The Commission has already addressed this sort of issue before. In Advisory Opinion 2004-31 (Russ Darrow), candidate Russ Darrow asked whether advertisements for a car dealership that included the name Russ Darrow constituted electioneering communications. The Commission held that they did not. The Commission concluded that advertisements "refer to [Russ Darrow Group, Inc.'s] car dealerships or Russ Darrow III [the candidate's son and public face of the dealership], and not to the candidate [Russ Darrow, Jr.],"[83] even though the advertisements "include 'Russ Darrow' as part of the dealership's name."[84] According to the Commission, "while the name 'Russ Darrow' is used throughout the proposed advertisements, most of these references include the full name through which a particular dealership does business (*e.g.*, Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac)."[85] Similarly, while "Obamacare" and "Romneycare" are used in the proposed advertisements, these references are to the

[82] 11 C.F.R. § 100.29(b)(2).

[83] Advisory Opinion 2004-31 (Russ Darrow) at 3.

[84] *Id.* at 1.

[85] *Id.* at 3.

colloquial name of legislation.[86] Just as "Russ Darrow" was a reference to a car dealership and not a candidate, so to are references to "Obamacare" and "Romneycare" references to legislation, not candidates.

The requestors acknowledge, and the Advisory Opinion approved by four of my colleagues emphasizes, that in 2002 the Commission considered and ultimately rejected a categorical exemption for popular names of legislation from the definition of electioneering communications.[87] In the words of the FEC:

> The Commission [was] persuaded by the examples cited by the commenters and other examples from its own history of enforcement actions that communications that mention a candidate's name only as part of a popular name of a bill can nevertheless be crafted in a manner that could reasonably be understood to promote, support, attack or oppose a candidate.[88]

While the Commission foreclosed a categorical exemption, it does not follow that all communications that reference a popular name for legislation that incorporates a candidate's name are *per se* electioneering communications. As the Commission stated in a previous Advisory Opinion:

> The decision not to adopt a blanket exemption for such communications, however, does not preclude the Commission from making a determination that the specific facts and circumstances of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate and, hence, do not constitute electioneering communications.[89]

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[86] An alternative approach reading "Obamacare" and "Romneycare" as synonymous with President Obama and/or Governor Romney would lead to some odd conclusions. For example, Advertisement 7 states "And now that Obamacare is turning two, its own parents don't even want to celebrate." Clearly, President Obama is not two years old, nor is his presidency in its second year.

[87] Final Rule on Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002); Advisory Opinion 2012-19 (American Future Fund), Advisory Opinion Request at 5; Advisory Opinion 2012-19 (American Future Fund) at 3.

[88] Final Rule on Electioneering Communications, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002).

[89] Advisory Opinion 2004-31 (Russ Darrow) at 4; *see also* Federal Election Commission, Open Session, June 7, 2012, Agenda Doc. 12-24, Draft A at 10-11.

Thus, the decision not to adopt a blanket exemption for popular names of legislation does not render all references to popular names for legislation electioneering communications.

This view is supported by both the position adopted by the FEC before the Supreme Court in *McConnell* and the comments of McCain-Feingold's sponsors to the FEC. When Justice O'Connor asked the government about whether candidate names in popular names of legislation trigger the application of the electioneering communication provisions, the response was not a categorical yes or no; rather, the government emphasized the narrowness of the electioneering communication provisions, and noted the *potential* for *some* advertisements mentioning a candidate's name as part of the popular name of legislation to serve an electioneering purpose.[90] Similarly, in their comments, the sponsors of McCain-Feingold opposed a categorical exemption for popular names of legislation, noting that "[t]he difficulty with crafting such an exemption, however, is the uncertainty of what constitutes a 'popular name' of legislation," leading to concerns that a categorical exemption "intended to exempt

[90] *See* Oral Argument Transcript at 165-166, *McConnell v. FEC*, 540 U.S. 93 (2003) ("**Question**: How, how, how do you – how do you protect it if what you're talking about is the McCain-Feingold bill or the Roth IRA or something like that, where the, where there is a candidate's name attached to specific legislation?

Mr. Clement: Well, let's, Justice O'Connor, let's take the McCain-Feingold provision, for example. Now, first of all, one option, of course, is to refer to it in the way I have, as the Bipartisan Campaign Reform Act. It's important to remember, however, that the restrictions in this bill don't restrict any corporation from talking about the McCain-Feingold bill in 48 states or in fact all 50, as long as Senators McCain and Senator Feingold are not up for election.

