FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON COORDINATED COMMUNICATIONS

Tuesday, March 2, 2010

999 E Street, N.W.

Ninth Floor Meeting Room

Washington, D.C.

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COMMISSION MEMBERS:

MATTHEW S. PETERSEN, Chairman

CYNTHIA L. BAUERLY, Vice Chair

CAROLINE C. HUNTER, Commissioner

ELLEN L. WEINTRAUB, Commissioner

DONALD F. MCGAHN, II, Commissioner

STEVEN T. WALTHER, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

ALEC PALMER, Acting Staff Director

ROSEMARY C. SMITH, Associate General Counsel

JESSICA SELINKOFF, Office of General Counsel

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHAIRMAN PETERSEN: The special session of the Federal Election Commission will come to order.

I would like to welcome everyone to the Commission's hearing on proposed rules regarding coordinated communications. This hearing will take place over the course of two days starting today and concluding tomorrow. On both days we will discuss the notice of proposed rulemaking on coordinated communications which was published in the Federal Register on October 21, 2009, and the supplemental notice of proposed rulemaking on coordinated communications which was published in the Federal Register on February 10, 2010.

The NPRM explained and sought comment on proposed rules in response to the decision of the U.S. Court of Appeals for the D.C. Circuit in Shays versus the FEC, more commonly known as Shays III. The supplemental NPRM elicited additional comments on those proposed rules in

light of the Supreme Court's decision in the Citizens United versus FEC case.

I would like to thank all of the people who took the time and effort to comment on the proposed rules, and in particular those who will appear today and tomorrow as witnesses to give us the benefit of their practical experience and expertise on the issues raised by the proposed rules.

Let me describe briefly the format that we will be following today and tomorrow. We will have a total of 11 witnesses who have been divided into three panels. We will hear from two panels today and one panel tomorrow. Each panel will last for one and a half hours, and we will have the first panel this morning followed by a lunch break and the second panel this afternoon.

Each witness will have five minutes to make an opening statement. We have a light system set up at the table to help you keep track of time. The green light will start to flash with one minute left. The yellow light will go

on when you have 30 seconds left. When the red light pops up, that means it is time to wrap up the remarks, and the balance of time will be reserved for questions by the Commissioners.

For each panel we will have at least one round of questions from the Commissioners, the General Counsel and the staff director, and if time permits, we will have subsequent rounds of questions as well.

I look forward to the discussion over the next couple of days between my colleagues up here on the Commission and those who will be testifying regarding the rules that apply to coordination, which is an issue whose importance has only been elevated by the recent Citizens United decision.

I understand some of my colleagues would like to make some opening remarks as well.

The Vice Chair?

VICE CHAIR BAUERLY: Thank you, Mr. Chairman. First, I would like to thank you and your staff and the General Counsel's staff and

the other staff of the agencies for putting together this hearing. We have a number of witnesses over the next day and a half and I would like to thank all them as well for being willing to be here and share their views with us, and for all of those who provided written comments as well. It is extremely helpful to us as we attempt to once again craft an appropriate regulation under the statute.

The specific elements that could go into crafting a meaningful rule to govern coordinated communications provide ample fodder for discussion, disagreement and thoughtful argument, but as we all know, we are not writing on a blank slate. As some commenters have duly noted, it is an unenviable task before us, and I assure you we appreciate your sympathy.

Our task is, of course, to respond to the Shays III Court's view that the express advocacy outside the window is an enormous loophole, in its words. The Court concluded that the express advocacy standard not only frustrates Congress's

goal of prohibiting soft money from being used in connection with federal elections but provides a clear road map for doing so. So we are here today to try to understand how to structure a regulation to address the Court's view that the prior rule did not rationally separate election-related advocacy from other speech.

We must also address the Court's concern about our time window for common vendors and former employees in the conduct prong, and we have received some very helpful comments and I would like to discuss some of those in more depth today and tomorrow; because, while we might be able to agree that information does lose value over time, defining at precisely what point in time that occurs in a manner that will satisfy the Court will require I think, further details, so I look forward to those conversations with commenters.

The task before us is not an easy one, but it is our duty to respond to the Court's decision by examining the content standard

applicable outside the window and more fully explaining the appropriate time window for the conduct standard. We appreciate your written comments and your time and I thank the Chair.

CHAIRMAN PETERSEN: Any other statements?

Commissioner Hunter?

COMMISSIONER HUNTER: Thank you, Mr. Chairman and thank you to all the witnesses. We look forward to your comments and really appreciate your written comments. They definitely helped me clarify which issues are before us and which ones we can flesh out today.

Along those lines, I just wanted to say, as the Vice Chair said, the Shays III Court directed us to develop a rule that rationally separates election-related advocacy from other activity, and I think, you know, we have to look at the two sides of crafting that rule. On the one hand, we would like to find a bright-line rule that considers the concerns about the chilling effect of imprecise rules; but on the other hand, I think we all want to avoid a

two-part, 11-factor balancing test that the Supreme Court so clearly disfavored.

In response to reading the comments, I think perhaps, and I want to clarify it as much as I can to say perhaps, the WRTL standard in the view of most commenters might be an appropriate place to land, and one of the things in particular that I am looking forward to hearing about today is do commenters believe that the WRTL standard as proposed, which is essentially just the Supreme Court's test, is clear enough on its face or would it benefit by additional information in order for people to determine whether or not the speech is election-related or not.

Thank you.

CHAIRMAN PETERSEN: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I was appointed to this Commission exactly one day after the adoption of the

coordination regulations that first issued after BCRA at the end of 2002, and it was not an accident that they waited until after that vote to -- that the President waited to appoint me to the Commission. At the time I was a little bit frustrated because I thought, darn, I have been sitting out here waiting for months and they have been doing all these interesting rulemakings and I just didn't have a chance to participate in that. And I just want to say that I am no longer frustrated.

CHAIRMAN PETERSEN: Thank you, Commissioner Weintraub.

Commissioner McGahn?

COMMISSIONER MCGAHN: That is a tough act to follow, but I will try. I want to thank the Chairman, first, for doing something that this group of Commissioners hasn't done, which is giving opening statements and allowing that in this hearing.

I think opening statements are important in some rulemakings because it is tough for

commenters to sometimes know where various Commissioners are until it is too late. We sometimes question in the abstract, and I think given the history of this particular rule that has gone on for years and years and years, it makes sense to try to define some issues and share with the public where some of us are and particularly where I am going into this having read the comments.

Obviously we are here to talk about Shays III and in particular the coordination content standard. There the D.C. Circuit said a rule that had magic words as the content test for the year-round standard was not enough. Various options have been presented. One is "promote,attack,support,oppose," which is another portion of the statute that some may suggest we export from its context in McCain-Feingold into the coordination regime. Most comments have said that is not a good idea.

The question I will have for commenters, though, is for those who do support it, they tend

to say it is a clean standard and it has been upheld by the Supreme Court. Is that really true in the context of a coordination rulemaking? Certainly it was upheld on its face in its use in the statute for spending by party committees, but can we really take a standard that is designed for, as one commenter suggested, sophisticated political actors and apply it to others?

The standard most commenters seem to have coalesced around, for a variety of reasons, is the Wisconsin Right to Life standard, as Commissioner Hunter suggested. The problem with this obviously is the Citizens United case undid presumably much of it, but maybe it is still a standard as viable in coordination.

The question I have, though, is can we export it from its roots and then have it be a free-floating test without all the other attachments, meaning it was a test designed to construe a statute that had objective criteria like referencing a federal candidate within a certain time period, and if we do use this test,

do we have to be careful that we also take with it the various limiting factors that Chief Justice Roberts articulated in his opinion?

Because my fear is if we don't do something like that, and I would be curious to hear from the commenters if you agree or disagree with this, do we end up going down the road that the Commission had gone down with the much maligned section 100.22(b), which was a reg purporting to define express advocacy, probably well-intentioned, but if one reads the Furgatch decision upon which -- where it finds its genesis, how the Commission has interpreted subsection (b) over the years is a far cry from the facts of Furgatch, and I don't think we should have a standard that then is allowed to just exponentially grow over the years, and the question is do we concern ourselves with that here or not?

Because ultimately we are defining a term, which is expenditure, and that comes with it a lot of baggage and a lot of water under the

bridge not only with Shays III. Some argue that although the Supreme Court has defined expenditure one way in Buckley, that is only with independent speech. That doesn't apply once the speech is coordinated, it should be a different standard, and the Shays III Court does give some cover to that argument, but that does not mean, I think, that it is an anything goes, know-it-when-you-see-it standard, because ultimately we are still defining a term, and I think all of the various vagueness concerns that the courts have articulated over the years still apply. I would be curious to hear from the commenters if they agree or disagree with that.

In particular, what the Commission has struggled with is really specifics. We will probably hear from commenters that if the rule goes too far, it will chill the ability to speak. I think instinctively we all know that is true on some level, but I would be curious to hear from commenters specifically why it would chill, why a rule that goes too far would cause people to

hedge and trim.

I am thinking of perhaps some past MURs the Commission had engaged in, I think some of the commenters were counsel of record in some larger investigations on coordination, maybe that would be helpful to discuss. Other commenters have claimed that when expenditures are coordinated with a candidate or party, they are legally indistinguishable from expenditures made by a candidate or party. I would like to hear from commenters whether or not they think that is true. I can see on one level how they are making the argument, but on the other hand, particularly from a state or local party perspective, not all spending by state or local parties are expenditures merely because it comes from a party. It may be a disbursement, it may be an issue ad, it may be a state campaign expenditure.

But it seems to me that that sort of argument goes too far, as perhaps the express advocacy test doesn't apply to the definition of expenditure when spending is done by a candidate

or a party. The same commenter makes that argument. That would then mean all spending by parties are expenditures, and we know that is not true, otherwise Congress would not have had to introduce the "promote, attack, support, or oppose" test with respect to federal election activity.

Ultimately, though, all this turns on our old friend, the distinction between contribution and expenditure. Some comments seem to spill much ink on court citation. Some of it is persuasive. Some of it seems to merely label things on the contribution side.

I would like to know, are we really regulating expenditures here, and if so, can we survive strict scrutiny? Because although today we are concerned about surviving potential Shays IV, of course, it won't be called Shays IV, we would probably have to find another plaintiff, but what about an attack on the other side that says it goes too far?

And then the remaining issues, I would

like to hear about the common vendor, former employee. It seems to me that it is a good rule to have a bright-line. Unfortunately, the Commission, according to the Shays III court, didn't really support it.

One can see a person right out of college taking their first job in politics and then realizing a month later when they have a better offer, they can't take the job because, well, the Federal Election Commission might say that could cause a coordination investigation. I think there if commenters are in favor of the rule, they ought to provide specific examples, not just a general thing about, oh, it is nice to have people be able to move around jobs. I think we need specifics.

With that, Mr. Chairman, I yield back. Thank you.

CHAIRMAN PETERSEN: Thank you, Commissioner McGahn.

Commissioner Walther?

COMMISSIONER WALTHER: Other than to

thank everyone for coming, I'm going to pass on comments at this time. Also, thank you for those of you from the Hill that are here. Nice to see that you are willing to take the time to listen to some of the presentations that are going to be made today.

CHAIRMAN PETERSEN: Thank you, Commissioner Walther.

We will begin with our first panel then. Our first panel this morning consists of Jan Baran on behalf of the U.S. Chamber of Commerce, Craig Holman on behalf of Public Citizen, and William McGinley of Patton Boggs. Take your places. Mr. Baran, you are on the far left.

MR. BARAN: It is my far right.

(Laughter)

CHAIRMAN PETERSEN: As I mentioned earlier, each of you will have five minutes to make an opening statement. Why don't we start with Mr. Baran and go across the table. Whenever you are ready, feel free to proceed.

STATEMENT BY JAN BARAN

ON BEHALF OF U.S. CHAMBER OF COMMERCE

MR. BARAN: Thank you, Mr. Chairman. And good morning, Commissioners and staff. Appreciate this opportunity to appear at this rulemaking hearing. I am representing the U.S. Chamber of Commerce. The Chamber was a party in the McConnell litigation. It also has been very active as an amicus in many of the Supreme Court cases we may be discussing this morning, including Wisconsin Right to Life case and of course, the Citizens United case, and in the Citizens United case our brief was cited multiple times in both the majority opinion and the dissent.

This constitutes my third appearance at a hearing on this subject matter, starting in 2002 before Commissioner Weintraub was here, and then again in 2006 and now today, so some of what we will discuss will surely be deja vu all over again.

I would like to just emphasize that consistently through these hearings and in our

comments on behalf of the Chamber, we emphasize two particular aspects of this rulemaking. One was we urged the Commission, as it has attempted to do, to be sensitive to the First Amendment rights that are at issue in all of these regulations, the rights of freedom of speech, freedom of association, and particularly important to the Chamber is the right to petition government for the redress of grievances, and as I am sure many of you know, the Chamber of Commerce is one of the most active and largest lobbying organizations here in Washington, D.C., so they are exercising that important First Amendment right.

The second element that the Chamber has emphasized in all of these rulemakings is a plea for clarity. We know that we join many others who are urging the Commission to establish bright-line tests. This is very important, not only for those of us who have to comply with your regulations, but it is obviously very important to the Commission.

You have limited resources. You would like to have clear regulations so that people know what the rules are, that they will follow them, and then it will make your enforcement life a lot easier if the rules are clear. For that reason, in our comments, we have urged rejection of the so-called PASO test in this rulemaking, and we have urged that the Commission consider adopting the Wisconsin Right to Life test in this regulation.

Since the Shays III Court has concluded that express advocacy is too limited, the Commission's burden is to come up with some additional content standard, and we believe that although it is not perfect, the Wisconsin Right to Life standard is something that people are familiar with, it is already in your regulations, and in fact, the regulated community has had experience under that standard in the 2008 election, and I know also that both corporate and union and other types of organizations seem to have effectively used that standard just two days

before the Citizens United opinion in a special election in Massachusetts.

I believe that the forms that have been filed with the Commission by many organizations who engaged in electioneering communications that were protected by the Wisconsin Right to Life standard exceeded several millions of dollars. So there is evidence here that people are familiar with that standard.

We did not specifically comment on the common vendor issue but would like to urge the Commission to consider two things. One is please retain the firewall element of that particular standard. It is something people are familiar with. It can be executed and seems to work.

And in terms of a time limit, which I know that you have to struggle with, I would suggest that maybe you ought to look at your longstanding polling regulations for allocation of expenditures on polling. These are regulations that have been in existence since, I think, 1977. It essentially concludes that polls

lose all of their value after 180 days, they become worthless. Somebody can actually give a poll that is that old to a campaign and it doesn't have any value under this regulation.

Perhaps that has some relevance to whether or not the knowledge of the former employee or former vendor may be equally antiquated and valueless, because that is what the common vendor-former employee regulation is seeking to prevent, insider information that is taken from a campaign and given to an independent spender.

Finally, I would like to conclude by noting that there have been some suggestions that perhaps the coordination rules for some speakers ought to be different than for other speakers. I don't see what the constitutional/legal basis would be for that. I would just say that whatever is not coordination for one speaker should not be coordination for all speakers, and that the coordination rules ought to be applied even-handedly to all independent speakers.

Thank you very much.

CHAIRMAN PETERSEN: Thank you, Mr. Baran.

Mr. Holman?

STATEMENT BY CRAIG HOLMAN ON BEHALF OF PUBLIC CITIZEN

MR. HOLMAN: Thank you, Mr. Chairman and Commission, for letting me testify, especially since I asked so late in the process.

To start off, I want to highlight the fact that the type of campaign financing communications that we are talking about in coordinating communications should be viewed and must be viewed as similar to candidates' activity and not third-party group independent expenditure activity.

We are talking about activity that is coordinated with candidates and with parties, and as courts from Buckley there on in, including Citizens United, has recognized that coordinated activity must be treated differently than independent expenditure activity and by a different standard.

Citizens United has dramatically increased the importance of a careful and effective coordination communication regulations developed by the FEC. The case itself only addressed independent expenditure activity, but in unleashing a vast new pool of finances in campaigns, Citizens United has fundamentally changed the dynamics of the financing of campaign practices of which we are not even sure how yet we are going to see it unfold before us. It is sort of like a new wild west that this country has never seen before. We will see how it plays out.

But from some past activity, we can understand that there is a heightened danger of potential corruption. Corporations have not been shy to give hundreds of millions of dollars in soft money campaign contributions or in issue advocacy expenditures and often -- and through PAC contributions, and it almost always goes to help benefit incumbents, as opposed to challengers.

Different corporations will make different political expenditures for different reasons, but clearly one of the overriding bases of corporate involvement in candidate elections is to try to endear themselves to lawmakers. This is a very high potential for excessive undue influence peddling, and as we saw also in the McConnell litigation, there is the reverse possibility of corruption that is often overlooked in these discussions, and that is lawmakers actually shaking down corporations for finances, for financial support for the campaigns, essentially a potential to return to the old system of party bosses.

These two potentially corrupting factors that have been highlighted, have been maximized by the Citizens United decision, really accentuate the importance of coming up with a very careful coordinated communication regulation.

The number one change that can be done, the single-most important thing that the Federal

Election Commission can do is to come up with a more capturing content criteria for those types of coordinated communications that are outside the pre-election window, and it would be the PASO standard.

As one of the principal authors of the Buying Time studies as well as the Shays court has recognized, the express advocacy standard is functionally meaningless. Almost no one says "vote for" or "vote against." When it comes to third-party groups, according to my study in 2000, only about two percent of those ads ever said, vote for or elect or don't elect somebody. Even candidates don't use that expression. It is just considered tacky when it comes to campaigning for oneself. They just don't say vote for me. So, it is really not a practice that is done in campaign activity.

The Wisconsin Right to Life standard, the functional equivalent of express advocacy, suffers from much of the same problem because it is so narrow and focuses on that type of express

advocacy. But much, much more importantly, the Wisconsin Right to Life standard focused on independent expenditures, not coordinated expenditures. We need to recognize that when we are talking about coordinated communications, we are talking about the types of ads that really are designed, promoted, suggested by the candidates, and they should be treated by a similar standard that we treat the ads of candidates, and that is the PASO standard.

I just want to conclude -- I have much more to say, but I am sure we will get into some of this later -- I just want to conclude that the PASO standard is a content criteria that does not stand alone when we talk about a coordinated communications regulation. It is complemented, supplemented by the conduct criteria, so when you combine both the content criteria and the content standards, that is where you can provide a reasonable, yet effective and yet safe coordinated communications regulation.

CHAIRMAN PETERSEN: Thank you,

Mr. Holman.

Mr. McGinley.

STATEMENT BY WILLIAM MCGINLEY, INDIVIDUALLY

MR. MCGINLEY: Mr. Chairman, Commissioners, thank you for the opportunity to be with you today. Initially I would like to reiterate that the testimony I am giving is a reflection of personal views and not that on behalf of any client or other individual or organization.

I wish to make a few comments before the question-and-answer portion of today's hearing.

First, the Supreme Court's holding in Citizens United has a direct impact on this rulemaking. The Shays III court stated that the FEC coordination rule must close the door and prevent the use of soft money in federal elections. However, the Supreme Court vitiated that rationale when it held that corporations may sponsor express advocacy advertisements.

Also, the Supreme Court opined that

lawmaker gratitude and access are not compelling governmental interests that justify burdening speech rights. Therefore, the constitutional landscape has changed dramatically and the Commission must take this into consideration.

Second, the Commission cannot simply reclassify independent speech as coordinated communications through the use of vague and subjective regulations designed to chill First Amendment rights. I would like to pay Mr. Holman a compliment and cite to one of the comments that they filed in 2004 in response to the political committee status rulemaking where the definition of expenditure was at issue, and while discussing nonprofit organizations, organizations that are at issue today in this rulemaking, they stated:

"Discussion of issues of public concern, which may carry with it criticism or praise of elected officials who are candidates for federal office, is central to the mission of such organization and is entitled to substantial constitutional protection. Defining all

communications that attack, oppose, promote or support candidates as expenditures" -- and I understand we are in the coordination rulemaking, but the content filter is still relevant here-- "under FECA, within the scope of FECA regulation, almost everything done by organizations devoted to the discussion of, or advocacy of positions on, issues of public importance. The implications of such an expansion of FECA coverage would be huge."

The PASO standard focuses on the information conveyed in each communication as opposed to the action urged. Information conveyed about the policy positions of an officeholder may be deemed to promote or oppose the officeholder referenced in the advertisement even if the communication contains a clear, non-electoral call to action.

Third, the Commission must continue to use the content standard as a filter to determine what types of communications are subject to regulation and possible prohibition. The content

of each communication is the only factor that remains within the control of the speaker. Vague and subjective standards remove such control from the speaker and place it in the hands of the Commission for after-the-fact manipulation. Inquiries focusing on intent and effect and using contextual factors are prohibited under the relevant case law. Therefore, the proper content standard is the appeal-to-vote standard articulated by the Supreme Court in Wisconsin Right to Life. If a communication does not contain express advocacy or its functional equivalent, it falls outside of the Commission's jurisdiction and is not subject to regulation under the coordination rule.

Finally, the Commission's vague and subjective content standards have forced many speakers and vendors to seek the safety of the firewall safe harbor provision. The fact that so many groups have sought protection under this provision serves as evidence of an uncertain and ill-defined regulatory environment. The

Commission must preserve the firewall safe harbor as a means to mitigate the effect of politically motivated complaints designed to harass respondents.

In sum, the coordination rulemaking implicates core First Amendment values, and the Commission must narrowly tailor its regulations to address the specific issues at hand.

I am happy to answer any questions you may have, and thank you for your time.

CHAIRMAN PETERSEN: Thank you, Mr. McGinley. We will now turn to questions from the Commissioners. Let's start with Vice Chair Bauerly.

VICE CHAIR BAUERLY: Thank you, Mr. Chairman. I would like to start with Mr. Holman, if I might.

Your comment recommends that we adopt the PASO standard in response to the Court's concern that the prior rule did not rationally separate election-related advocacy from other speech, and some commenters, including the two on either side

of you, have expressed some concern about this other area of speech, in particular, lobbying activity and advocacy.

I would like you to please comment on this concern and whether, in your view, a PASO standard provides sufficient clarity to avoid reaching this non-election-related speech?

MR. HOLMAN: Thank you for the question. First of all, I want to emphasize, especially in response to my colleagues here on my right and left, that once again we are not talking about defining independent expenditures and independent expenditure activity. We are talking about the same type of activity that candidates are subject to.

The PASO standard is something that all the courts, including the Citizens United court, has recognized can define exactly what a candidate does. The Citizens United court, the Wisconsin Right to Life court, were only talking about independent expenditures by outside third-party groups. They never, never went so

far as to say something like a PASO standard does not define a campaign ad run by a candidate or a party. In fact, all of these courts have assumed that any ads run by candidates and parties, if they are designed to affect a federal election, are in fact subject to the regulations and are appropriately captured. They can be captured by the PASO standard as well.

So, the courts have generally recognized the PASO standard is applicable when it comes to candidate communications, and when we are talking about coordinated communications with candidates, we are talking about candidate communications. This is a standard that is applicable here because you can assume that any communication run by a candidate, as long as it is designed to influence the federal election, is in fact designed to influence the federal election and can be captured under the regulatory regime.

The McConnell courts, for instance, recognize that the PASO standard was certainly adequate, using their quotes, it gives a person

of ordinary intelligence a reasonable opportunity to know what is a campaign ad versus what is not a campaign ad.

The Federal Election Commission as well uses the PASO standard when it comes to defining federal election activity. So, it is a standard that is sufficiently broad to capture candidates' intended coordinations, but at the same time, it is a standard that one knows what it means.

I believe it was my colleague on the right -- on the left -- one of them argued that suppose a communication said just a statement of fact, that representative X voted three times against abortion rights. That is just a statement of facts and that would not be subject to the PASO standard unless the communication, or course, goes on to say, therefore, you should thank representative X for his vote, or in some other way implied support or opposition to the policy statements of the abortion rights issue. It is a sufficiently clear standard that reasonable persons know what it means.

VICE CHAIR BAUERLY: Mr. McGinley, I think you -- as I read your comments, you don't agree that that standard is sufficiently clear, and one of the issues in particular that you have raised is about notice to those that would have to gauge their activities under it, and I would like some further clarification.

You have expressed your concern there is no notice because there is no definition. Of course, we have provided alternative definitions for a potential PASO standard, and my question is, is your concern that these proposed definitions don't provide sufficient notice, or that there could be no definition, in your view, that could be workable enough to provide people with notice as to what activity would be captured?

MR. MCGINLEY: I think a couple of points in response to that question. The first is that the PASO standard was enacted in McCain-Feingold to limit the scope of the FEC's jurisdiction with respect to political party committees, so that

communications put out by a political party committee that did not PASO a federal candidate or by a state candidate that did not PASO a federal candidate would not be subject to federal regulation.

So, the Congressional intent behind the PASO standard is to apply to political committees either already registered with the Commission or for state candidates who are basically referencing a federal officeholder. They were never intended to apply to organizations that are outside the Commission's regulation, such as a nonprofit group or, for now, for-profit corporation engaged in advocacy.

The second thing I would like to say is that one of the things that Mr. Baran raised and that I agree with, which is that the lobbying and the grassroots lobbying component of this type of rulemaking that has the potential to be over-inclusive under the PASO standard, is that when organizations, for reasons not related to an election, engage in advocacy on issues and ask

constituents to contact their lawmakers or, for that matter, potentially even candidates to express an opinion on an issue is not election-related speech.

Now, under the expansive definition of PASO, that would be subject to the coordination rules and I think would have a chilling effect on the open discussion of important issues of the day. We see that Congress is continually bringing up issues late into the campaign season. They should not have a free speech zone. They should not have the ability to chill the discussion because organizations are engaged in both direct lobbying and grassroots lobbying and using those contacts has an ability to stifle the free expression of political ideas.

VICE CHAIR BAUERLY: Thank you. I think one of the things we are trying to figure out is where the line is between independent speech and coordination. That is the point of the reg itself. So, while the frame which you are using, starting from a point of independent speech or

starting from a point of candidate communication because it is coordinated, that doesn't get us to the line drawing and I think that is what we are trying to do.

I would like to move to the functional equivalent test and talk about that in terms of whether it can meet the Court's standard, the Shays court standard for rationally separating election-related activity, and I note the Citizens United court obviously, following the Wisconsin Right to Life test, found "Hillary: The Movie" was in essence a feature-length negative advertisement that urged viewers to vote against Senator Clinton for president, and as it was applying the test would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of president.

So, I guess I would like to hear from each of you briefly, because my time is almost up, in your view, in light of the Supreme Court's application of the functional equivalent test,

can that test be viewed as covering election-related activity outside of the windows in a way that is sufficient to meet the Shays court's concern? As we have all stated, that is our primary goal here. We obviously have to be informed by other decisions, but we are under a court order here.

MR. BARAN: If I could go first, Commissioner. I think "Hillary: The Movie" as an example is a little complicated because the lower court had concluded it was express advocacy, and the Supreme Court in its opinion didn't really rule one way or another because it said it is clearly an electioneering communication, and it certainly is pejorative, and for purposes of our First Amendment constitutional decision, whatever it is, we conclude that it cannot be prohibited when it is independently financed by the speaker.

I think that the Wisconsin Right to Life standards will satisfy the Shays court in the following way. First of all, the Shays court said that the express advocacy standard was too

limited and that you ought to reach out in a rational basis and include some additional election-related speech that, if coordinated, would constitute a contribution.

So, what does the Wisconsin Right to Life standard provide to you? It says that certain speech, even though it references a candidate, is not a limited electioneering communication within the 30- and 60-day period because it pertains to issue advertising and it is not sufficiently election related.

So, our comments and those of other comments suggest, well, take that principle, and we know that in a 30-60-day period an electioneering communication cannot be coordinated, whether it is exempt under Wisconsin Right to Life or not, and extend that beyond the 30-60-day period to encompass only the election-related speech and not the issue speech, and that is important because you -- there is no prohibition on coordinated issue speech outside of the 30-60-day period.

If independent groups and legislators want to discuss an advertising campaign to pass a bill, as I think we will see in the near future if health care reform is going to come up for a vote again, that type of coordination is not election-related and cannot be subject to this regulation because, in our opinion, it interferes with the First Amendment right to petition the government.

Also, the sponsors of McCain-Feingold repeatedly said, we do not intend to interfere with bona fide legislative activity, whether it is the content or whether it is the collaborative nature of legislative activity. Legislators have to coordinate, they have to coordinate with their constituents, they have to coordinate with their various private groups that support their legislative agenda. That is part of being a legislator, and that is what you are trying to separate, and I think Wisconsin Right to Life gives you some standard although the functional equivalent definition, in part, contemplates that

the regulation in that context is limited to the 30-60 days. That is part of being functionally equivalent. It is within the 30-60 days.

But, you are trying to fashion a standard for another purpose, dealing with coordination, and the Court says, we just want some rational basis, and it seems to me that the Supreme Court has offered you one rational basis, which is, well, okay, if it is election-related in the 30-60-day period, then maybe we extend that for purposes of coordination even though it is not subject to reporting, for example.

MR. HOLMAN: The Wisconsin Right to Life functionally related standard I do not believe would survive another Shays court scrutiny. It is a smidgen beyond the magic words test but so narrow that it does not capture most or nearly all campaign communications.

Now, once again, I want to reiterate. We are talking about candidate communications here when we are talking about coordinated communications. Can you imagine if the Federal

Election Commission were suddenly to design the regulatory regime of campaign ads, contribution limits, disclosure requirements and so forth, applying it to candidates using just the functional equivalent standard?

Literally all candidate communications would escape regulation under that standard. That is why the courts have rejected this type of standard for coordinated communications beyond the pre-election window. It would not capture nearly all the campaign ads that would be sponsored by or promoted by candidates and their campaigns.

I want to reiterate one other point too. When we are talking about the PASO standard as a content criteria, no one is suggesting that that is a stand-alone standard, that any communication beyond the pre-election window that PASO's a candidate would be captured. That is not what is being discussed here. What is being discussed here is that is one prong of a two-prong test. So, if it actually is PASO-ing a candidate, then

you take a look at the conduct standard and do those come into play as well, have they been encouraged by candidates, are candidates materially involved, have there been substantial discussions with candidates. That is the test of coordinated communications as to whether they qualify as actual candidate's campaign ads and not independent expenditure ads.

MR. MCGINLEY: I would go back to what I said in the opening statement, which is that the reason that the Wisconsin Right to Life standard works, the reason that it separates the election-related speech from other speech such as issue advocacy or grassroots lobbying is because it focuses on the appeal in the communication itself. It does not focus on the information conveyed, the facts that are conveyed by the speaker.

Instead, it asks, what is the reasonable interpretation of that communication? Is it an appeal to vote for or against that candidate or is there some other plausible meaning that that

communication conveys that would put it outside the scope of the Commission's regulation.

I think what is critically important here is to remember that the Court in Citizens United when it talked about coordination, it cited to Buckley on page 47, and Buckley on page 47 discusses expenditures that are made with coordination or pre-arrangement, expenditures being the defined term that the Court focused on.

In fact, they refer to footnote 53 where the Senate report uses the example where a candidate asks a supporter to place a billboard endorsing that candidate, in other words, containing express advocacy, and so it is important to go back and look at Citizens United, it is important to go back and look at what the Court was saying in Buckley about where the lines are on this.

It is critically important that the Commission continue to use the content standard as a filter to decide which communications and activities are subject to regulation and possible

prohibition and not try and bootstrap on the conduct standard so that speakers will be afraid to speak because they are worried about intrusive investigations that are typically conducted in connection with coordination inquiries.

So, we need to give the speakers the ability to control whether or not they want to be subject to regulation by the Commission, so that their political opponents and, frankly, for the Commission not to be able to second guess and import a meaning into those words that are not supported by the plain words of the communication itself. The content of the communication is the only thing that remains within the control of the speaker, and I think that is something that is very important for the Commission to keep in mind when deciding whether or not to go with the PASO standard or with the Wisconsin Right to Life standard, is whether or not the speakers have fair notice so that they can make informed decisions about whether or not they want to engage in regulated activity.

CHAIRMAN PETERSEN: Commissioner Hunter?

COMMISSIONER HUNTER: Thank you. A little bit more specific on the WRTL standard as I mentioned in my opening comments. I would like to know from the panel if you think the WRTL standard as proposed in the NPRM would benefit by an additional objective kind of test logged on to WRTL, and for example, do we pick out parts of 114.15 or along the lines of something that Lyn Utrecht suggested in her comments? On page 3 of her supplemental, she suggests that the conduct standard should apply to those communications that contain express advocacy or are unambiguously related to an election because they make reference to a candidacy, voting or an election.

So, again, the question is: Is the standard as it was in the NPRM sufficiently clear or would it benefit by something along the lines of an objective portion requiring that the communication refer to candidacy voting or an election?

MR. MCGINLEY: Once again, I think that Ms. Utrecht's standard gets closer to where we should be with Wisconsin Right to Life. In other words, the items she lists as far as being contained within the communication, the candidacy, the act of voting or the election, do reference the election context.

But once again I need to go back and emphasize, it needs to focus on the action urged in the communication, and the reason is -- and I think the Supreme Court, the majority opinion in Citizens United did a very good job of this.

Number one, they said that in the time period immediately preceding an election is when most political speech is going to occur. It is when the general public starts paying attention. And there may be opportunities for groups that have an issue agenda to want to comment on those issues in the context of an election, not urge any election action, but basically to highlight their issue. Why? Because Congress may be coming back into session after the election for a

lame duck session. It may be that they believe they can help shape the legislative priorities in the next Congress, so what we need to do is to make sure that we are focusing on the action urged.

The other thing that the Supreme Court I thought did a very good job of was stating what happens in reality, and that is that most political communications are generated not because of some grand plan that is laid out a year in advance or six months in advance. It is the give-and-take of political discussion. It is that a lot of political communications are sponsored, are put up on the air reacting to either events in the Congress, events on the ground or speech by their opponents.

When we get to the conduct standard, we can talk about the connection with the common vendor, but I think that was a very insightful point that the Court brought to the forefront, and that is that political speech is a game of give-and-take. It is not some grand scheme that

is laid out.

So when people want to react -- people forget that Ross Perot, his campaign in '92, was the one that really drove the deficit as a major issue. Many groups who were into cost controls or good government may have wanted to comment on that in the context of the election. Why? Because the American people were paying attention. And so they needed to have the freedom to engage in that issue discussion without fear of regulation or prohibition.

So, that is why I think that Ms. Utrecht's standard gets closer to where we should be, but I thought the Court was very forceful on the point that an objective standard, Wisconsin Right to Life, had been turned into this complicated two-part, 11-factor test and that it really removed the discretion from the speaker who gets to control the content of their advertisements and decide whether or not they want to subject themselves to regulation and put it into an after-the-fact analysis that would get

into intent, effect and use contextual factors to possibly subject them to regulation that they didn't want to be subjected to.

MR. HOLMAN: That sounds a bit like an argument to weaken the content criteria and the coordination regulation within the pre-election window, which my impression is not a whole lot of commenters were really asking for. Currently within the pre-election window, within the 90-day and the 120-day pre-election window, the content standard and criteria seems fine, essentially electioneering communications, express advocacy as well as PASO, literally all of it, it covers it fairly well and rather substantially, and that is not what is under contention under the Shays III order, and I did not really think was under consideration as part of this rulemaking process.

What we are really focusing on once again is outside the pre-election window, and I want to emphasize and repeat again, the standard that is being discussed here with the Wisconsin Right to Life functional equivalency standard is something

that the courts have applied to independent communications, independent expenditures. This is not something that any of the courts have applied to candidates' communications, and that necessarily means it really has no place being discussed in terms of coordinating communications which are to be treated the same as candidate communications.

MR. BARAN: The question is whether the Wisconsin Right to Life standard should be modified by the language in the proposed rule; is that correct?

COMMISSIONER HUNTER: Yes, and, if I might, I think the Chairman just told me, I think we are considering -- I think we have agreed to leave the comment period open for sometime afterward, so if people want to think about it more and submit comments in response to my question or whatever other question, I think we agreed that that is something we are willing to do.

MR. BARAN: I appreciate that, and we

might take the Commission up on that opportunity because in our comments we do suggest that the additional language actually increases ambiguity and lack of clarity rather than clear things up because the existing Wisconsin Right to Life standards are clearer, they pattern, the Supreme Court's decision, and of course they have been used already in one election and seem to be understandable to the regulated community.

I would just like to comment that the courts have really not dealt with the coordination issue in enforcement type cases. In fact, I think the only time the Supreme Court has actually commented on it was in the Colorado case, the 1996 Colorado decision which upheld the constitutional right of political parties engaged in independent expenditures, and in that case, the Commission did assert both in the Tenth Circuit and in the Supreme Court that the Colorado party had coordinated its advertising with the candidates because they help candidates and there were some general assertions that

parties really like to assist their candidates. That is why they are in the business that they are in. The Court simply rejected that type of a generalized assertion. So, whatever coordination is, it is not that. There has to be some specific planning and collaboration with the candidates, and since that time, I don't think the Court has commented on coordination at all.

The Shays court has commented on it in the context of this rule. I read the Shays court's opinion to say, well, it has to be more than express advocacy and it has got to be rational. So you, Commissioners, come up with something that is a little more than that and rational. I think our comments are saying, well, Wisconsin Right to Life is patterned after a Supreme Court decision, is more and it seems to be somewhat rational here. I don't know if the Court of Appeals is going to disagree again, but it seems to me they have given you an invitation to come up with something as opposed to PASO, which nobody since the Supreme Court vaguely

commented on it has been able to interpret and certainly would not be understandable by the regulated community.