Now, at the point that somebody wants to make a reference to the McCain-Feingold, to one of those Senators' voters in the immediate days running up to the election then they may not be referring to it in a way that has nothing to do with the election. They may be referring to it as that no good McCain-Feingold legislation, and it may clearly have an electioneering purpose.").

grassroots lobbying ads on specific bills within the 30 and 60 day windows" will "be used by political advertising strategists to design attack ads that evade the law."[91]

Uncertainty is not an issue in this instance. Unlike the more nebulous examples cited by the sponsors in their comment before the FEC (*e.g.*, "the Gore tax," "the Dole/Gingrich budget" or "the "Bush-Morella energy plan"),[92] there is no uncertainty that the terms "Obamacare" and "Romneycare" are popular names for specific pieces of legislation; the term "Obamacare" has been widely embraced as a reference to the Patient Protection and Affordable Care Act by the media, opponents, and supporters of the legislation, including the President himself.[93]

Reading Obamacare and Romneycare as references to legislation rather than clearly identified federal candidates is a reading that is consistent with the narrow scope of the electioneering communication provisions. As it was originally fashioned, the electioneering communication provision was an outright ban on certain corporate and union speech.[94] Thus, Congressional intent ought to be viewed through that lens, and any interpretation of the electioneering communications provision must consider that, at the time of its enactment, a communication triggering the reporting requirements under McCain-Feingold could also trigger criminal sanctions if broadcast by a corporation or

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[91] Notice of Proposed Rulemaking 2002-13: Electioneering Communications, Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 7.

[92] *Id*.

[93] Chris Cillizza and Aaron Blake, *President Obama Embraces 'Obamacare' Label. But Why?*, Wash. Post (Mar. 26, 2012), *available at* http://www.washingtonpost.com/blogs/the-fix/post/president-obama-embraces-obamacare-label-but-why/2012/03/25/gIQARJ5qaS_blog.html; Jeff Mason, *Obama Campaign: Obamacare Not a Bad Word After All*, Reuters (Mar. 26, 2012), *available at* http://www.reuters.com/article/2012/03/26/us-usa-campaign-obamacare-idUSBRE82P14E20120326.

[94] *See* 2 U.S.C. § 441b; *see also Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("Section 441b's prohibition on corporate independent expenditures is thus a ban on speech.").

labor organization. It is not surprising, then, that the sponsors of the law have already stated that the electioneering communications provision does not necessarily cover references to legislation. To say otherwise is to say that Congress intended to ban corporations and unions from using common and established names for legislation. This outcome is incompatible with the government's representations that McCain-Feingold is a narrow law that targets so-called "sham" issue ads and has only a marginal impact on "genuine" issue advertisements. The proposed advertisements in this Advisory Opinion request are not the sort of "sham" issue ads contemplated by Congress; they focus on specific pieces of legislation and do not promote, attack, support, or oppose any candidate for federal office. While the terms "Obamacare" and "Romneycare" include the root words Obama and Romney, they are nevertheless references to specific pieces of legislation, not clearly identified candidates for federal office.

3. Conclusion

While some of my colleagues have focused much of their attention on the disclosure aspects at issue in this Advisory Opinion request, this rhetoric has nothing to do with applying the electioneering communication provisions. Merely because the Supreme Court has upheld the electioneering communication regime, and turned back a single as-applied challenge, does not give the FEC license to then take matters into its own hands and go beyond the law as upheld, or otherwise sweep within its reach advertisements that are not campaign-related. The FEC must still heed the language of the Act and its own regulations; it must not get swept up in either the ongoing Presidential election, or the current political debate about whether current law provides sufficient disclosure or not. Such a determination is for Congress to make.

The Commission historically, and more recently some of my colleagues in particular, have not been particularly aware of their limited role as administrators of the law as passed by Congress. Instead, they prefer to behave as quasi-legislators, unbound by the confines of the law agreed to by Congress. The latest justification for this activist approach is the mantra of "disclosure," fueled in part by the Supreme Court's turning back of an as-applied challenge to the electioneering communications reporting regime.[95] Of course, *Citizens United* had nothing to do with the reach of such reporting; that case concerned "Hillary – the Movie," which unquestionably and unambiguously identified a federal candidate by name, and even identified her as a candidate. It had nothing to do with whether "the administration" or "the White House" were sufficient or whether audio without further identification is enough to trigger a reporting obligation. Lost in the name-calling and ignored in what has become a predictable stump speech trumpeting "disclosure" is any reference to the host of cases that either struck disclosure entirely,[96] or limited its reach.[97] Certainly, some disclosure has been upheld – *Citizens United* was nothing new, as the electioneering communication disclosure provisions had already been

[95] *See Citizens United v. FEC*, 130 S. Ct. 876 (2010).