CHAIRMAN PETERSEN: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I'm going to follow up on a couple of the points that were pursued by my colleague. Let me start with PASO. I understand that -- I am going to direct this to Mr. Baran and Mr. McGinley.

It seems to me that the argument that you have made so far about PASO -- let me back up a second. We have gotten a lot of comments that say we shouldn't use PASO because it is vague and overbroad, and it seems to me that what you have said so far has mostly addressed the overbreadth aspect, that you think, particularly, you, Mr. McGinley, that it encompasses what you believe ought to be legitimate protected lobbying communications, but I want to focus on the vagueness, which is something Mr. Baran kind of

touched on a second ago.

Promote, support, attack and oppose, these are not arcane Latin terms. They are two-syllable words that people without law degrees use every day of the week. Dare I say, people of ordinary intelligence use these words and understand them, and I suspect that if I were to approach either of one of you at a cocktail party and say, wow, I saw an ad last night that really attacked candidate Jones, neither one of you would squint your eyes and scratch your head and say, I am sorry, what was that word, attack? I don't understand that word. What does it mean? You know what it means, and yet the argument is frequently made that nobody knows what promote, support, attack or oppose means, and nobody can figure out how to apply these terms.

This strikes me as a lawyer's argument that, you know, if you walk outside this building and ask 10 people, do you understand what the word attack means, you will not find any of those 10 people who are going to say, no, I don't know

what that means.

So, help me out here. When you say you don't know what it means, what do you really mean? Either one of you.

MR. BARAN: Well, a couple of things. First of all, Craig Holman indicated that somebody wrote an ad that says so-and-so has voted against abortion funding by the federal government three times. That is okay, it doesn't promote or attack or support, but if it then went on to say, and call up the Congressman or Congresswoman and tell them to keep voting or not to vote that way, I guess it would. Is that right? I find that vague. I am not sure what the difference is.

Let's take another example. Let's assume that this mythical Congressman is in a close race in New York City, and the ad says, Congressman so-and-so voted against abortion funding three times; call up the Congressman and tell him to continue voting that way. But the abortion issue in that particular district is not in favor of

that particular position. Is that ad promoting the candidate or attacking the candidate?

It is a little bit like the story of Congressman Joe Wagner of Louisiana who was known as a very virulent segregationist and decided he was going to support Senator Kennedy for president in 1960. He went up to him, according to the story, and said, well, Jack, I am all for you. Tell me what you want me to do. You want me to come out for you or against you?

(Laughter)

MR. MCGINLEY: I would simply say that the term attack, attack what? Did you attack the policy position taken by the federal officeholder who happens to be a candidate or are you attacking the candidate themselves? That is where it begins to break down in practical application, because an advertisement that says, call Congressman McGinley and tell him to vote no on bailouts, after I go through a litany of the votes that I have taken on bailout legislation, is that promoting me, is that attacking me or is

that attacking the issue?

It seems to me that that type of advertisement fits exactly within the definition of grassroots lobbying under another body of law, which would be the Internal Revenue code and the IRS regulations. Is it a communication to the general public? Is it discussing a legislative issue? Is it asking the viewers or the listeners or the readers to contact the official with the authority to influence that issue and ask them to take some sort of action? Or is the general public going to express some sort of view about the issue to the officeholder?

I mean, how many close votes have there been in the Congress lately? How many times can you identify swing districts where a legislative issue, the outcome of a legislative vote, can be determined by running advertisements in eight congressional districts? Those are not election related. That has everything to do with the legislative issue at hand.

Some could say, well, you are just

running that advertisement because you want to attack the officeholder who happens to be a candidate. You are basically teeing up the issue for the election. But how is the speaker supposed to have advanced notice? When can I run an ad that attacks an officeholder for a position and then asks the viewers to contact that officeholder and ask them to vote a different way? Is that election related?

The officeholder may be out there talking about it on the campaign trail, but that is something beyond the control of the speaker. So, when does the speaker get to maintain control? They get to maintain control when you lay out an objective bright-line test.

The Wisconsin Right to Life test is one that encompasses more than the magic words, in Buckley. It is one that goes beyond the explicit terms to vote for or against. It is a standard that is susceptible of no other reasonable interpretation than an appeal to vote for or against.

So, attack and promote are vague and they break down in practical application when you begin to apply them to specific advertisements, especially where you are discussing incumbent officeholders who happen to be candidates discussing, frankly, radioactive issues.

COMMISSIONER WEINTRAUB: So, it sounds like what you are arguing is that the vagueness and the overbreadth are kind of interrelated.

MR. MCGINLEY: Correct.

COMMISSIONER WEINTRAUB: Mr. Holman, do you want to respond, particularly since they are citing to your analysis as demonstrating their point?

MR. MCGINLEY: Can I just interject? I meant that as a compliment.

(Laughter)

MR. HOLMAN: I took it that way, actually. I just want to make this point over and over again because I have seen it come up in all of the comments that are being offered here, and that is, a lot of commenters are choosing to

view the PASO standard or this content criteria as a stand-alone standard, as if that alone determines that there is a coordinated communication going on with the candidate. This is not a stand-alone standard.

By having something like the Wisconsin Right to Life standard or the express advocacy standard for communications outside the pre-election window, as the Buying Time studies show and actually your own research shows, it affects very little, very few communications, very few ads. Already are -- most ads then are automatically disqualified from consideration of being coordinated with the campaign even if the candidate asks for that type of ad to be run outside that pre-election window.

So, what the Shays III court is asking you to do is to come up with a standard that accurately captures the coordination between a candidate and a sufficient content standard that works in tandem with that conduct standard.

So, we are not talking about PASO as a

stand-alone issue. This is not regulation of lobbying activity, grassroots lobbying outside the window. This is just one of the criteria that helps define when a candidate is running an election-related ad outside that window through coordinated activities.

COMMISSIONER WEINTRAUB: Let me switch my focus to the Wisconsin Right to Life standard and its clarity.

Mr. Baran, you said in your comments that the Commission's regulation interpreting the Wisconsin Right to Life ruling provided a level of clarity that allows third-party speakers to understand in advance whether their communications will be subject to regulation.

You seemed to feel, at least at that time -- and I will give you the opportunity if you want to back off on that -- but you seemed to think when you submitted these comments, before Citizens United, that the extra stuff in the regulation that the Commission passed actually was helpful, and I assure you that that certainly

was our goal. It has become a controversial rulemaking, and I don't want to get into a debate about that, but that certainly was our goal, to improve clarity and to provide better guidance.

So, I guess my first question is, in light of what the Citizens United court said about that rule, do you want to revise and extend your comments on that, do you have different feelings about it today?

MR. BARAN: I am afraid I didn't quite follow that. You are saying we didn't say it was clear?

COMMISSIONER WEINTRAUB: No, I think you did say it was clear.

MR. BARAN: And I think we said it again in these comments, right?

COMMISSIONER WEINTRAUB: Yes, that is what I am talking about. In these comments, you said that it was clear.

MR. BARAN: And we incorporate the rule in our comments at pages 10 and 11.

COMMISSIONER WEINTRAUB: You did, but

this was before CU, and what CU says it was ambiguous, that same rule, so I am giving you the opportunity to back off of that, if you want to.

MR. BARAN: Thank you. We have actually had experience with your rule during the 2008 election and the Massachusetts special election, and the safe harbor works. We understand it and our clients understand it. We have to review all kinds of lobbying advertising and other types of advertising throughout the year, and this is helpful. This was helpful in the 30-60-day period, and my point here is if you extended this principle beyond the 30-60-day period, I think people would understand it and it would help.

I understand the Supreme Court may have made other comments on it, and obviously Mr. Holman has made other comments on it, but I see your objective here is to be relatively limited. You are trying to be responsive to the Court of Appeals.

COMMISSIONER WEINTRAUB: We are trying to respond to the Court of Appeals.

MR. BARAN: Maybe someday down the road someone else will have a better idea, but this is the best that, I think, the regulated community can come up with right now.

COMMISSIONER WEINTRAUB: Here is my concern. If we were to adopt the Wisconsin Right to Life standard, and the Supreme Court seems to frown on our attempts to elaborate on what they apparently view as something that stands on its own as a beacon of clarity, your comments suggest that you thought that the elaboration in the Commission's earlier rules were helpful and made it more clear.

What I don't want to run into is, we adopt, suppose we were to adopt, the Wisconsin Right to Life standard on its own, sort of in deference to the Supreme Court, who of course we want to be deferential to, and then we hear from people that actually they don't think it is that clear, and they can't figure out where the lines are, and it is not a bright-line test.

I don't want to be caught between that

rock and that hard place, so I am asking you guys whether you think it is clear or not.

MR. BARAN: I can't guarantee the views of other people. I can't guarantee whether a future experience will raise other issues that we are not anticipating today, but based on the rule thus far, it seems workable, that is our testimony both in our comments and, obviously, in my comments today, so that you can separate what the Court has previously said is not election-related functional equivalent content. You want to separate that other content so that people can go about in their public debate on non-election activity more than 30 to 60 days before an election.

COMMISSIONER WEINTRAUB: Obviously one possibility is we could just take 114.15 and move it, basically -- take that whole thing and move it over and say that is now the new coordination --

MR. BARAN: You can't move it. You still have to use it, or do you not, for reporting

purposes, correct?

COMMISSIONER WEINTRAUB: Right. But we could take something that looked a lot like that and import it into this context, or what we have proposed in the NPRM was to do a stripped-down version of that, that pretty much just parroted the standard out of the Court opinion in Wisconsin Right to Life.

Now we have two data points. We have got the Wisconsin Right to Life ads that we now know were not the functional equivalent of express advocacy. We have got "Hillary: The Movie" and the ads for that that we now know are the functional equivalent of express advocacy.

So, if we had just the language that is in the proposed rule, what is called the Modified Wisconsin Right to Life standard, and those two data points, one that is and one that is not -- and I ask this not only to you, but to your colleagues on the panel -- would that provide you with the level of clarity that you need?

MR. BARAN: I think the stripped-down

version would not. It wouldn't be as helpful as your existing regulation.

MR. MCGINLEY: I would simply say, and I don't have the regulation in front of me, but advertisements that discuss what some people would call the qualifications of somebody, or their fitness for office, or possibly commenting on character. Well, how does that apply in the real word? What happens if an advertisement says you said you were going to vote for lower taxes, you said you were going to shrink the size of government, but then you voted for the bailout, and now the bailout is coming up again. We expect you to keep your word and vote against the bailout. That is an advertisement about legislation, not elections. So, does that comment on the officeholder's qualifications, does it comment on their fitness for office, does it comment on their character? Some would say yes, but it would not be an election-related ad. It would be an advertisement designed to influence legislative policy, not elections.

And so, in practical applications, these terms begin to break down as you begin to apply them to real-world advertisements.

COMMISSIONER WEINTRAUB: Isn't that exactly what the Court did in the Citizens United case when they said "Hillary: The Movie" would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the presidency? There is little doubt that the thesis of the film is that she is unfit for the presidency. That seems to be exactly what the Court did, what you are telling us not to do.

MR. MCGINLEY: Right, but at the end of the day, what is happening in the real world with the legislative issues at hand? "Hillary: The Movie" was put out during the Democratic presidential primary in 2008. I haven't seen the movie, but it is my understanding that there were some of the interviewees that basically said she, can't serve as president or she cannot assume the presidency, and they were basically making the

functional equivalent of vote for and vote against. This was not a legislative advertisement saying we need to prevent more bailout legislation, or we need to adopt health care reform, where you talked about the prior positions and voting record of the officeholders as a way to convince the viewer that it is in their best interest to contact that officeholder to express their views about the legislative issue at hand.

COMMISSIONER WEINTRAUB: Is it the tag line that distinguishes it?

MR. MCGINLEY: Which brings me back to my opening comments, which is that the test you adopt should not focus on the information conveyed. Rather, it should focus on the action urged in the advertisement. If the purpose of the advertisement in the communication says she can't serve as president, without saying vote for or vote against, that would be the functional equivalent under Wisconsin Right to Life. However, if it says, call Senator Clinton and

tell her to not to vote for bailout legislation, that is a clear, non-electoral call to action that would place it outside the scope of Wisconsin Right to Life.

COMMISSIONER WEINTRAUB: Mr. Chairman, I apologize, I am sure I have taken more than my time, but I found that to have been very illuminating.

CHAIRMAN PETERSEN: Thank you for that. Commissioner McGahn.

COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I'd like to spend my time with Craig Holman.

I think everyone agrees that when speech is coordinated, it is a different standard than when it's independent. That's your theme. Remember, we are talking about coordinated speech, not independent speech. All these cases are about independent speech, not coordinated speech, but to me that begs the question, as the Vice Chair indicated, we are here to determine the line between the two, so to simply say when

it is coordinated it is a different standard doesn't advance the ball.

Your written comments I found interesting because, for example, the heading B, FEC has struggled to develop effective coordination rules for independent expenditures. I would hope so, because if they are independent the coordination rules would not govern, right? So, how have we struggled to develop effective coordination rules for independent expenditures? Every case I read says we can't do that.

MR. HOLMAN: That is right. I would have been mixing terminology there.

COMMISSIONER MCGAHN: That is something that is a theme that I think we all need to keep in mind, terminology here matters, right? What is an expenditure, what is not an expenditure, what is express advocacy, what is not express advocacy. In the comments you talk about overt express advocacy versus other express advocacy. I have read Buckley many times. They seem to define express advocacy. What is the difference

between overt express advocacy and regular express advocacy? I don't follow when you sort of italicize things in your comments for if something is really express. Isn't it express or it is not?

MR. HOLMAN: By that phrase, I meant by overt express advocacy the magic words test, vote for, vote against. By other express advocacy, I meant functional equivalent of express advocacy.

COMMISSIONER MCGAHN: Thank you for that clarification. I would like to explore a little bit where I have actually heard some agreement between you and Mr. McGinley.

Stating facts, so-and-so voted against something, that doesn't have an electoral relation, as I understand what you said earlier. Remember, Shays III, we have to determine what is the difference between campaign-related speech and not campaign-related speech.

So even if it's -- do we agree that something is coordinated in the lay sense of the word, meaning there has been discussion between a

politician and an outsider over something that is not election related, do we agree that that is beyond the reach of what we are doing here at the Commission?

MR. HOLMAN: I would agree that a pure statement of facts without any other context of supporting the certain stances of the candidate wouldn't qualify under the PASO standard.

Now, a pure statement of fact could qualify under the electioneering communications standard, for instance, just by reference to a candidate, but that is not the standard I am advocating for outside the pre-election window. I think we should have a weaker standard than merely an electioneering communications standard outside the 120-day window, and PASO seems to be the best and appropriate remedy.

COMMISSIONER MCGAHN: When you say electioneering communications standard, you mean the statutory, the reference -- the terminology, I am getting lost. What do you mean by electioneering communications standard?

MR. HOLMAN: Merely referring to a candidate within that timeframe.

COMMISSIONER MCGAHN: Okay. A statement of fact, though, if it is done in consultation, even at the suggestion of a candidate, is that a problem we have to worry about? You just said it doesn't PASO. Let's say it is beyond PASO. Is that permissible?

MR. HOLMAN: It would be coordinated communications within the 120-day window. If you were to apply the PASO standard outside of the 120-day window, it would not qualify as coordinated communication.

COMMISSIONER MCGAHN: Okay. Now, your response to an earlier question, and it has come up a couple of times, if you state so-and-so voted against funding for abortion three times, but you add the tag line, call him and thank him for those votes, that somehow becomes promote, attack, support, oppose? Why?

MR. HOLMAN: Yes. That is then expressing support for that position.

COMMISSIONER MCGAHN: Let's say the call to action says, call the congressman and tell him what you think about those votes? Now, we are in the studio, we have time running here, we are making an edit to an ad, we have to get it out of the door and we have to change traffic and we have to get to the station. Okay. So we don't give time to wait. The question is: Can we do that ad or not?

MR. HOLMAN: Without any other context of the ad and it just gives a statement of fact and then it says, call the congressman and express what you think, without any other context of this ad, that itself does not PASO. I couldn't imagine an ad running like that.

COMMISSIONER MCGAHN: Let's assume that is the only text. How could it PASO? Happy picture? Happy music, maybe?

MR. HOLMAN: As long as there wasn't an expression of support or opposition or promoting or attacking the position of the candidate, that would not qualify under the PASO standard.

COMMISSIONER MCGAHN: Let me ask you this: Are you familiar with the advertising that was at issue in Wisconsin Right to Life?

MR. HOLMAN: Yes, although --

COMMISSIONER MCGAHN: Let me refresh your recollection. It was an ad that concerned judicial nominations, and it was an ad the Right to Life folks wanted to air that mentioned Senators Kohl and Feingold, and it was close to Senator Feingold's re-election and it urged them not to block now-Justice Alito's ascension to the U.S. Supreme Court by filibustering judicial nominations. Would that ad be PASO under your standard?

MR. HOLMAN: That ad would be PASO, but first of all, this ad was within the electioneering communications window, so it qualifies as electioneering automatically, but, yes, that would also qualify as PASO had it been done way outside the electioneering communications window.

COMMISSIONER MCGAHN: Where is the

electoral link between an ad that talks about judicial nominations and the election?

MR. HOLMAN: The electoral link is by expressing support or opposition to the policy preferences of a candidate for office. That is the electoral link.

COMMISSIONER MCGAHN: How do you square that with the language in Buckley that the discussion of issues and the discussion of candidates devolves in practical application?

MR. HOLMAN: I didn't understand the question.

COMMISSIONER MCGAHN: How do you square that with the language in Buckley that says the difference between issue speech and electoral speech dissolves -- it dissolves in practical application?

MR. HOLMAN: Because that is not the sole standard that is being applied here. That is just the content criteria. Remember, this is not a stand-alone criteria in determining whether or not a certain speech or communication is

promoting or opposing a candidate. This is just one prong of the content criteria. It does express support or opposition to where a candidate stands on an issue, which could be an issue advocacy, but then if it is in fact coordinated through the conduct at the suggestion of the candidate, then it meets the other prong and becomes a candidate communication.

Even a candidate ad under Buckley that did exactly that ad, would be classified as a campaign ad supporting or opposing the candidate and subject to the regulation. The only way it is viewed as issue advocacy outside the regulatory framework for a candidate is if it is an independent expenditure by a third party and not coordinated with the candidate.

COMMISSIONER MCGAHN: See, again, that begs the question of what is coordinated or what is not coordinated, because in the context of judicial nominations, and folks run ads in judicial nominations, that tends to be based upon how senators are going to vote, and a lot of that

is done in very open and notorious coordination with Capitol Hill, at least that is my understanding. I have never worked in the Senate, but from the outside looking in, that seems to be how that works.

So, it seems to me that if there is a judicial nomination, that can no longer be coordinated if PASO is the standard year-round assuming that the Wisconsin Right to Life ad that the Supreme Court said the government couldn't regulate, PASO becomes the standard, that kind of advertising could not be at all coordinated with who you need to coordinate that with in the Senate or perhaps the White House. Is that where this leads?