[96] *See Davis v. FEC*, 554 U.S. 724, 744 (2008) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." (*quoting Buckley*, 424 U.S. at 64)); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) ("Under our constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above [concerning regulating labor organization activity, regulating lobbying activity, and taxing press activities] were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

[97] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976). *See also Carey v. FEC* , -- F. Supp. 2d --, 2012 WL 1853869 (D.D.C. 2012) (imposing costs and fees and rejecting efforts by Commissioners Weintraub and Bauerly to impose additional reporting and recordkeeping obligations on advisory opinion requestor).

upheld in *McConnell* nearly ten years ago – but such holdings do not give unelected bureaucrats license to take matters into their own hands.[98]

One need look no further than the recent debacle of *Carey v. FEC*, where my colleagues sought to impose extra-statutory disclosure obligations and burdens on the plaintiff in the context of an advisory opinion,[99] to see how such political posturing regarding disclosure can end badly. Such additional reporting and recordkeeping obligations were already ruled out of bounds by the D.C. Circuit in *EMILY's List v. FEC*;[100] despite this, my colleagues went into judicial battle waving nothing but the

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[98] Nor does it empower such bureaucrats to intimidate, mock, or otherwise bully requestors. If one is confused why some believe that compelled disclosure can chill otherwise protected speech, one need look no further than statements made to the requestor by Commissioner Weintraub at the June 7, 2012 public meeting:

> And I'm not here to debate you. You're here to answer questions. I'm not here to debate you. I'm voicing my opinions and explaining my views as is appropriate for a Commissioner…
>
> The notion that you could actually use somebody's own voice — their own voice — and claim that you are allowed to criticize them using their own voice and you don't have to identify who you are? You want to hide behind some shield, some ambiguous name like American Future Fund and not identify who you are when you're criticizing the White House, when you're criticizing the President using his own voice? That certainly is not demonstrating civic courage.

See Open Meeting of June 7, 2012, Agenda Item IV. Draft Advisory Opinion 2012-19 (American Future Fund) (statement of Commissioner Weintraub) http://www.fec.gov/audio/2012/2012060704.mp3. Contrary to that Commissioner's grandstanding, the statute permits persons to seek guidance from the Commission in the form of an advisory opinion. *See* 2 U.S.C. § 437f. Thus, when a requestor comes to the Commission, it is the requestor who is ultimately asking the questions, not the unelected bureaucrats who are supposed to be public servants. The use of "disclosure" to justify such antics had been foretold: "Since few aspiring censors will admit openly to their purposes, the appeal to 'disclosure' has given them the moral authority, in public argument, that they need." Robert Bauer, *Celebrating McCain-Feingold's Birthday: "Speech! Speech!"*, More Soft Money Hard Law Web Updates (Mar. 28, 2007), *available at* http://www.moresoftmoneyhardlaw.com/updates/disclosure.html?AID=962.

[99] -- F.Supp.2d ---, 2012 WL 1853869 (D.D.C. 2012).

[100] 581 F.3d 1 (D.C. Cir. 2009).

banner of "disclosure," a position held to be so unreasonable[101] that the United States taxpayers might pay in excess of $120,000 in costs and fees awarded to the *Carey* plaintiffs.[102]

Perhaps some will say this current advisory opinion is not as clear-cut as *Carey*, and that the current disagreement is the sort of matter left to an agency's discretion.[103] But here, Congress has addressed several of the precise questions presented. Congress has passed a statute and made clear time and time again that it was to have a bright line, objective trigger, and foreclosed a test based upon the impact on the listener. The FEC itself claimed as much in court. Now, some seem to think they can simply walk away from such representations, and declare certain advertisements to be electioneering communications based on their own subjective view. Although it is tempting to say we all know what the requestor is trying to do, or what the requestors means, that is not the standard. The rule requires a reference to the candidate, either by way of the candidate's name (or similar identifying language) or picture. And the requestors have a statutory right to ask whether their proposed advertisements come within the reach of that rule. To answer their question: None of the ads contain such a reference, and thus none come within the definition of electioneering communication.

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[101] *Carey*, 2012 WL 1853869 at *5 ("FEC also erroneously contends that two of its commissioners were reasonable in believing the Circuit opinion in *EMILY's List* was not binding on the agency.").