MR. HOLMAN: I am actually not sure where you are leading on this. I am trying to keep this pretty straightforward and simple, that if a candidate does at the suggestion or materially contributes to a third-party communication that does PASO, that either supports that candidate or attacks the opponent, that that would qualify as

a coordinated communication. Is that where you are leading? I am not sure.

COMMISSIONER MCGAHN: I am trying to figure out how a judicial nomination ad has anything to do with an election to office. It seems to me that is certainly one of the things senators do that -- is the duty of a senator, that is not tied to the election. Maybe his vote at some point raises a point in a voter's mind at some point, but we know that is not enough.

Let's keep talking around the Wisconsin Right to Life ad and let's assume the call to action was, call these two senators and tell them what you think about Judge Alito. Does that make the ad okay? This is assuming the conduct prong is satisfied. My whole hypothetical assuming the conduct prong is satisfied. We are simply talking about the content prong.

MR. HOLMAN: And it is outside the electioneering communications window. If you take all of those considerations into effect, it

would not qualify under the PASO standard. The Wisconsin Right to Life ad that you are specifically talking about, by the way, was a duplication of another ad that the same group did two years earlier targeting Senator Kohl, and the second one, I believe, was targeting Senator Feingold. It wasn't really focusing on the judicial candidacy. It was an electioneering communications within that 60-day window which was trying to portray Kohl originally, and then two years later they just changed the faces and put Feingold in there. It was designed to affect voter attitudes toward Kohl or Feingold.

COMMISSIONER MCGAHN: How do you know that?

MR. HOLMAN: That is my judgment of the ad itself. The fact that it was a duplicate ad, two years apart, same ad, same criteria, just focusing on two different officeholders when they happened to be running for election. I did not produce the ad.

COMMISSIONER MCGAHN: So, they ran an ad

two years before now-Justice Alito was nominated. I think the ad had Kohl and Feingold in it with Alito.

MR. HOLMAN: Both times it did have both Senators in it, but it did emphasize --

COMMISSIONER MCGAHN: Did I miss something, was there an amendment to the Constitution, was Kohl on the ballot two years in a row?

MR. HOLMAN: No, but one of the officeholders was running for office. Remember too --

COMMISSIONER MCGAHN: Does that then preclude you from running an ad trying to sway that politician's vote on confirming a judge simply because that person is on the ballot within that cycle?

MR. HOLMAN: Under BCRA with the electioneering communications provision, it would have required that the ad not be paid for by corporate or union money.

COMMISSIONER MCGAHN: And we know what

the Supreme Court said about that theory.

Let's turn to PASO itself. I think I must have missed something. Because my understanding with how the PASO standard was sold was that it wasn't a content standard per se or a limitation, it was designed to avoid circumvention of the limits, meaning a federal officeholder, even in the wake of the soft money ban, the national parties could still in theory raise soft money or attend an event -- not to raise soft money but raise money for a state party where the state party could then use soft money the federal officeholder didn't raise, to benefit that federal officeholder's election, and hence the federal election activity concept, if it promotes, attacks, supports or opposes the federal officeholder, the state party, local party, could not use non-federal money. Same thing with state and local candidates.

So, now it was designed to be an anti-circumvention measure and now it is going to be used as a content standard for coordination.

I don't see those as being the same thing, and I would ask actually either Mr. McGinley or Mr. Baran, does that seem to be your recollection of what PASO was about, and can we then take that kind of standard and export it into a coordination analysis?

MR. MCGINLEY: That is my understanding of how the PASO standard came about. The other thing that I would like to point to that kind of relates to that is that Buckley's distinction between expenditures that apply to outside groups and expenditures that apply to candidates and political party committees is that if money is disbursed for a communication even though it doesn't contain express advocacy by a candidate or a political party committee from the federal account, by definition it is going to be an expenditure, because they said why else would they do it? They are promoting a federal election somehow or their own candidacy.

But, with respect to the outside groups, with respect to the independent spenders, they

did say that express advocacy needs to be the standard, that it is the only way you can delineate between what a group is doing in connection with an election versus what the group is doing in other contexts. That may be political but not election-related.

So, the PASO standard seems to be a way, and it is my understanding of how this was done, was so that when state parties that were able to maintain both federal and state accounts, when the state account money was being spent in connection with an election where federal candidates were on the ballot, the state money spent needed -- could not PASO the federal officeholders on the ballot. What it did was it made sure that you didn't completely federalize all of the elections within a state and state party activity, and so it was a line that was drawn so that you would keep the federal side to the federal account and the non-federal pure state activity could be done entirely out of the state account.

MR. HOLMAN: May I respond to this too?

COMMISSIONER MCGAHN: As long as it doesn't cut into my time.

MR. HOLMAN: This exactly is an anti-circumvention standard. That is what the coordination regulation is all about. It is about making sure that outside groups and candidates do not circumvent the contribution limits, the disclosure requirements that apply to candidate communications, which makes PASO a perfect standard to apply in terms of the content criteria for anti-circumvention.

COMMISSIONER MCGAHN: Mr. McGinley, do you think the ad in Wisconsin Right to Life promoted, attacked, supported or opposed a federal candidate?

MR. MCGINLEY: No.

COMMISSIONER MCGAHN: Mr. Baran, do you agree or disagree with that? And if you can't remember the text of the ad and actually want to see the script because, well, that is what very experienced lawyers do before they render

opinions, I certainly understand.

MR. BARAN: I don't recall it doing that, but I would like to review the text of the script itself before commenting conclusively with my opinion.

COMMISSIONER MCGAHN: Thank you, Mr. Chairman.

CHAIRMAN PETERSEN: Thank you.

Commissioner Walther?

COMMISSIONER WALTHER: Thank you.

I was a little interested in the tension between Wisconsin Right to Life standard versus PASO, as if it has to be one or has to be the other, and you can take a standard like express advocacy and build in a safe harbor to reduce the uncertainty of what that means or how it would be applied, and I am wondering if we could discuss whether or not -- I have some concern as to whether or not the Shays court would accept Wisconsin Right to Life standards. If we were to do something like apply a PASO standard, I don't know why it has to be PASO, but it is one that

has statutory recognition, and whether or not we define it, add a safe harbor that clarified some of the problems that Mr. McGinley referred to and Mr. Baran about when it might be applied, so that – and I am not sure whether you'd have an additional factor about a call to action or not, but I am interested, Mr. Holman, in how you might see an approach like that. Take the PASO standard and try to tighten it up and have a safe harbor so people can have greater certainty as to whether or not they are following it or without it.

MR. HOLMAN: I found some of the safe harbor or actually additional definitions to PASO, especially when it was focusing on things like candidacy or election, not to be appropriate.

There was an Alternative A, I believe, that was offered to provide other words that would help define what support and oppose mean, and I find that okay. It doesn't help or it doesn't hurt. Quite frankly, I think we all know

what support or oppose means, so when an ad is something like a pure statement of facts that makes no commentary on whether or not that is good, bad, support, oppose, or thankful or horrendous or something else, that is when you trend into the actual PASO standard.

I want to also add that the PASO standard itself cannot stand -- we are always talking about, in terms of a coordination regulation, with coupling it with the conduct standards as part of the coordination regulation.

MR. BARAN: But that is part of the problem here, is that there are going to be instances where there will be conduct regarding certain content which should not be regulated, it should not be interpreted as a contribution, and I think the prime example is the one we keep bashing -- or throwing back and forth where we have a disagreement.

You say that an advertisement outside of 30-, 60-, 120-day window produced, let's say, at the request of a senator who is a candidate

urging a group to publicize in a particular district another senator's position on legislation and urging the public to call that other senator and tell them, either vote for this legislation or vote against that legislation, you say that that is promote, attack, support, or oppose, right? Because of the language saying, call up the senator and either thank him or tell him to vote another way, and our position is that is part of the legislative process.

MR. HOLMAN: If it affects that campaign.

MR. BARAN: We are talking about the content. We are talking about the content of the message. That is the content.

MR. HOLMAN: And the conduct standard is whether that --

MR. BARAN: You are saying that if another senator had requested that group to engage in that advertisement outside of the window, that is coordinated expenditure that ought to be treated as a contribution. That is where we disagree. I consider that an

interference with the group's, if not the senator's, right to legislate and to petition the government. That is part of the legislative process. You are saying it is part of the election process, because the content is supporting or attacking the senator for his or her position on this legislation.

Let's put it in the real world context of health care reform. If I understand you correctly, let's say that last December when there was going to be a Senate vote on the health care legislation, if one of the political parties or one of the senators in that debate went to an association or a union or whatever, the AARP, and said it would really help if you ran some ads in this district urging the viewers to contact their senator before this vote and tell him to support this legislation, that would be PASO.

MR. HOLMAN: The conduct standard applies when it affects the candidate's own election, not when it affects other elections.

MR. BARAN: Okay. If the senator says it

will help my election if -- Harry Reid says it will really help if you pass this bill.

MR. HOLMAN: And attack my opponent.

MR. BARAN: Yeah.

MR. HOLMAN: That would conform to the coordination and content standard. That would be a Harry Reid-sponsored ad.

MR. BARAN: Because of the message in that market.

MR. MCGINLEY: Maybe I can make a couple of comments.

COMMISSIONER WALTHER: Go ahead, Mr.McGinley, but I have got a couple more questions too.

MR. MCGINLEY: It seems to me that a number of the factors that would seem to come into play here when discussing the PASO standard is that we are relying on context. We are relying on factors that are beyond the control of the speaker. Is the officeholder up for election? What is the timing of the vote? When do we need to air this communication so that it

is the most effective for the legislative purpose, right before the committee votes, right before the full Senate votes? Is it a discussion about a judicial nomination?

And if you ask the viewers or the listeners to contact them, somehow going beyond providing information about that issue and actually asking the viewers or the listeners to take some sort of legislative action now suddenly magically converts it into a PASO ad because the officeholder referenced in the advertisement happens to be a candidate.

Now, it can't be that speakers who are engaged in legislative battles communicating their views to the general public, asking the general public to take some sort of action where the viewer or the listener can exercise their own free will whether to comply with that request and contact the lawmaker, is somehow going to magically convert this into an election ad because it either promotes or is perceived to promote or attack because of all these contextual

factors and people's gleaning the intent of the speaker and somehow the effect of the communication even though it discusses the issue and asks people to take a clear, non-electoral call to action, somehow the effect of the speech is going to have a residual impact on the election of the officeholder referenced.

That can't be the standard. That removes control from the speaker. Speakers are now at the mercy of the regulator who can second guess what they tried to do at the time. That can't be the content standard.

It also goes back to the opening comment where we need to use the content standard as the filter. You can't engage in the coordination analysis, you can't engage in a coordination investigation unless the communication at issue satisfies one of the content standards under the second prong. We can't bootstrap on the conduct standard.

Just because somebody airs an advertisement that refers to a federal

officeholder, they should not suddenly be subject to the intrusive, time-consuming, resource-depleting, money-depleting cost of an investigation to determine what were the contacts, what were the discussions, who talked to who. That depletes the resources of an organization to the point where they must speak less.

COMMISSIONER WALTHER: Let me go on with this a little bit. I recognize your question, but we are asked to, for example, define -- whether to define PASO or not. I am not sure if the definitions that we have before us give us more clarity because we just use commonly understood words to define a commonly understood word. I am not sure that gets us anywhere when people really want to disagree with something that is going on. So, we find ourselves trying to give somebody a hand with a safe harbor.

That is really where I am heading, because you can look at major purpose or express advocacy and we are asked to define major purpose

but it hasn't happened. But on the other hand, we maybe can have safe harbors, for example, on what is and what is not, and that helps get everybody down the road.

I am suggesting that perhaps if we have something in between PASO, because of the safe harbor, and Wisconsin Right to Life and maybe we could find ourselves on more common ground on what PASO is not as much as trying to find out what it is through definitions. I am just wondering, maybe, Mr. Baran, would that kind of an approach be more attractive to you than trying to guess what the common words were, with or without definitions that we proposed?

MR. BARAN: If you created a safe harbor, I would turn again to 114.15, if you are looking for some guidance on a safe harbor. Whatever PASO means, it doesn't mean language that urges the viewer to contact a senator or a congressman. It wouldn't mean any content that is focused on legislative, executive or judicial matters or issues. That type of content should not be PASO,

even if it urges the viewer to call up Senator so-and-so or Congressman X and tell him to vote for or against a particular piece of legislation or a policy. That is where, I think, the difference is. Craig is interpreting policy preferences as promoting, supporting or attacking individuals who happen to be candidates, but they are also legislators and government officials.

COMMISSIONER WALTHER: Thank you, Mr. Chairman, I think we have 13 minutes. I apologize.

CHAIRMAN PETERSEN: No problem. I think this has been a very lively and very fascinating discussion up to this point. We have been focusing primarily on the content standard. I wanted to just briefly touch on the common vendor, former employee conduct standard.

Mr. McGinley, you brought up something that kind of piqued my interest as you were making a point on another matter, about the give and take of political campaigns, how what may be the battle plan at one point in time is going to

change and maybe change drastically as events overtake that plan.

The Court in Shays III, when discussing this standard, talked about that there may be some information -- they basically said the Commission has not justified why a 120-day standard should be -- why is that the right line to draw. So, we are in a position where we can either draw a new line or we can justify where the line is right now. In your comments, you mentioned, that we should keep the current line, but that we need better to explain that. So I just want to touch on that a little bit more.

The Court specifically mentions some things whose value may last beyond 120 days. They specifically mentioned a detailed state-by-state master plan that a chief strategist puts together, donor lists and lists of supportive voters as information whose value may extend beyond 120 days.

You have represented campaigns. You have actually been a general counsel for a party

committee, so your experience in these matters I think is long and extensive. Let me touch on the donor list and the list of supportive voters, those two items of information first.

First of all, are those the sorts of pieces of information that a campaign or a party gives out freely?

MR. MCGINLEY: Of course not, no, because they are assets of the party committee or the campaign.

The other attribute that I would like to point out, when you are talking about donor list or voter list, those are things of value. When you are talking about a common vendor or a former employee, what you are trying to prevent is the use or conveyance of the private plans, strategies, needs or activities of the campaign or the party committee where the outside group may be coordinating with them. Donor lists and voter lists are not the type of information that the common vendor or former employee conduct standard, the 120 days, is designed to prevent.

Those are assets.

What we are talking about is the people and the information that they may have. A vendor is not -- or a former employee is not going to walk out the door of a campaign with the master plan. It is not going to happen. It is proprietary information of the campaign, it is proprietary information of the party committee. The party committees and campaigns guard that information jealously, and the reason that they do is because they don't want anybody else to know what they are up to, because the minute it gets outside, it is going to leaked to the press and it is no longer a master plan.

As you stated before, I believe the give-and-take of the campaign cycle is critically important to this as well, because whatever master plan they may have cooked up, it gets blown up immediately as soon as the campaign is engaged. You can look at numerous races across the county where everybody thought the conduct of the campaign was going to go one way, the person

should bank the money and wait for the general because regardless of who was on the ballot in the primary, they were just going to sail through. Now you see people engaged in a give-and-take. There is charges and countercharges. There are attacks and counterattacks, and so whatever game plan had been drawn up is out the window, and it is happening on the Democratic side, it is happening on the Republican side, and that is the nature of politics. And so whatever information people may have thought was valuable in the off-year, by the time the summer rolls around in the election year, it is worthless.

CHAIRMAN PETERSEN: Again, going back to the donor list and list of supportive voters, if a common vendor or a former employee had those pieces of information and then was trying to use those for running an ad, basically we've got larger problems than coordination. That is the theft of an asset, which is going to subject them to other laws. There are already other laws that

would govern that, and let's assume they are just taking what they encapsulate in their head. A donor list and a list of supportive voters, that is going to be thousands, tens of thousands of lists, people long. Maybe a few dozen they can retain in their mind, but if someone is trying to take with them whatever they retained in their brain, it is generally going to be a fairly small number.

Let's go to the state-by-state master plan. Like you said, I am looking back and I am assuming, again, drawing on your experience as both a general counsel for a party committee and also in your representational capacity for campaigns. I would imagine that four months ago the strategy and the master plan for the Republican Party, for example, would be very different than it is now.

In fact, would you say, in your opinion -- do you think that the master plan two weeks before the Massachusetts special election in January was very different than the master plan

two weeks after that special election?

MR. MCGINLEY: Yes, I would think they were radically changed based upon the change in the environment. I would say the master plan that may have been in place eight weeks out from the Massachusetts special election where everybody thought that Coakley was going to cruise to election was radically different than what happened two weeks out when the Democratic Party woke up and realized they had a problem. They were reacting to the environment on the ground in the election.

So, all of this talk about how vendors may be able to, or former employees may be able to carry with them some sort of master plan that is going to carry through 120 days in a political campaign, I don't think there has been 120 days in this election cycle that has ever been consistent. I think that the environment has changed so radically from right after the inauguration to six months later, to six months after that, that 120 days, is, frankly, a bit

over-inclusive. I realize you have to have some sort of standard, and 120 days has actually worked pretty well because people have become accustomed to it, people are aware of it, and they don't want to violate it, so people are taking precautions to make sure that they ensure compliance.

That is probably another point that I would like to make in the context of the conduct standard. The overwhelming number of people try to comply. They read your rules, they seek guidance, they try to understand what they can and cannot do, they try to stay on the right side of the line. This is not an environment where people are running around trying to circumvent the rules, evade the rules or break the rules and disregard them.

This is an environment where people at great expense are trying to hire lawyers, hire accountants to try to comply with these rules, and one of them is the use of firewalls. Vendors, party committees and even outside

groups, even though they are not specifically referenced in the firewall safe harbor, create internal firewalls. They disrupt the internal operations of the organizations. They force separation between employees of a vendor. They force separation within the internal operations of a political party committee. They are very disruptive and they are very costly because in some instances these groups are engaging in redundant conduct because they are fearful that they can't use or convey any private information and they want to stay on the right side of the law on this.

So, they are worried about being captured in these coordination rules or being subject to an intrusive investigation. In their mind, the cost-benefit analysis is let's pay people on the front side to get the firewalls established to ensure compliance throughout the cycle, so it is an important part that this remain. The sanctity of the firewall safe harbor is something that the Commission should preserve and possibly

strengthen going forward.

CHAIRMAN PETERSEN: Mr. Baran, you also are second to none in terms of your experience in terms of representing campaigns and also being a former general counsel to a presidential campaign. Do you have anything to add about these master plans? I am sure that you have not only seen them but have probably been intimately involved in developing them, and in terms of the value of that information over time as the give-and-take of a political campaign, as that process evolves, what has been your experience and what sort of value do those have over time from your experience?

MR. BARAN: I agree with the comments from Bill McGinley. Master plans are wonderful. They do tend to go out of date. But let's assume that they still retain some vestigial value. The only additional observation I have about master plans is that usually the entire press and political world knows what the master plan is. It is pretty much public information. It is not

like some nuclear secret.

If a candidate has a strategy, it is not rocket science and it is usually leaked by some campaign manager to try and prove how brilliant he or she is. So, everyone knows what the master plan is and when things go right, people start commenting about, well, it is not going according to plan, is it?

CHAIRMAN PETERSEN: So, in other words, it is not a state secret that is guarded under lock and key to any great extent?

MR. BARAN: No, not in my experience, and not for a long time. Maybe back in the '70s when Pat Caddell and Hamilton Jordan had a master plan for Jimmy Carter, but they are the ones that kind of discovered the Iowa caucuses, nobody cared about them until 1976, but every campaign for president since then has had a master plan which was pretty well known, and my observation of Senate and House so-called master plans are that they are pretty well known and they all seem to be the same.

CHAIRMAN PETERSEN: I will ask this of you and of Mr. McGinley. So, from your experience, let's say that, again, they don't take this master plan, let's assume that is not something that a former employee or common vendor is entitled to take away, but they were able to internalize to a certain extent what was in that master plan.

From your experience, is that information, for one thing, that valuable, and is it something that is really not known or fairly much common knowledge anyway as a result of the sorts of leaks you mentioned?

MR. BARAN: No. I think the type of information that would be valuable if it were timely would be, for example, how much money and resources does the campaign have? Well, a lot of that information is public too because campaigns file reports, but let's assume that you don't know how fund-raising is going in the third quarter of a campaign. If you knew that information and you combined that with, well,

that will affect the ability of a candidate to advertise in a particular location, then that would be useful information, but I would point out that that is information that is relevant only on a timely basis and usually would have to be well within 120 days of an election --

CHAIRMAN PETERSEN: So it's not the type of information –

MR. BARAN: So I think you have already eliminated somebody moving from a campaign that close to election with relevant information to an independent spender that could then say, well, I now have material information about where the candidate needs some additional advertising and we will go and make an independent expenditure there.

CHAIRMAN PETERSEN: Is there anything further you wanted to add, Mr. McGinley?

MR. MCGINLEY: No. I would agree with that. As Mr. Baran said, a lot of the campaign plans are going to be leaked, and in fact the master plans are drawn up to be presented to the

press to show the road map to victory, so a lot of this information is already public, it is available from a publicly available source.

To any of the details that may remain confidential within a campaign or a party committee, Mr. Baran is correct, they are going to be disclosed in the FEC report because it is all going to become a question of resources and the like.

I would also point out that most of the information that it is going to be of value to others who may be interested in the race without hiring a former employee or a common vendor is going to be the public file at the television stations.

Everything that you need to know about a strategy is publicly available. You are going to start to see the buy show up. People are going to ask who placed the buy. The public file at the stations is going to provide that information. You are going to start to see that at the radio stations. You are going to start to

hear grumblings from the reporters about what theme the opponent is pushing or what theme others are pushing that are trying to influence what is happening on the ground.

So, the information that is especially valuable is available from public sources, so the whole concept that you are going to be walking out with some type of document that is going to hold the keys to victory for everybody or for a particular candidate after 120 days is not going to exist because that information goes stale and is no longer useful.

CHAIRMAN PETERSEN: We are getting close to what our assigned time was, but I want to give our general counsel an opportunity to ask questions.

GENERAL COUNSEL DUNCAN: Thank you, Mr. Chairman.

Given the time constraints, I would ask this question of the panel, but if you would like to reply in the extended comment period, I think that would be fine as well.

We have had a lot of discussion about how to formulate or define your preferred content standards, either the WRTL test standing alone or supplemented by the regulation or the PASO standard.

I would like to just ask whether in addition to that defining and formulating, you would find it useful in the rule and/or the explanation and justification to have specific examples and to have a view on whether, whichever content standard the Commission chooses, whether that standard is met in those specific examples?

And if your answer to that is yes, then perhaps this is best for you to reply to in the extended comment period. Could you share with us what examples you would prefer and your view as to whether they meet the applicable standard?

MR. BARAN: Well, since I am here to promote the Wisconsin Right to Life standard, I think that in your past rulemaking you have examples, and that would be useful perhaps to repeat.

MR. HOLMAN: And since I am here to promote the PASO standard, I don't find it particularly useful nor damaging to come up with some examples of what support and oppose means. I guess I do believe PASO is pretty self-understood, but there is no greater damage or benefits that came out of, for example, Alternative A to add further definition to PASO.

MR. MCGINLEY: Sometimes it is useful. The only danger with providing the examples is that I don't want the regulated community to be locked into those examples that are deemed permissible versus those that are not, because what we don't want to do is take away the creative ability of the speakers to fashion the message that they want to convey, so what we don't want to do is create a number of examples that lock them into certain type of advertisements for fear that if they go outside the box on that even though they don't meet the legal test, somehow they are going to be subject to investigation or complaints filed, and so with

the caveat that the examples would be illustrative only and are not a complete list of the type of permissible or prohibited or regulated communications, I think it does provide some information to the regulated community that is useful.

CHAIRMAN PETERSEN: Staff director, are there questions you wanted to add?

STAFF DIRECTOR PALMER: Thank you, Mr. Chairman. No questions at this time.

CHAIRMAN PETERSEN: Any final comments or questions or follow-up? Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I just wanted to, as a follow-on to General Counsel's question, ask, in supplemental comments, if you choose to submit them, on the question of examples, we have 13 examples in the NPRM. Very few people – in fact, I'm not sure if anybody actually commented on any of them.

In particular, some of them have ambiguous calls to action, no call to action. There is the Bill Yellowtail ad. There is an ad

that says, the tagline is "What is he thinking?" I am not sure what kind of call to action that is. There is the Real Truth About Obama ad, "is this the change you can believe in?"

So, if you would care to, I would find it very informative if you could look at some of these ads and give us your opinion. Pretend you are us. We get these complaints. We have to look at these ads and decide whether they come under these standards or not, and under either PASO or Wisconsin Right to Life or both, do you think that these are ads that we should throw out at the RTB stage or that would meet these criteria and therefore would require some investigation? I would find that, as I said, illuminating.

CHAIRMAN PETERSEN: I think we plan on keeping the record open for 10 business days following this hearing for any comments and further submissions that our witnesses would like to submit.

Any other comments or questions by my

colleagues?

I really want to thank this panel of witnesses. I think this has been an excellent exchange. I appreciate you for the expertise that you have shared with us and for the thoughts and opinions that you have on this very important rulemaking.

As has been mentioned by many of my colleagues, this has been a long process, almost a decade-long process trying to get this down and hopefully we can get this right, and certainly your comments will hopefully lead us down the road to successfully concluding this rulemaking.

Once again, thank you for your remarks. We will stand in recess until 1:30.

(Whereupon, at 12:06 p.m., the hearing was recessed to reconvene at 1:30 p.m. that same day.)

AFTERNOON SESSION

(1:35 p.m.)

CHAIRMAN PETERSEN: The special session of the Federal Election Commission will reconvene. We turn now to our second panel. That panel consists of Sean Cairncross on behalf of the National Republican Senatorial Committee; Jessica Furst on behalf of the National Republican Congressional Committee; Cleta Mitchell of Foley & Lardner; and Mike Trister on behalf of the Alliance for Justice.

We would ask that as with the prior panel, each witness has five minutes to make an opening statement. That system of lights in front of you should give you some sort of idea where you are timewise. When the green light starts flashing, you are within a minute; the yellow light within 30 seconds and red light means the five-minute period is wrapped up. After that, we will have a session -- a round of questioning by the Commissioners. So we will start with Mr. Cairncross and work our way across

the panel. So, Mr. Cairncross, whenever you are ready, feel free to begin.

STATEMENT OF SEAN CAIRNCROSS ON BEHALF OF THE NRSC

MR. CAIRNCROSS: Thank you. Good afternoon, Mr. Chairman, Vice Chairman, Members of the Commission.

On behalf of the NRSC, I thank you for the opportunity to testify today. We have a keen interest in this rulemaking and we have functioned under virtually mirror image coordinated communications regulations for some time and hopefully our practical experience will be useful to the Commission as well.

I will be brief this morning. I think regardless of the challenges these coordinated communications regulations have faced in court, the Commission has done a very commendable job thus far in trying to regulate here. This is a very difficult area. It is in the heart of the First Amendment, reaching political speech. Fortunately, as this litigation has advanced, so

has the constitutional landscape touching on precisely what speech is subject to any regulation at all, and the very question that has bedeviled this rulemaking for so long, what speech outside of express advocacy may constitutionally or properly be swept into a coordinated expenditure regime has been clarified and it has been clarified both with respect to the actual content of that speech and the means available to the Commission in order to determine the nature of that content and the short answer to both of those questions has been not very much. In the words of Chief Justice Roberts, the motivation of a speaker is entirely irrelevant to determining constitutional questions. First Amendment freedoms need breathing space in order to survive and I think it is important to remember here that speech that is not deemed coordinated is independent speech. So a coordinated communications regulation that overreaches impinges upon precisely on that speech which the Supreme Court has made clear may

not be regulated.

And so I think, with that in mind, there are three guiding principles ought to operate on the Commission's work here, the first is content needs to be the touchstone of any new rule. That content should be defined, it should be clear so that speakers know precisely in advance whether their speech will be covered by these regulations or not and any test that is post hoc determinative based on intent or effect upon the listener should not be adopted by the Commission.

Second, any rule should be narrowly tailored. And here I think that means two things: The first is that targeted communication should be made for the purpose of influencing a federal election as determined by the text of the ad; and second, then if it is coordinated through some action or conduct on the part of the parties; and third, in rationally separating election from non-election-related speech, the Commission should endeavor to side in favor of the speaker.

And so before addressing content directly, I think a very important point needs to be made concerning an argument that floats in this context that is an attempt to dodge the constitutional reach of recent Supreme Court opinions, and that is, in short, that a candidate's mere asking for something in this context is alone enough to trigger a coordinated expenditure and that I think was something that was considered and passed by the Commission and was rightly rejected, but it fails for multiple reasons.

First, it creates a -- there is no end to the scope of the regulation; second, it turns an expenditure analysis -- and, after all, here we are talking about looking for a coordinated expenditure in the communications context into a contribution analysis, which flips the reasoning behind the regulation on its head. Third, it ignores the plain reading of the statute and the case law and the Commission's prior statements that in this context, related to speech, content

is -- content is vital in making sure that the regulation is reasonably related to a federal election, and fourth, it invites the very sort of litigation and investigation and process afterwards that the Supreme Court has ruled itself chills speech.

And so an expenditure, as we know, is related -- is made for the purpose of influencing a federal election in a speech context. That means it is either express advocacy or its functional equivalent. Going beyond that would require reaching a standard that would survive strict scrutiny before the court. That has never been done.

With that, thank you.

CHAIRMAN PETERSEN: Thank you, Mr. Cairncross.

Ms. Furst?

STATEMENT OF JESSICA FURST ON BEHALF OF THE NRCC

MS. FURST: Good afternoon, Mr. Chairman, Madam Vice Chair, Commissioners.

Thank you for the opportunity to testify

before you today on this important matter. I prefer to let my comments speak for themselves rather than be redundant and recreate them but I do have a few principles that I hope can be helpful to you this afternoon.

First, if anything is taken from our comments today I hope it is two critical but perhaps general considerations, and that should assist you in creating this very important rulemaking. First, the Commission must enact a clear bright-line standard that will allow political actors to determine whether communication will be subject to coordinated regulations. As first stated in Wisconsin Right to Life, and reiterated in Citizens United, the First Amendment protections afforded to speakers require that we steer clear of the quote open ended, rough and tumble factors which invites complex argument in a trial court and virtually inevitable appeal. If there is one thing I am certain that my colleagues here today would all agree with, it is that we need to put an end to

the virtually inevitable appeals of the coordinated regulations. In order to do this, the Commission must craft an objective rule that focuses on the content of the communication, rather than the intent of the speaker, the effect on the hearer or the third party's ability to correctly guess as to whether the communication is subject to regulation because it is attacking, blaming or criticizing or exempt because it is instead condemning, offending, or disparaging.

Second, the Commission must ensure that any coordinated regulations issued are narrowly tailored and only restrict those communications that are both coordinated and made for the purpose of influencing a federal election.

Let us return to basics for one moment. The Federal Election Campaign Act of 1971 as amended essentially provided that when an expenditure is coordinated with a candidate, a contribution to that candidate results. The operative word there is expenditure, which the Act limits to "any purchase, payment,

distribution, loan, advance deposit, gift or money or anything of value made by any person for the purpose of influencing any election for federal office."

Since BCRA, commissions, committees and litigants alike have all struggled with defining what is meant by "for the purpose of influencing any election for federal office," which has in turn made it incredibly difficult to craft coordinating regulations. But the party committees believe that the Wisconsin Right to Life and Citizens United has set the standard and now this Commission is charged with upholding the decision of the nation's highest court. Unless a communication is both coordinated and susceptible of no other reasonable interpretation, then advocating a clearly identified candidate's election or defeat, the communication may not be subject to restriction. It is with this general maxim in mind that the party committees support the Wisconsin Right to Life appeal-to-vote test as the content standard that should govern

coordinated communications.

In Citizens United the Court indicated that going beyond the standard raises serious constitutional questions practically resulting in a prior restraint on speech. After Citizens United, it is exceedingly clear that ambiguous tests and 11-factor balancing tests produce an unacceptable and unconstitutional chilling effect. It is no longer constitutional to regulate speech absent an appeal to vote.

Before I close I would like to quickly acknowledge that the party committees are aware that party that the party committee coordinated regulations were not directly challenged in Shays litigation and further, that the proposed regulations will not directly affect the party committees at this time. However, we thought that it was absolutely critical that our voices be heard with regard to this matter and we appreciate the opportunity to testify. Each cycle a different type of entity seems to surface as a major player in the political communications

arena, while other persons or organizations particularly active in previous cycles may for some reason choose to sit out. This is not true for party committees. Political party committees will always be one of, if not the most active participant in political communications cycle to cycle. As Citizens United emphasized, the First Amendment requires the benefit of doubt goes to protecting as opposed to stifling speech. We appreciate the opportunity to voice our opinion with regard to this matter.

Thank you.

CHAIRMAN PETERSEN: Thank you, Ms. Furst.

Ms. Mitchell?

STATEMENT OF CLETA MITCHELL, INDIVIDUALLY

MS. MITCHELL: Thank you, Mr. Chairman, and members of the Commission. Thank you for the opportunity to be here.

I was looking at the agenda of the people who asked to testify and provided comments and I didn't see Mr. Shays, I didn't see Mr. Meehan, I don't see Common Cause or Democracy 21 here

today, nor their counsel. It seems to me it is worth noting that if these litigants keep taking the Commission to court and complaining about the way the Commission has decided to promulgate regulations based upon comments and hearings, that the very least they ought to do is show up and tell you what it is they think you ought to do rather than waiting until after the fact.

And I think that one of the things that is important and I would urge the Commission to consider is that you ought to stop trying to put the toothpaste into the same old tube, because, as my colleagues have said, the constitutional landscape has been clarified and I think it is important to follow the clear direction of the Supreme Court in the two cases cited by Ms. Furst and Mr. Cairncross, that in Citizens United and in the Wisconsin Right to Life case the Court has given the Commission clear guidance and you ought to follow it.

I want to mention just three things that I think are really important. Number one, the

Court made very clear that it is impermissible to treat media corporations differently than other kinds of corporations. All corporations have First Amendment rights and those rights also extend to labor unions and that means when promulgating regulations, it is incumbent upon the Commission to say, are we going to apply these regulations to the newspaper; are we going to apply these regulations to the television station, and the Court has been very clear that the First Amendment does not allow the government to license speakers differently. The right comes from the First Amendment, not from the Congress or even the Commission. So it is important to use that standard.

The example I used in my comments is that if a candidate walks into a newspaper editorial board and says, I would like for you to endorse me, and subsequently that newspaper endorses the candidate and uses its corporate treasury funds to communicate that endorsement, that is, under current law, that is exempt, under current

regulations. If, however, that same candidate goes to a citizens organization or to a corporation down the street or a labor union and says, I want you to please endorse me and subsequently that corporation, whether it is a for-profit or not-for-profit or a union decides to endorse that candidate, that could be deemed a coordinated public communication and what I would urge the Commission to realize, to take to heart, is that every type of regulation that may be promulgated needs to be judged against a test of whether or not that same regulatory scheme can be applied to and is being applied to a media corporation because the Supreme Court has said you cannot distinguish between the two.

Secondly, as my colleagues have mentioned, you must articulate and promulgate bright line tests. Mr. Shays and Mr. Meehan and their ilk have not ever had to try to sit in a room with a group of people, citizens who want to be involved in the process, and to try to tell them what they can and cannot do because the more

the Commission tries to explain the regulations, the more difficult it is to understand what they mean. So these bright line tests are really important. Objective standards that do not require massive discovery and investigation by the Commission.

Now, I was around when all of this began with the Christian Coalition case and remember well such things as the Commission's inquiry into whether or not Pat Robertson's prayer asking God's blessings for particular candidates constituted a coordinated communication. I am not making that up. It is in the case and I know that the Shays-Meehan crowd didn't like it because ultimately Christian Coalition was exonerated, but we did get some law articulated. But they didn't like that, those guidelines, so when they wrote BCRA, they didn't write new regulations or definitions of coordination, they just said the Congress was wiping out what the Commission had already done and ordered the Commission to articulate new

regulations, which the Commission has been trying to do ever since.

But it is important to realize that we have gone back to basics, thank goodness, and you must articulate clear, simple regulations that do not require, frankly, a lawyer to be able to explain them to ordinary citizens who want to be involved in the process.

And finally, two more quick points I want to make. One of the questions the Commission raised in the supplemental notice was whether or not the Commission should establish some higher threshold for filing complaints under the coordinated regulations and I would say, absolutely. I think if the Commission would establish clear standards, clear, objective standards of what is and is not -- what did the Court call it? Pre-arrangement, or coordination. If the Commission would establish very clearly here is what is and here is what is not coordination, and then require a complainant to have some actual evidence of violation of that

clear standard so people cannot basically write their names on a piece of paper and turn it in as a complaint and the penalty is going through the process. I think that is a pretty good idea for the Commission to take that into consideration and finally, remember that whatever disclosure requirements -- remember the Court has left intact the disclosure requirements. We have to be able to know is this an independent expenditure, do we follow those disclosure requirements, is it an electioneering communication, which is it? And we have -- the Commission must make that clear so we can tell people which disclosure and disclaimer requirements they are obligated to follow.

And I will yield to questions at an appropriate time.

CHAIRMAN PETERSEN: Thank you very much, Ms. Mitchell.

Mr. Trister?

STATEMENT OF MIKE TRISTER ON BEHALF OF THE ALLIANCE FOR JUSTICE

MR. TRISTER: Thank you, Mr. Chairman.