[102] This is not the first time that sort of approach lost. Take the case of *Unity '08 v. FEC*, 596 F.3d 861 (D.C Cir. 2010). There, the Commission claimed that, despite not having a named candidate, Unity '08 was subject to the burdens of reporting as a political committee. My colleagues who voted in favor of that were reversed. *EMILY's List* is another example. Again, my colleagues who voted for what was at issue in that case were reversed – not simply because their rule was unconstitutional, but because their actions were *ultra vires* and went beyond the Act.

[103] *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Appendix A:

Transcript of Proposed Advertisements

(Advisory Opinion 2012-19 (American Future Fund), Advisory Opinion Request at 12-19)

Advertisement 1:

VIDEO	AUDIO
Gas prices/pump	(music up & under) ANNCR: Since this Administration began, gas prices are up 104% And the U.S. ***still*** spends over $400 billion a year on foreign oil.
Image of the White House	ANNCR: The White House *says:* We must end our dependence on foreign oil . . . (:03) [narrator's voice]
Oil rig/science labs	ANNCR: But the Administration ***stopped*** American energy exploration . . . .
b-roll of "Denied" Stamp with image of White House	and *banned* most American oil and gas production – the White House wants ***foreign*** countries to drill – so we can buy from *them*.
middle east oil	***Keeping*** us dependent on foreign oil – and crippling our economy.
on-screen text: Call the White House at (202) 456-1414	Tell the White House it's time for an American energy plan . . . that actually works for ***America***.

Advertisement 2:

VIDEO	AUDIO
Gas prices/pump	(music up & under) ANNCR: Since 2008 began, gas prices are up 104% And the U.S. ***still*** spends over $400 billion a year on foreign oil.
Image of Washington Monument	ANNCR: The government *says:* "We must end our dependence on foreign oil . . ." (:03) [*President Obama's voice*]
Oil rig/science labs	ANNCR: But the government ***stopped*** American energy exploration . . . .
b-roll of "Denied" Stamp with image of Washington Monument	and *banned* most American oil and gas production – the government wants ***foreign*** countries to drill – so we can buy from *them*.
middle east oil	***Keeping*** us dependent on foreign oil – and crippling our economy.
	Tell the government it's time for an American energy plan . . . that actually works for ***America***.

Advertisement 3:

VIDEO	AUDIO
Gas prices/pump	(music up & under) ANNCR: Since 2008 began, gas prices are up 104% And the U.S. ***still*** spends over $400 billion a year on foreign oil.
Image of Washington Monument	ANNCR: The government *says:* "We must end our dependence on foreign oil . . ." (:03) [*WH Press Secretary's voice*]
Oil rig/science labs	ANNCR: But the government ***stopped*** American energy exploration . . . .
b-roll of "Denied" Stamp with image of Washington Monument	and *banned* most American oil and gas production – the government wants ***foreign*** countries to drill – so we can buy from *them*.
middle east oil	***Keeping*** us dependent on foreign oil – and crippling our economy.
on-screen text: Call the White House at (202) 456-1414	Tell the government it's time for an American energy plan . . . that actually works for ***America***.

Advertisement 4:

VIDEO	AUDIO
B-roll: Americana/Washington Monument/U.S. Supreme Court/U.S. Capitol	ANNCR: The most basic right . . . The First amendment freedom of religion.
Images of newspaper headlines	But the Government is taking a stand on a critical question of religious liberty. *Against* the U.S. Catholic Bishops . . . and people of faith across the country.
churches/families	Forcing religious institutions to pay for abortion-causing drugs . . . Violating their conscience and religious beliefs.
HHS building image On-screen text: Call Secretary Sebelius at 1-877-696-6775	Call Secretary Sebelius, tell her it's wrong for her and the government to trample the most basic American right.

Advertisement 5:

VIDEO	AUDIO
Americana/Washington Monument/U.S. Supreme Court/U.S. Capitol	ANNCR: The most basic right . . . The First amendment freedom of religion.
Images of HHS building	But the Administration is taking a stand on a critical question of religious liberty. *Against* the U.S. Catholic Bishops . . . and people of faith across the country.
churches/families	Forcing religious institutions to pay for abortion-causing drugs . . . Violating their conscience and religious beliefs.
White House footage and images On-screen text: Call Secretary Sebelius at 1-877-696-6775	Call Secretary Sebelius, tell her it's wrong for her and the Administration to trample the most basic American right.

Advertisement 6:

VIDEO	AUDIO
Toddler throwing a tantrum A frustrated parent holding a toddler TEXT: "White House will not mark two-year anniversary" of health care law (Washington Free Beacon, 3/19/12)	VO: The Terrible Twos. VO: All parents dread the phase. VO: And now that government run healthcare is turning two, its own parents don't even want to celebrate. VO: The health care law is showing all the Terrible Two warning signs…
More b-roll of toddlers, as appropriate TEXT: [As much as a] "3 percent increase in health insurance premiums" (FactCheck.org, 1/4/12) TEXT: "CBO: … to cost twice as much" (Fox News, 3/16/12) TEXT: [Many workers] "will not, in fact, be able to keep what they currently have" (Time, 6/24/10) TEXT: "…allies get waivers…" (Washington Examiner, (5/23/11) TEXT: "crushing penalties" (Human Events, 3/4/12)	VO: Mood swings… Temper tantrums… VO: it was supposed to lower premiums, now it's going to cost you more. VO: Yes, the Terrible Twos are more expensive than you think… VO: The toddler will tend to say "no" a lot. VO: Some parents will give in to the child's every demand. Doing so can have short-term benefits, but in the long term, this will create a monster. VO: Sadly, most parents have to pay the price for not complying with these mandates.
TEXT: "White House will not mark two-year anniversary" of health care law (Washington Free Beacon, 3/19/12)	VO: So…Since its family won't wish its health care law a happy birthday…
TEXT: "Happy 2nd Birthday,. Meh." TEXT: "AmericanFutureFund.com"	VO: I guess we'll have to. Happy Birthday national, government run healthcare, may none of your wishes come true.

Advertisement 7:

VIDEO	AUDIO
Toddler throwing a tantrum A frustrated parent holding a toddler TEXT: "White House will not mark two-year anniversary of Obamacare" (Washington Free Beacon, 3/19/12)	VO: The Terrible Twos. VO: All parents dread the phase. VO: And now that Obamacare is turning two, its own parents don't even want to celebrate. VO: The health care law is showing all the Terrible Two warning signs…
More b-roll of toddlers, as appropriate TEXT: [As much as a] "3 percent increase in health insurance premiums" (FactCheck.org, 1/4/12) TEXT: "CBO: … to cost twice as much" (Fox News, 3/16/12) TEXT: [Many workers] "will not, in fact, be able to keep what they currently have" (Time, 6/24/10) TEXT: "…allies get waivers…" (Washington Examiner, (5/23/11) TEXT: "crushing penalties" (Human Events, 3/4/12)	VO: Mood swings… Temper tantrums… VO: it was supposed to lower premiums, now it's going to cost you more. VO: Yes, the Terrible Twos are more expensive than you think… VO: The toddler will tend to say "no" a lot. VO: Some parents will give in to the child's every demand. Doing so can have short-term benefits, but in the long term, this will create a monster. VO: Sadly, most parents have to pay the price for not complying with these mandates.
TEXT: "White House will not mark two-year anniversary of Obamacare" (Washington Free Beacon, 3/19/12)	VO: So…Since its family won't wish its health care law a happy birthday…
TEXT: "Happy 2nd Birthday, Obamacare. Meh." TEXT: "AmericanFutureFund.com"	VO: I guess we'll have to. Happy Birthday Obamacare, may none of your wishes come true.

Advertisement 8:

VISUALS	AUDIO
White House Photo CLIP: http://www.youtube/com/watch?v=WxZK0spa1yl&feaure=youtu.be (*using only a portion that does not clearly identify any candidate for Federal office*)	VO: Liberals marked the 5th anniversary of Romneycare with a video. They would like you to believe Romneycare and the national healthcare law are the same. But, are they?
FOOTAGE of Tea Party Rallies and Town Halls.	VO: Romneycare was developed to meet the needs of one state, Massachusetts, with a population of 6.6 million people VO: The national law blanketed the entire country with a one-size-fits all approach to serve 313 million people! VO: When Romneycare was passed in Massachusetts, it had broad bipartisan support. VO: The national law was passed along party lines and was wildly unpopular – who can forget the tea party protests and townhalls?
Map of the United States PHOTO: U.S. Capitol Building Photo: Birthday Cake	VO: Today, two years after it was passed more than half of American voters are opposed to the national health care. VO: No wonder the government let the law's 2nd birthday pass without notice.
	VO: National healthcare: Romneycare's evil twin.