I am here today on behalf of the Alliance for Justice, which is a coalition of civil rights, women's, environmental, consumer organizations that work to advance and protect the opportunity for non-profit organizations to participate in various forms of advocacy. And our concern, which has been a long-running concern with the coordination regulations, is the extent to which those regulations might, under some circumstances, limit or make it more difficult to engage in legislative and other forms of advocacy.

One of the things that I think is unfortunate about both of the Shays appeal decisions is that while they talked a lot about the purpose of BCRA to limit soft money, they didn't talk at all about the purpose of the coordination provisions or the legislative history of the coordination provisions which ultimately, threw, as Ms. Mitchell described, threw it back in your lap.

The fact is that the original BCRA and the legislation that was introduced had very far-ranging coordination provisions in them, in the statute, and there was a major uproar actually about those provisions and the concern was that it would limit the ability of groups, individuals, to meet with their Representatives, their Senators, to discuss policy and legislation. And, if you read – we've cited in our original set of comments a good deal of that legislative history. So what you have, when Congress sent it back to you, they also sent it back with the message which is protect advocacy, protect legislative advocacy and I think it is unfortunate that the court did not really focus on that part of the legislative history. Now the question is -- what the court did do in the second Shays case, I think is, first, as was said earlier, it clearly, as it did in the first case, approved a content standard. There had been some debate about that, whether or not the Commission had authority even to write a content standard,

whatever it might prove to be. And I think that the opinion -- both opinions are quite clear on the notion that you could in fact include a content standard in the regulations.

And the second thing that I think is very clear in the second opinion is that the content standard outside of the 90 or 120 day periods does not need to be as restrictive as the content standard within those periods. The court was very clear in approving that part of your regulation. They approved the fact that you had windows, and they approved the fact that there were different standards within them. They took issue with the precise standard that you used outside of the 90/120 day windows, namely limiting yourself to express advocacy. But they did not object to the notion of a less restrictive standard outside of the period and within the windows. I think that is very critical for the job that you now face. So the question is where do you go, given what the court has said, which is limiting yourself to express

advocacy is not sufficient, but you don't have to be as restrictive as the "refer to" test that applies within the windows.

We, as we have stated in our comments, support the appeal-to-vote test that is derived from the Wisconsin Right to Life decision. We reach that, however, in a different way than has been argued so far. There are those who argue, and you have heard that argument today, that essentially Wisconsin Right to Life sets a constitutional minimum, that you can only regulate speech as express advocacy or its functional equivalent under Wisconsin Right to Life.

There are also those, I am sure they have made them in their comments, who would argue that Wisconsin Right to Life is a case about independent speech, not coordinated speech, and therefore doesn't satisfy or doesn't address the question that you are facing today.

We reach the same results, however, not as a constitutional matter, but the Court of

Appeals said you could adopt a reasonable standard in addition to express advocacy, and we think that that standard is the standard in Wisconsin Right to Life, not necessarily because it is constitutionally required, it may or may not be, but because it is a reasonable standard that goes beyond express advocacy that the Supreme Court feels it can use. It used that standard in the Citizens United case when it looked at the movie, "Hillary," and decided it was in fact the functional equivalent of express advocacy, and it has an objective standard there that can be applied, and we think the goals of what they were attempting to achieve in Wisconsin Right to Life are equally applicable in this context, namely, coming up with a standard which will avoid endless litigation, that will distinguish between electoral activity on the one hand and non-electoral and other kinds of advocacy on the other.

In other words, the Court in Wisconsin Right to Life was engaged in a similar exercise,

trying to come up with a standard there which we think works in this context as well, and I think that as a matter of law under the Administrative Procedure Act, which is what the Shays case is about, that standard would be sustained in part because it was adopted by the Supreme Court itself.

I don't think, and we have written extensively on this, that the PASO test, which you also consider, meets those requirements, and we have gone into quite great detail why the PASO test will not work. Basically it is overbroad. The Commission itself has found in the past that the PASO test would include legislative advocacy within it, and they said that in the electioneering communications rulemaking in 2002.

So, we don't support the PASO test because we don't think it works. We think the Wisconsin Right to Life test is exactly the right formulation that should be applied.

CHAIRMAN PETERSEN: Thank you for those statements. We will now open it up for questions

from Commissioners, and we will start with Commissioner Hunter.

COMMISSIONER HUNTER: Thank you, Mr. Chairman.

I'd like to focus -- everybody on this panel has said they support the WRTL standard, the content standard, and so focusing on that, as we did with the last panel, and I will remind everybody that the comment period will be reopened for an additional 10 business days if you want to think about my question or anybody else's question and get back to us within 10 business days, that would be perfectly appropriate and very useful.

The question is, the WRTL standard, as you know, that went out in the NPRM essentially tracks the language in WRTL and also Citizens United, and so the question is would it be helpful to anybody if we added additional factors to that test, whether it is part of 114.15 as one of the previous panelists suggested or something completely different than that but something that

may provide people with a little bit more clarity and, as the three first panelists discussed, bright-line tests with an objective standard.

One idea along those lines is one that Lyn Utrecht proposed in her comments, and she said, the content standard should apply to those communications that contain express advocacy or are unambiguously related to an election because they make reference to a candidacy, voting, or an election, and another person on a previous panel said one idea might be to add something that made it clear that it was an appeal to vote. It was a little bit more of a finer point on that.

So, I am interested in everybody's thoughts on that question.

MR. CAIRNCROSS: Sure. I think from our perspective, we would prefer what we view as the Roberts test, which is the straightforward appeal to vote without adopting additional guidelines, I think for a couple of reasons.

One is those sort of guidelines seem to have been -- have been viewed by the Court,

that 11-factor test was viewed dimly, and I think it was referred to as a practical prior restraint on speech, so rather than setting a boundary within which, if you cross a line, that speech is going to be subject to those -- to the coordinated restrictions, the appeal-to-vote test, which is very, very similar to an express advocacy test, it would be our concern, I think, that if you were to go beyond that, you would be going beyond the tenets of the holding itself.

MS. FURST: I would agree. I appreciated Ms. Utrecht's comments. I think what she stated was just to further strengthen the nexus to the appeal to vote and the election-related activity. That is what we are trying to do, trying to avoid another 11-factor test as was criticized in Citizens United. I think anything that further focuses us on the nexus to the election would be fine.

MR. CAIRNCROSS: If I could cut in one more time, I took from this morning that there was a question as to what serves to chill speech,

and in my experience, we deal in a very practical world where people are not interested in what the factors are or what the tests are, or the legal theories thrown in. Can we act or can we not act? Are we going to get in trouble or aren't we going to get in trouble?

It is a pretty straightforward equation. If the answer is we don't know, we have to run it through this balancing test and see where it comes out, it is unlikely that that speech is going to be heard and received. It in my experience, people won't speak.

MS. MITCHELL: I might say in response to your question, I can't urge strongly enough to do what Lamar Alexander said to the President, the other day, scrap it, start over, get a clean sheet of paper. The more you try to explain what you promulgated previously, the harder it is to understand for normal people. And ultimately, that is who you are writing regulations for. Honestly, you are not writing them for Judge Kollar-Kotelly. You are never going to satisfy

her until all of us stop participating, and that will make everybody happy on that particular side.

But I just think it is really important to take a deep breath and look back and think about the entire panoply of the regulatory scheme and say, does this meet the test that the Supreme Court has articulated in these cases?

All these regulations that have been promulgated prior to these decisions I think have to be viewed anew against these very simple but important First Amendment principles, clarity and objectivity, bright lines, protecting, not chilling speech. That is a sea change.

I would urge you not to start trying to put little maraschino cherries on top of the sundae because underneath it is stuff that needs to be cut out and thrown away.

MR. TRISTER: We initially supported the 114.15 regulation as a way of spelling out what the appeal to vote means. After Justice Kennedy's treatment of those regulations in the

Citizens United case, I think we backed away from that somewhat. We still support the appeal-to-vote test.

The question is are you going to spell out a detailed regulation that does add to the complexity or is it going to leave it essentially -- there are going to be case-by-case determinations, there will have to be. The Court itself in Citizens United had to make a judgment and in fact applied some of the factors that are in your regulation in deciding that the movie was in fact the functional equivalent, and you as a Commission will have enforcement cases and you will make judgments and you will go beyond that.

I think the question about the regulation is, the regulation tends to take on a life of its own. That is what I think is troublesome about a regulation that tries to spell out the factors. First of all, it becomes exclusive. If it is not in the factors, then you lose.

Then you get into parsing what the factors mean instead of looking at each case and

looking at the facts in the case and reaching a conclusion. I think you will -- I would say you would do better by essentially adopting subparagraph (a) of the regulation, which states the appeal-to-vote test as the Court announced it in Wisconsin Right to Life and Citizens United, but you don't go beyond that. I think we would favor that, although I appreciate the need for more guidance.

I think it is really a question of are we going to have a regulation and are we going to fight about it and are we going to sit it out there for litigation and let people take pot shots at it or are you going to deal with it on a case-by-case basis, because you are going to have to make judgments, there is no question about that. The test is not so absolute that it just answers every case. You will have to make judgments and you will explain those judgments, but I think that, in my view at least, I think you are better off without all of that complexity.

COMMISSIONER HUNTER: Just as a follow-up, Mr. Trister, to what you were just saying, I think you are right, the Supreme Court did use some different things and make a judgment, but my reading of page 8 of the opinion, even though they threw out some things that are in the regulation that has now been discredited, including qualifications, fitness for office, her policies, all this kind of stuff, her Machiavellian nature, that is all tied in for me in the very next paragraph by saying, the movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for president.

So, I appreciate what you are saying, you know, the regs take on a life of its own, but so do the words in the opinion, and we are just trying to put as much context in that as we can if we even need to. But again, even though those terms are thrown out in the Supreme Court's opinion, it is all tied to her candidacy in the movie.

MR. TRISTER: I think that is right. But I think that will be the case in almost all the cases that come before you as well. I don't think you are going to have cases where it is not clear that it is about the election.

It is hard for me to think actually about how you could not fall within the appeal-to-vote test without having some reference to the fact that the individual being mentioned is a candidate or there is an upcoming election or something that links it to the election. I am not sure that you need to spell that out. To me that is implicit in the standard itself.

COMMISSIONER HUNTER: Thank you. That is very helpful.

CHAIRMAN PETERSEN: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I just want to note for the record that it is my understanding that Council for Democracy 21 was fully intending to be here and had asked

to testify when we originally scheduled this hearing, and when we changed the date in light of the need to get further comment on Citizens United, he had a conflict with some litigation that he was involved in on the other side of the country and I personally am not going to hold that against him.

I want to compliment some of the panelists on their optimism. A couple of you have said, you know, a couple of you have said that if we avoid a particular standard we can avoid litigation. Mr. Trister, in your comments, you said that if we adopt the standard as so understood, the Court had no difficulty in applying the appeal-to-vote test and you believe the same would be true for the Commission. I am sure you have read some of our recent statements of reasons, and I appreciate your optimism. From your mouth to God's ears is all I can say on that.

Let me start with you because you did change your position. We had one witness earlier

today who started out where you started out and stayed there, and you started out there and now you have shifted, and you have talked a little bit about that, and I guess my question is, for you and I guess also for Mr. Cairncross, and Ms. Furst who talked about wanting to have these bright lines and how important that is, is would this give you that kind of bright line, would this give you that kind of clarity that you need in advising your clients, in interpreting whether ads are -- whether you feel comfortable running the ads that you want to run, does it do it?

MR. TRISTER: It doesn't do it as much as a magic words test, but I think you are between a rock and a hard place here. That is what you wrote, and if you are asking me whether I prefer the regulation that the Court threw out, yes, I would, but unfortunately it did throw it out, and so the question is how do we deal with the current situation in light of what the Court said.

I think, frankly, there are only really

two options on the table that I know of. One is Wisconsin Right to Life and the other is PASO. Given a choice, I think the appeal-to-vote standard is a far more satisfactory standard, gives more clarity, far more clarity than PASO does. So, it is preferable. It is not the best of all possible worlds, but I think that is not on the table because of the Court. I think that that is the difficulty.

So, it will give some clarity. It will be better than where we were with PASO. I think PASO leaves open much too much. I think one of the things about -- I think you have to take into account where the appeal-to-vote test comes from. It comes from a decision which was attempting to narrow. It was a case in which the Chief Justice was trying to narrow specific kinds of communications and say these were permissible, these were not.

That is very different from PASO, which I think is moving in exactly the opposite direction. I think -- PASO is trying to broaden,

trying to expand, so in that sense Wisconsin Right to Life is a better standard because it needs to be interpreted in light of its genesis, where it comes from, and what the Court has said about it.

When the Court spoke in Wisconsin Right to Life about the need to avoid lengthy investigations and all of that, that is part of the standard. It is not written into the standard, but it is part of what that standard is intended to do, so we have some legislative history or judicial history trying to interpret it, which will give us the kind of clarity, at least more clarity than anything else that we have available.

MR. CAIRNCROSS: I agree with that insofar as it is a standard that is -- would be more acceptable likely to the coordinated regs when they go back to the Court, but I just want to emphasize that the Wisconsin Right to Life standard, that appeal-to-vote standard incorporates that, and I would call it something

stronger than legislative or court history. It is a statement from the Supreme Court that this contextual searching post hoc is no longer acceptable, and in layman's terms I think of it as you are no longer judging a figure-skating contest where the action takes place and you go determine what it means and whether the triple axel is hit or not, and it is more this is a sprint, and you got a stop watch and you time the time and what it says on its face is what it says.

So when you view it in light of that, and the actual holding itself, it makes a lot of sense and would give us a way to give our clients clear guidance.

COMMISSIONER WEINTRAUB: I am not sure I followed your figure-skating analogy, but okay.

MS. MITCHELL: That is more subjective than a sprint, the judging of a figure skating performance is subjective with the judges, more than a sprint.

COMMISSIONER WEINTRAUB: What we have

before us are -- we have two examples. We have got one set of ads from Wisconsin Right to Life that we know were not the functional equivalent of express advocacy, and we have got a movie and another set of ads and "Hillary, The Movie" that we know are the functional equivalent of express advocacy, so I guess we have two examples.

Does that help to make it more clear? Because I agree with you, Mr. Trister, and that is part of my frustration, when we wrote that regulation, we tried to incorporate the factors that we heard the Court talking about in Wisconsin Right to Life, and they said, don't write that down, and then they used the same - factors again when they analyzed "Hillary, The Movie," so it was like they said, don't write them down, but this is what the factors are.

Would you agree with that characterization?

MR. TRISTER: Pretty much. You can't look at an individual case without applying factors, and I think there will be factors. I

think lawyers who practice in the area have their own factors, their own guidelines for advising people.

COMMISSIONER WEINTRAUB: Have any that you want to suggest to us?

MR. TRISTER: Some of them are in your regulations and some of them are not. You have to look at the thing and look at what it says and so on. I think the important part of Wisconsin Right to Life, we keep using the shorthand, appeal-to-vote, but the actual language of your regulation and also of the Court is susceptible of no other interpretation.

COMMISSIONER WEINTRAUB: No other reasonable interpretation.

MR. TRISTER: No other reasonable interpretation, but that is part of the appeal-to-vote standard certainly when I refer to it. I am including that "not susceptible" part of it, and that is critical. I don't want to use the word presumption, but it tells you how to approach a close case as does the-tie-goes-to-

the-speaker language. All of that is part of the content of that test because it's -- in the same opinion. It is Justice Roberts explaining what it means, and I think that's what does it.

Now, there are -- there will be more cases, individual cases, not necessarily challenges to your regulations, and I think that there will be understandings evolved as you proceed with them. It is a question of do you write them all down now and try to anticipate them or do you deal with them on a case-by-case basis?

COMMISSIONER WEINTRAUB: Which, of course, the Court also frowns upon, case-by-case determinations.

MR. TRISTER: Not so much in this context. I think what they frowned upon was this endless litigation that probes into who said what to whom at what dinner party and who said what to whom when they bumped into each other at some fund-raiser, and that is the kind of investigation which we have to avoid under the

coordination regulations.

That is the value and the importance of the content standard. The content standard allows us to deal with cases at the RTB stage. It allows us to avoid the conduct part of the test by eliminating cases before they get into that kind of intrusive, nasty, endless kind of investigation. I have been through them, and I think that is the value of the test. It won't eliminate all of them, but I think it gives you as a Commission and parties that are brought before the Commission something to argue about and to talk about at the RTB stage before we get into the coordination, the conduct part of it.

MS. FURST: If I may add, for one second, when I first started my practice, I was given what I think to be a very wise piece of advice, was that I am not paid or engaged by a client to say maybe, perhaps, I don't know, give it a try. I am paid to say yes or no; yes, that is permissible; no, that is not, and this is a hard area of the law, obviously. That is shown by the

fact that we are still dealing with this many years later, and there is no perhaps perfect, easy solution.

However, I think that when you compare the two options we are faced with, if I have to look at an ad and determine if there is an appeal to vote there, if there is a nexus to an election, that is much easier for me to decipher than to look down a laundry list of words and definitions and try to see if I think something is promoting and perhaps if the person who is charged with reviewing that will also think it's promoting, and try to make a determination based on a list of factors as opposed to an appeal to vote.

MR. CAIRNCROSS: I would just say that I think that standard has an added benefit in that it eliminates the need to justify any sort of timeframe. No one argues that the reason the time windows exist is to infuse some objective mechanism for separating election and non-election related speech, so this solves that

problem. As a single standard, people understand it and can function under it, and it has the backing of the Court to boot.

COMMISSIONER WEINTRAUB: Speaking of individual cases, I will repeat the request that I made of the earlier panel, which is we put out a bunch of examples in the NPRM which everybody ignored, but since this is the sort of decision we have to make, when the complaints come in, we have to decide, RTB or not RTB, and we do it based on this kind of information, what did they say in these ads. One panelist earlier said, well, it depends on the call to action, but some of them have ambiguous calls to action or no call to action.

So, to the extent that you all think this is a really easy test to apply, I would be really interested in seeing you apply it to this set of ads, and I think that might be illuminating to see if everybody comes to the same conclusion. No cheating, no coordinating out there. I want to get your individual views on how these ads

would play out.

If we adopt these regulations that you are asking us to adopt, suggesting that we adopt, how would they apply when we get these kinds of cases in? You have 10 days, and it would be very helpful to me to see what people say about the specifics.

MS. MITCHELL: It always comes back to what is the standard, and the objective standard should be such that most of the time or 99 percent of the time we would all agree that a particular communication either does or does not or is or is not an appeal to vote.

One of things -- I go back to my criticism of Mr. Shays and Mr. Meehan is that they are not here and they have never been here. After BCRA passed, you will notice that none of the sponsors agreed to come and appear before the Commission, and if you read the depositions of the sponsors, in asking them about different ads, is this a sham issue ad or is it a real election-related ad, they were all over the map.

Even the sponsors didn't agree. It seems to me that that is why it is incumbent, not upon us to tell you if it does or doesn't, what we think, but it should be a person of reasonable intelligence ought to be able to read the standard, apply the standard and most of the time come to the same conclusion.

COMMISSIONER WEINTRAUB: That is part of the exercise, that is why I want to find out whether it actually does play out that way.

One of my own experiences, I went up to the Hill a number of years ago with one of my Republican colleagues and we sat before a whole group of members and tried to explain these rules, and Marty Meehan did come to that meeting and he stood up and he helped us out, and there were points where I didn't know what to say, and I said maybe Congressman Meehan can help us out here, and he was very game, and he got up and he was very helpful.

MS. MITCHELL: He should have done that on the record before the Commission.

CHAIRMAN PETERSEN: All right.

Commissioner McGahn?

COMMISSIONER MCGAHN: Thank you, Mr. Chairman.

If I am thinking of the right meeting, I think I was there.

COMMISSIONER WEINTRAUB: I think you were.

COMMISSIONER MCGAHN: I was, yes. I remember Congressman Meehan said that common vendors were okay. I remember distinctly, he answered, oh, sure, they are fine, they are fine, which makes me want to ask Mr. Trister a question, but before asking the question, I want to say I really thought your comments were very helpful from the legislative perspective in going through the history. Too often we forget that notwithstanding what seemed to be a non-conferenced bill that passed, there is a lot of legislative history in earlier versions of McCain-Feingold and Shays-Meehan, and it is significant that Congress did try to formulate a

coordination rule but couldn't muster the votes to marshal a more restrictive standard, so it has been left to us.

But I want to jump a little bit to another topic which is about the common vendor, former employee, and I think your comments say we should just abandon the safe harbor. I assume that is because if we get the rule right, it should all take care of itself.

Let me ask you this question. Let's assume you have a person recently graduated from college, gets a job in Washington, D.C., works for the Democratic Party. Does that for a few months, but then realizes they are not making a lot of money and decides they want to be more issue driven, so they get a job with an outside organization, perhaps like your clients or someone maybe similarly situated, but a group that maybe does television ads, and let's say this group does independent expenditures. Now we know they can regardless of what kind of money, so there can be more of that.

You have an ad that will pass the content standard because it is an IE, it's going to be express advocacy; you are going to have a former employee from a party committee working for that group. If a complaint was filed and we are confronted with whether or not there is reason to believe, I would think some would probably say there is, is the answer then a full investigation and depose all of these folks or is there a more middle ground with some sort of safe harbor that might work?

MR. TRISTER: Well, our comments I think on the common vendor and former employee provisions, I think, again look to where you sit today in light of what the Court of Appeals has said to you, and again, you started with a rule that had an election cycle period, and then I thought quite reasonably narrowed that, and they said, no, and what is troubling to me is that I think -- I wrote comments in 2003 when the Commission was first considering a common vendor and other approach, and I said, I don't think you

have got enough empirical evidence, at that point, to write a regulation. Now you are being told that you didn't have enough empirical evidence to change it from a regulation that you didn't have empirical evidence for in the first place. So, there is a very circular kind of thing, so I don't know what to do actually at this point.

The requirements -- what the Court has said to you seems to me to be setting you out on a mission which is going to fail, how do you distinguish between polling data as opposed to a campaign plan as distinct from -- what is the shelf life of polling data, what is the shelf life of something else, and are we going to have different rules for each different type of information and each different type of vendor, and it seems to me that you are not going to be able to come up with the information, and the reason is I don't think it is a problem to begin with. I think if we had a whole history of common vendor problems, the Commission might be

able to craft a rule that will deal with those problems, but you don't, there hasn't been that much. We said that in 2003. We still think it is true.

I don't know, actually, what to advise you. You have got a 120-day rule. They said that doesn't work, that is not good enough, and they want a lot of empirical evidence, which I don't think is available. I don't think you are going to come up with that information.

So, what do you do on that? My view is don't have a rule that singles out common vendors, treat it under the regular rule, treat it as the same thing as former employees, treat them under the regular rule, and we will see what happens, and maybe ten years from now you will find out that that doesn't work, that you need a special rule for common vendors and former employees, but that was never explored. There was never an opportunity to see whether there was a need for that.

I know none of you were on the Commission

back then, so I am not blaming anybody personally, but I think it was unfortunate, and I think frankly it was a misreading to some extent of what Congress said in 214 of BCRA when it said, address these various issues, and it said, common vendors.

I think there was an understanding or a thought on the part of the Commission that it had to come up with a common vendor rule. I don't read that legislative history, and I think the Shays opinions now make that absolutely clear. Congress wasn't telling you to write a common vendor rule. It was telling you to think about a common vendor rule and decide what makes sense, and I think the right conclusion would have been not to have one, not to have a separate rule for common vendors.

COMMISSIONER MCGAHN: Let me ask the other witnesses who may have some specific experience with this, two folks from national parties and Ms. Mitchell who has represented national parties and a number of campaigns.

Have you encountered situations where particularly junior staff people, who may on paper -- who you know don't have insider information but may be at the wrong place at the wrong time, have had trouble moving around during an election cycle, maybe lawyers for outside groups saying, no, you can't hire that person. Have you encountered this situation?

MR. CAIRNCROSS: Yes. We have encountered it both in terms of people who want to leave national party employment and go outside, and in terms of our people able to bring on a vendor or even junior staffers who have been outside and have touched tangentially in some way a campaign, yes, we have experienced that.

MS. MITCHELL: Seems to me one of the problems comes about because the focus becomes on the former employee or the common vendor rather than the communication itself, because ultimately it is, is this communication based on pre-arrangement or coordination between the party paying for it and the source of the information.

So, again, I come back to the content is important. The conduct standard should be very simple and clear and easy to understand, and what I think happens so many times -- I know we addressed this in the last set of rulemakings on coordinated regulations, and that is what do you do with a small company? That is a two- or three-person shop and they make their living doing, whether it is direct mail or media buys or fund-raising, and they can't wall themselves off, but they are really just -- they are really not responsible for -- they are not some nexus of taking information from this client and moving it over here to this client. I don't see that. What I see is people try to do the best they can for each individual client or customer, whether it is a party or the campaign committee, and you really -- I know the Commission has tried to address it, but it creates more problems and burdens than there are problems to be solved.

COMMISSIONER MCGAHN: Let me ask this, and let me offer this before I ask the question.

I think the thinking originally with the concern over common vendors that Congress had was more the old model where you had a presidential campaign, a primary. You had a presumptive nominee. The campaign staff would leave the campaign and go to work for the national committee. Then they all decide to start some issue ads or IE's or something that benefits the campaign, and then they go back and work for the campaign, for the general. It seems like you would take information from the campaign, go to the outside, come back. Same for outside groups. That runs afoul of, I think, anyone's version of a coordination rule nowadays, but it seems to me there has got to be a more narrow ground to reach that but not reach the hypothetical I came up with.

I guess the question is: Is 120 days the right day, and if so, why? Because as Mr. Trister pointed out, we don't have a lot of data on this, not only Mr. Trister, but the Shays III court. If we like 120 days, now is the

chance to explain why that day works in political terms.

MR. CAIRNCROSS: We submitted comments -- and we supported the 120 days, but we didn't do so out of any belief that that is the end-all and be-all number. We did so more out of a practical consideration, that this is something we function under, people understand it, people adhere to it, and to your point, in some cases it creates problems and I believe on its own is capable of preventing individuals from speaking from time to time.

If you have a group who is coordinating issue advocacy outside of the timeframe and that vendor may want to be used by an IE unit within that window, that is going to create a problem for that vendor. There are firewall issues -- you can create a firewall for that, but --

COMMISSIONER MCGAHN: It is going to hurt the vendor's ability to earn money and engage in their profession --

MR. CAIRNCROSS: To pursue happiness.

COMMISSIONER MCGAHN: OK, that's tangible. Any other concrete reasons?

MR. CAIRNCROSS: No. So, I think if you change it, that makes sense to me, that you would either subject it to the standard coordinated analysis or narrow it in some fashion, and at the very least, I think the definition of common vendor ought to be narrowed because the information that is conveyed and held by media buyers or placement people or even fund-raisers is not the sort of creative, strategic information that is flowing through the communications that the regs are designed to prevent from flowing to the beneficiary.

COMMISSIONER MCGAHN: Media buyers, you can just call the station and get the same information they have. They really don't have any information that is not public. It takes a little bit to get to it.

MR. CAIRNCROSS: Correct.

MS. FURST: The same with fund-raising.

That is public information as well.

MS. MITCHELL: What media buyers do is that they really are tracking information that they are interested in for a particular client is what the opponent for that same race is buying. They are not coordinating with other campaigns. What they are focused on is this campaign or political party-buy versus the opponent for that buy.

That is really -- and I see it particularly with a lot with media buyers, they are the ones adversely impacted in their ability to conduct their business because they might represent both -- candidates or party committees, and there is really no information they make available to another that is useful or a coordinated public communication.

MS. FURST: I think, if I may interject, one point that is important to remember is this idea that there exists some sort of big master plan or information that somebody could walk away with that would be relevant for any long period

of time, over 120 days or otherwise, is sort of a myth. I would love to see that. I feel like if I miss one particular meeting one week, the plan has completely changed from the next. I think it is very difficult to make the case that information stays relevant that long, and if you were intending to be helpful in running an IE, that you could rely on information that you were last privy to 120 days earlier.

COMMISSIONER MCGAHN: I think it depends on the nature of what you are doing. My hypothetical, which really isn't hypothetical for presidential campaigns, that is a whole different worldview than your role helping a gazillion, round number, House campaigns which always seem to be in flux. It is tough to fashion a one-size-fits-all rule. Mr. Trister would probably say that is why you really don't need the bright line.

Anything else to justify the 120 days?

MS. MITCHELL: I think the Commission ought to seriously consider changing the

shelf-life rule for polls. I think six months is way too long for a poll.

COMMISSIONER MCGAHN: Why do you say that?

MS. MITCHELL: Because when that rule was written, it was decades ago, and we now have instant polling, polling is done on a regular basis. We have 24-hour news and all the various sources of information, and people are making decisions and learning about content and candidates and officeholders.

COMMISSIONER MCGAHN: Plus, polling has evolved, right? The old polling was done once in a while, but now you have brush fires, you have the roll, you have all kinds of things. If anyone wants to elaborate on any of that jargon to put in the record how polling has evolved, maybe supplement your comments, because I don't have time.

MS. MITCHELL: The point is, when I say really take a deep breath and look at the regulations, I mean exactly that, because I think

the Commission -- I am back in where I started -- trying to put this toothpaste into the coordinated regulation tube is maybe not going to be successful.

I think it is important to take a breath -- look back and say, maybe we ought to look at the whole panoply of the regulatory scheme in light of these two cases. And one of them is -- the regulations are full of these kinds of anomalies that no longer apply, and polling is one of them. When that was written, it was a whole different ball game. I think the Commission needs to spend some time looking at all of those kinds of things that are simply no longer relevant.

COMMISSIONER MCGAHN: Certainly agree, but we can't do that today.

MS. MITCHELL: No, not today.

COMMISSIONER MCGAHN: Certainly. I think we can do much more but I have already taken up enough time.

CHAIRMAN PETERSEN: Thank you.

Commissioner Walther?

COMMISSIONER WALTHER: Thank you very much.

The frustration that is increasing here on our part is the fact that we really can't get any guidance on a vendor, for example, what factors should we consider? We have to adopt a rule. It is a struggle. There is very little empirical evidence that exists now that we didn't have then, and so I am not too sure whether we just substitute one arbitrary standard for another and see if we maybe strike some lucky day that the Court will approve. Are there any particular factors if you were sitting in our position that would -- that you would apply to this situation?

MR. CAIRNCROSS: I would say only that the -- like I said earlier, our support of the 120 days is simply because that is what has existed until now and people have become somewhat accustomed to functioning under it. That is not a justification or an explanation that is going

to be helpful for the Court, but the information -- the value of the information that is held by those consultants to survive 120 days and still be relevant, I am sure there is some piece of information that is perhaps out there, I don't know what precisely that would be, that would be very valuable. So, I think if you act to change that, I think narrowing that window significantly would be a helpful thing, and that alone may be able to justify that on the basis of the value of the information and the speed at which campaigns move today.

COMMISSIONER WALTHER: Narrowing the window would be to reduce the time?

MR. CAIRNCROSS: To shrink the time from 120 days, and I have no basis for suggesting a particular number, but 120 days is a lengthy period of time and there is virtually no relevant campaign strategic information that is going to survive 60 days, much less 120 days.

COMMISSIONER WALTHER: Aren't there times though, like in a presidential campaign, where

people look seriously at how they are going to conduct the whole campaign, not just the message, but you start making plans right away and they may include some plans that don't necessarily have a risk of being modified, to the point where, and there may be some strategic plans about how to approach getting electoral votes. Look at Obama. He went out and picked up all the small states and that was something that people hadn't really done before. That became well-known, and maybe it was well-known, it just wasn't well-implemented.

But there are things out there that -- or if you know something, which is a major weakness of your candidate that you hope doesn't come out, but you are strategizing for it right now, or a major attack on another candidate because you know a major weakness, but you are not going to disclose it until later.

MR. CAIRNCROSS: Let's use a specific example. In '08 the Reverend Wright issue became a very hot-button issue all of a sudden. If you

had consultants who were consulting and in on conversations the week where that was developing as an issue and then you took 120 days later and they were to act on whatever those conversations were, I will guess that the people involved in that campaign would be extremely nervous about what they were going to be saying and communicating 120 days from now.

And that strategy, whether or not that is a weakness, and that is just one scenario out of hundreds, changes day in and day out, and so there may be a case where there is some silver bullet, and campaigns are always, people are always hunting for them and they never seem to exist, that is out there, that is super secret and held, but I think in the grand scheme of things that very little of that information is still relevant, and whatever discussion was had at that period of time is going to be obsolete and at least an equal chance of being counterproductive, and again, this all takes place in a context of giving the tie toward

speaking. The endeavor should be slanted in favor of people working to produce speech rather than restricting that flow.

MS. MITCHELL: I think in answer to your question, if we go through the list of potential former employees and common vendors, I think the Commission is obligated to establish what is the problem you're trying to solve. What is the problem of a media buyer? Ultimately it comes back to, is this public communication, is this public communication something that this speaker is paying for that was made with the basis on a pre-arrangement?

And I think if you keep it narrow, the conduct narrow, it will help you narrow the scope of potential problems. I don't see the problems with common vendors. The thing that is interesting to me, I don't think Harold Ickes needs to be a common vendor with anybody, or consultant, to know exactly what it is he wants to do with any outside organization, and I think that is true -- I represent a lot of outside

organizations. They know what they want to talk about, and sometimes it is the exact opposite of what the candidates want to talk about, and I have had my campaign clients say, I wish my friends would quit saying these things.

So, I think that there is a lot of fear about things that I frankly don't think there is a lot of empirical evidence to support regulating a problem that, to my way of thinking and my observation, is really not a problem.

COMMISSIONER WALTHER: I just want to say that while it is easy to say for us to adopt a Wisconsin Right to Life approach, I guarantee you that there will be a number of lawyers before us trying to discern exactly what reasonable means, like the “reasonable man” standard we learned about in Torts, what is reasonable and what is not, susceptible of another meaning or whether it is an appeal to vote, and that is what I think Ms. Weintraub is saying, do you want some clarity on that or do we want to just sit there on a regulation, are examples helpful, are there other

ones that are inconsistent. I know some people say they are inconsistent.

We take any advice you have on how to implement that if that is in fact what we decide to do, and likewise, whether it is PASO or not, would it define it better to see examples in the regulations, just in the E and J, or instead of that, a safe harbor or defining what a reasonable man is to a reasonable person and susceptible of belief. I think in Hillary -- they said most of the people would agree. What does that mean for us now?

MS. MITCHELL: I don't know that there would be any -- I think the Commission ought to seriously consider going back to the Buckley test because the Buckley court said people have a right to know before they speak what speech is regulated and what speech is not. I know that we have come almost full circle. We are not quite full circle yet, but I think the Commission ought to seriously consider that. People can make fun of and denigrate the magic words, but there is a

reason they are magic words, because then you know if I don't say this, this, this, or this, I can talk, and the government can't come after me. I think that is what the First Amendment requires, but maybe I am too simple.

COMMISSIONER WALTHER: I think the problem is we are faced with people that are coming in with different iterations of those bright lines and we find ourselves getting more blurry than bright sometimes.

MS. MITCHELL: I understand that, but I think that maybe one of the things those of us who after we finish testifying and writing comments go back to our day jobs and sort of leave the field to the people who spend full-time trying to boss other people around and telling them what they can and can't say, and maybe we have an obligation to try to do something, and maybe we ought to file some lawsuits and say that these regulations violate the First Amendment, and maybe try to help you out a little bit.

MR. CAIRNCROSS: But also with respect to

the standard, if I could, I think it is helpful to view -- you are not deciding in a vacuum. That is to say, the -- PASO test, for example, which I think is unacceptable and faulty for numerous reasons, but I took from this morning's conversation that even its advocates have a very difficult time identifying what is and what is not.

To some degree, I think that it is an irrelevant question under that test because really what it means is, well, if you hit the conduct standard, we will find a way for it to meet PASO. Everything can be, if the conduct falls within this range, is PASO, and I think that that reverses the direction that the Commission needs to go in, which is establishing that expenditure on the front end.

And in the case of an expenditure, which is what we are talking about, we are talking about coordinated expenditures here, that test going back to Buckley was talking in terms of express advocacy, and even, if I recall it

correctly, the footnote in Buckley that touched on coordinated communications involved a billboard expressly advocating a call to action, vote for or elect the candidate -- I don't remember precisely, I apologize, but that is the framework that I think the Commission should be working in.

COMMISSIONER WALTHER: Thank you, Mr. Chairman.

CHAIRMAN PETERSEN: I just want to focus a few questions on the potential impact this rule will have on grassroots organizations that both lobby directly on Capitol Hill and also engage in what we call grassroots lobbying in terms of actually running ads to try to influence legislative debates.

And if I could start with you, Mr. Trister, I was looking on your organization's Web site, just looking at the vast array of interests that are represented underneath the umbrella of the Alliance For Justice, environmental groups, groups that deal with

judicial nominations, workers' rights, health care. There is hardly an issue that is considered by Congress and in the midst of our larger legislative debates that is not covered by one of the organizations in your group.

Did you happen to be here for this morning's panel?

MR. TRISTER: No, I wasn't.

CHAIRMAN PETERSEN: The question I have is about if we had -- because this rule obviously will have a very large impact on those groups and their ability to engage in grassroots lobbying, under a PASO standard as was articulated and defended on the earlier panel, PASO would seem to encompass not only a large amount -- maybe it would capture maybe all election-related speech, but it would seem to also capture a large amount of non-election-related speech.

The courts in Shays III clearly contemplated that there is a difference between election-related speech and non-election-related speech, and we just need to develop a standard

that rationally separated the two. It is not going to be perfect, but it needs to be close enough.

Would a PASO standard actually not rationally separate, but basically leave very little left in the non-election-related universe and basically sweep in most and make it election-related even if the way in which your groups operate, by no means is election-related in the sense that your groups are going up and actually trying to influence legislative issues?

MR. TRISTER: I think the problem with the PASO test is that, first, we are not sure what it means, but it is overbroad because it uses words like support or promote or attack or oppose. And, to me what that means is if you say something nice or say something negative about a candidate, you have promoted or attacked, you don't know, and yet you might want to be saying those things exactly in the context of a legislative effort.

An example is it is not uncommon amongst

groups that are active on legislation when a key vote is taken to want to thank members who came with them publicly in ads, and they say, thank you for your vote on the energy bill or thank you for your vote on that bill, or whatever.

Now, does that support them or promote them? I am afraid it does, because it is a positive statement about the person you are talking about, yet it is all done for legislative reasons. It is done because you know that that person is going to have to make a vote on the same bill when it comes back from conference, or if it doesn't pass this year it will be back next year, so you are trying to build and reward the people that have been with you on tough votes, and you want to be able to do that.

Now, the PASO test, I think and most people I have talked to think that is prohibited under that test, it would be swept under that test if you coordinate. That is the problem.

The other part of the problem is that these groups are regularly meeting with people on

the Hill. They may or may not be talking about the ads that they are going to run, but they can't afford an investigation into what they said.

They need a test that stops the thing in its tracks. They need a test that says if a complaint is filed -- when they run an ad of the kind that I just described, they need to be able to say that is not covered, so you don't come into and start deposing every one of our lobbyists to find out who they met with on the Hill and what they said to them and where they went to dinner and did they see them at a Saturday night dinner party, and that is what coordination is about when you get to the content standard.

So, you need something that filters that out, or groups are going to be afraid to talk to members of the Congress or they will not run the ad. It is one or the other. It is not a question of whether they will ultimately win. It is a question of having to go through an

investigation like that. That in itself is the deterrent. I think that that is the problem.

So, I think PASO is going to pick up a lot more and therefore open up more and more investigations.

CHAIRMAN PETERSEN: So, if I am hearing you correctly, under a PASO standard grassroots lobbying and regular kind of normal legislative grassroots lobbying that may have some incidental impact on elections, but as I read the statute, the statute doesn't say an expenditure is -- may have an incidental -- spending that has an incidental impact. It says spending that has the purpose of influencing an election, but you are saying under a PASO standard all sorts of communications that are truly intended for having an impact on the legislative process would now be swept within the umbrella of being considered election-related speech, which could trigger all sorts of --

MR. TRISTER: Let me give you another example.

CHAIRMAN PETERSEN: Would it be fair to say that that would then -- and I think I heard you say this -- would it be fair to say that that would chill your organization in terms of the sort of speech they would engage in?

MR. TRISTER: Yes. Thank you ads are one. Another version would be suppose you have a piece of legislation coming up and some members have come out against it. You want to change their position. So, you say, so-and-so wants to do such and such and we don't agree with it, we think it is a bad thing. He will vote against such and such a bill. Is that an attack? It sounds like an attack to me. It is an attack for legislative reasons, it is not an attack for electoral reasons, and yet it is an attack, and that is what the word is in PASO.

The problem is that so much of what you want to do as grassroots communication is going to be swept up in PASO. It is overbroad, to the extent that we can understand it at all.

MS. FURST: I think you hit the nail on

the head where I don't think you even have to determine the degree to which that extra speech is swept in there because it's going to chill speech so much that if you aren't sure if it is going to be okay, you are not going to speak. People are trying to comply. That is exactly what the First Amendment was designed to protect against.

CHAIRMAN PETERSEN: Ms. Mitchell, I should clarify at the beginning that you have also represented many grassroots organizations that engage in both direct lobbying and that have engaged in independent speech for all sorts of interests, so this is something that is in your wheelhouse.

MS. MITCHELL: Very near and dear to my heart. One of the things that is troublesome is, again, going back to the genesis of this notion in the first place, to go beyond regulating express advocacy communications and to call every radio and television advertisement within so many days of a primary or so many days of a general,

to refer to that by definition as electioneering has always been offensive to me because it subjects, still, the speaker to disclosures and disclaimers when in fact it may have nothing to do with the election, but by law the statute has converted First Amendment protected lobbying to disclosable and reportable electioneering. They are both protected under the First Amendment, but the statute presupposes that that is intended to influence the election.

I go back to Buckley. One of the things the Court said was you can't neatly separate elections and legislation and public policy. They are all tied together. That is, after all, what a democracy is about. I see so many organizations who are subject to a kind of a time period. We don't know how long this health care debate is going to go on. We are starting to get into primary periods, we are starting to get into caucuses and conventions that are going to nominate candidates all spring, and now all of a sudden organizations that are out there who don't

really care and don't really do election-related things, but they do lobbying and they do grassroots lobbying and they are determined, they are going to let those blue dogs to know we need you to vote this way or that way, and now they going to all have to report as though they are electioneering, and I think that that is really offensive, but that is what the authors of this legislation wanted. They do want, and I have seen the comments, they do believe, the people who have sued you before and will probably be back at the courthouse again as soon as the ink is dry on these regulations, whatever you write, they believe that all communications paid for by outside groups, I've always thought that was an interesting term, outside groups, outside of what, pray tell, but that any communications they make if they reference candidates or officeholders year in, year out, should be subject to disclosure and regulation by the Commission. I think that that is a very broad and impermissible type of approach.

So, yes, I see this all the time, and I think that it is really problematic because it starts with presuming that every time you communicate about an officeholder, that somehow you are trying to influence an election. That is not the case.

CHAIRMAN PETERSEN: Thank you. One last final point.

As we have been engaging in this rulemaking, obviously we have to meet the instructions of the Shays III court, what Judge Tatel set forward, the standard that we just can't use express advocacy outside the relevant windows, but it seems like as we are going forward we not only need to be concerned about -- is it safe to say we shouldn't be concerned just about what we need to do in order to meet the court's instruction, but we also have to be careful that in trying to meet that we don't unnecessarily walk right into a constitutional buzz saw and create a standard that could then subject us to further litigation for, again,

chilling too much speech that clearly doesn't have a nexus to the election. Would you say that it is safe to say that we need to keep both interests in mind as we are going forward on this regulation?

MS. MITCHELL: Absolutely.

MR. CAIRNCROSS: Yes, in fact, I think the Commission is obligated to act in terms of preserving the personal human rights highlighted by the Court.

CHAIRMAN PETERSEN: Vice Chair?

VICE CHAIR BAUERLY: Thank you, Mr. Chairman. I would like to return to the topic of vendors, and I do so with some trepidation. Let me be clear. I want to narrow this conversation just a little bit because we noticed a couple of alternatives.

While the original rule may have been not well-founded and perhaps there may be some other places to draw a line with respect to certain types of vendors, we have an alternative before us, and I would like to focus on whether we think

that alternative -- we can justify that alternative in response to what the Court said, which was basically, we didn't provide an explanation as to why the 120 days is relevant with respect to all of the campaign information that would be material, and thus, if it were used by a former employee or a common vendor, in the Court's view, could result in coordination that would go unregulated.

That is sort of where we are, and I really appreciate the party committee's response on this topic and elaboration of what I think you called diminishing relevance of data.

I have a couple more questions I would like to flush out, if I might. There are a couple of important points. Ms. Furst, you raised one of them, some data becomes public. After at least some, give or take, 90 days there is a filing report from a campaign that tells us what donors are. Files it to us, we put it on the Web. I think it would be hard to argue that that isn't in the public domain in the way that

would make it difficult to say that a former employee's possession of that information would be in any way different than anyone else in the public domain's ability to use that data.

I think the 120 days -- and this is where I would like your view -- is sufficient to cover something like donor information, that we can say safely that after 120 days, that data doesn't retain any relevance as you have used that term.

MS. FURST: We have discussed -- I just don't think the empirical evidence that we're looking for here perhaps exists. It would be wonderful if it does.

VICE CHAIR BAUERLY: I think you are right, we might not have a massive study that tells us this because there are a number of different types of data, a number of different vendors and employees at issue here, and I am not sure the Court said that we needed empirical data versus an explanation for why this is a sufficient timeframe.

We did have empirical data in setting

another window, the other windows. As I read the Court, it wasn't saying we needed empirical data, a massive study to explain why this is the bright line. I think an explanation, particularly from people who are engaged in this conduct and who would know best when this information becomes irrelevant or stale or public seems to me to something that we could provide the Court with as a justification.

MS. FURST: We supported the 120 days and we certainly support that over something broader. I look at it this way. Would I be comfortable if I were sitting on a campaign, directing that campaign, having an employee, sending that employee away for four months and then expecting them to walk back in and know exactly what needs to be done, what should be said, what ads should be run, what event held where, in order to ensure the success of our campaign? Absolutely not. That is absurd.

I think the time period of 120 days can certainly be lowered. I think with the advent of

the Internet, Twitter, for instance, things are literally happening instantaneously, so I think to assume that someone who is interested in helping or hurting a candidate by knowing a piece of information that is exactly relevant and exactly what is necessary after 120 days of sitting out, I just think that doesn't seem to make any sense to me.

MR. CAIRNCROSS: If I could also jump in here. Two things.

One, the Commission could offer justification to the Court based upon a narrowing of the definition of common vendor. That is to say, there are different fund-raisers and media buyers have different information than political consultants, for example. I think that that would hold some meaning for the Court because the coordinated regulations are designed to capture that sort of communicative, strategic messaging, and that certain common vendors just simply are never going to have that regardless of the timeframe they are operating in. That would be

one way to go.

And then the second thing is just to say, just to reiterate, whether it is 120 days or 60 days or even a month out, if I were to sit down with a consultant and say, look, this is really what we want, this is the messaging we want to do, that is unlikely to be effective for the campaign even if that were something that we did. And so, I don't know how successful you are going to be with the Court, and I think the Court is difficult to satisfy with these time windows and the justifications, but at least splitting the common vendors and narrowing that category may be something different, and it would have a basis that may have some meaning for the Court.

MS. FURST: Another thought that was helpful to me that came out of this morning's testimony was the idea that there is a difference between appropriating an asset of a committee, taking a list or something that is property of the committee that a typical former employee would not permissibly walk out the door with, and

then what knowledge is retained in their brain. I think that if you walk out with an asset, that is a whole other issue, a whole separate problem. The information that is retained in someone's brain over a period of four months, I don't think that is quite that useful any more.

VICE CHAIR BAUERLY: One thought I have with respect to that scenario, you can't always assume that it is a theft scenario. It might be that there is actually a good relationship, someone is going to pursue something else and taking a list with them, but I think the list presents another issue. You might have a list of potential supporters, so you might know who to identify, who may be interested in this particular communication, but of course if you don't have the campaign's current messaging and targeting information, the strategic information that you were just talking about, it seems to me that the list of who cares about this particular campaign is not relevant in and by itself, that there must be some other strategic information

that would go into a communication to therefore make it in some way coordinated, I think is what the Court was after.

So if you could perhaps speak to that, that would be helpful, because I don't think we can assume that these assets, while they are certainly assets that are protected by any good campaign organization, it may not always be the case that someone did it in an unauthorized way.

MR. CAIRNCROSS: Something else that may be helpful, even since the time that the 120-day timeframe was crafted, the speed at which, and the various methods of communicating for a campaign have increased so dramatically that even in that narrow timeframe they have been in existence, the speed at which a campaign will evolve and the tactics change and the strategy changes and what someone does on any given morning is going to perhaps change the way you are responding in the afternoon, much less a week later, that that would support both a narrowing of the 120-day window in addition to a narrowing

of the definition of common vendors. I am not sure that there is empirical evidence that is going to be satisfactory to the Court on that, but that is at least an approach that may yield some success.

MS. MITCHELL: I will give you two examples, empirical examples of instantaneous changes in campaigns where every piece of strategy went straight out the window, so that 120 days became light years.

VICE CHAIR BAUERLY: Right. I understand we will always find outliers, and one of the challenges I think that the Court has put before us, frankly, and in some ways I strongly disagree with, is the Court's assertion that some information -- we can always find the outliers, and that is the challenge. I think what we are trying to do is establish where the bulk of it is and where we can reliably say that we are confident, we have experience to draw upon that says after a certain timeframe this information simply is not relevant and therefore can't be

useful in a way to coordinate the communication that would therefore evade the goals of the act as the Court said.

Thank you, Mr. Chairman.

MS. MITCHELL: I would argue that 120 days is way too long, with all today's communication and all of the capabilities, it is too long a period, because things can change instantaneously, overnight. They can and they do.

MS. FURST: One other idea. Perhaps it would be helpful -- and I don't have this information on hand -- to inquire as to how often candidates and campaigns do poll. I mean, certainly they poll much more often than 120 days, but the environment changes radically and drastically from time to time.

VICE CHAIR BAUERLY: Certainly, and we may well want to revisit the polling regulation at some point in the future.

Like I said, we put alternatives out there, and the Court didn't say that 120 days was

not permissible. It said we hadn't justified it. So, if we want to use that, we will need a record to go back to the Court with and explain ourselves.

CHAIRMAN PETERSEN: General Counsel.

GENERAL COUNSEL DUNCAN: Thank you, Mr. Chairman. Given the time limitations and the time of the day, I do want to thank the witnesses for the very helpful information that you have provided, but I will pass on the opportunity to ask questions. Thank you.

CHAIRMAN PETERSEN: Anything from the staff director, other than to remind us that Canada beat the U.S. in the Olympic gold medal hockey game?

STAFF DIRECTOR PALMER: I don't want to rub it in.

CHAIRMAN PETERSEN: Any further comments or questions from the Commissioners?

COMMISSIONER MCGAHN: If you can indulge me, I have two quick questions.

First, I thought of after hearing some of

the other questions and testimony over the meaning of the Wisconsin Right to Life test. When that opinion came down, I read it as an objective legal standard. The Commission passed a reg which then became sort of a subject of a multi-factor balancing test, and it morphed into what seemed to be a reasonable person test where, as Mr. Cairncross alluded to, sort of a figure-skating judge, well, I kind of like this move but not that move, therefore, this ad crossed the line but that ad didn't.

In fact, in the briefs in Citizens United, there were a number of briefs that actually transcribed and then presented to the Court actual Commission deliberation on use of the reg, and now we have been told by the Supreme Court you can't do this multi-factor balancing test, but now I still hear concern over what about this inclusion of the word reasonable and unreasonable interpretation.

I think that is a legal standard. I am wondering if we can go right down the row, is it

a legal standard, how do we know that, or is it a question of fact, do we sit up here and factually decide whether we like an ad or not?

MR. CAIRNCROSS: I don't think it is a question of fact. In fact, I think that factual inquiry is foreclosed by that decision, which is to say any -- going outside the four corners of that ad and saying, okay, who talked to who about this, what is the timeframe of the ad, what is the -- who else is mentioned in the ad, if anybody, is exactly that contextual analysis that goes to the intent of the speaker and perhaps the effect on the listener. I don't think that is avoidable if you treat it as anything other than a standard.

MS. FURST: I think it is a legal question, certainly not one of fact. I think the important thing to look for is the nexus to the election. That is what was required by the Court there, not a looks like, feels like, know it when you see it, but is there any other reasonable interpretation that one could come up with that

would work. You are looking for the nexus to the election-related activity there.

MS. MITCHELL: I agree with Sean and Jessica.

MR. TRISTER: It is a legal standard, but it has to be applied to facts. The facts may be limited, the facts may be just what is in the four corners of the ad, but that is a fact, what it says is a fact.

So, it is a question of where do you look? Do you look beyond those facts to things like was it a competitive race? Answer: No. The Court said that. So, it is a narrowing of the facts that are relevant to applying that legal standard, but ultimately you have to look at what happened. That is a fact.

MS. MITCHELL: I do want to say that I go back to another thing I said earlier. I do think the Commission should articulate some higher threshold than just anybody deciding that they would just like to initiate a complaint and a full-scale investigation because that is what

people do with their opponents, it is just part of the process, it is part of the campaign. I think that is really unfortunate.

COMMISSIONER MCGAHN: My last question may seem odd, but it is something that Ms. Mitchell sort of said about operating from a clean state.

Notwithstanding the Shays III court ruling that we have to go beyond magic words, given what the Supreme Court has said really since Buckley, but for the sake of argument, let's say Wisconsin Right to Life, since, and what the D.C. Circuit has said since Emily's List today and Unity '08, can -- constitutionally, can we really go beyond magic words and still remain consistent with what the courts have said recently?

MR. CAIRNCROSS: I think you put your finger on exactly the problem. In all candor, I think it will be very difficult to do that. I think the appeal-to-vote test is very, very close to an express advocacy, magic words test. So, I

think that is right. I think they are virtually indistinguishable, but there is perhaps daylight between them. I don't know what that would be, and I think it would be difficult to determine that based upon a straightforward, objective view of the language of the ad. There is not a call for action that is saying -- that is appealing for somebody to go vote, to go support in an election a candidate. It strikes me that you are going to be into the -- going down the path of some contextual analysis.

MS. FURST: I agree. I think we have to go back to the fact that we started here with the word expenditure. An expenditure plus coordination is what we are trying to regulate. If you remember that an expenditure is defined, in part, as for the purpose of influencing any election for federal office, not that happens to influence, that may influence, that with a certain person interpreting it could influence, but for the purpose of influencing.

MS. MITCHELL: I think Shays III is

incompatible with the Supreme Court's decision, and I think that it is incumbent on the Commission to approach this in a way that is not just narrowly designed to respond to Shays III because I think the decision is incompatible with the law as it has been articulated by the Supreme Court and by the other decisions that you have referenced. That is exactly what I am saying.

MR. TRISTER: Well, as I said earlier, I don't think there is any definitive ruling yet on coordinated speech and how far they can go in regulating it. Citizens United was independent speech. The Court was clear about that. Wisconsin Right to Life was independent speech. We have to go back to Colorado Republican, the second Colorado Republican before they even addressed coordinated speech.

Whether that will turn out to be the same test or not, I don't think we have an answer to that question right now, but I don't think, as I said earlier, that that means that the Commission shouldn't adopt the Wisconsin Right to Life test,

because I think as a matter of administrative procedure, that is the right test to be applied in this context, whether or not it is required by Constitution or not.

MR. CAIRNCROSS: As I understand, the Shays III court had post-Wisconsin Right to Life reached out and asked the Commission does this apply here, and the plaintiffs, as you would expect, they are charging that the regs are too lax, then we will know, but they at least said, well, it may apply in some coordinated communications contacts with other plaintiffs, sort of leaving the door open.

The Commission's response just said, well, no, and our coordinated communication rules are supported by the general guidelines of -- general finance principles that Justice Roberts is talking about, which strikes me as being inconsistent.

If Chief Justice Roberts was talking about general principles and he was narrowing significantly the scope of speech subject to

regulation, and you are talking about a content standard that expands greatly the scope of regulated speech, I don't know how those are consistent. If it is a general principle, then it applies outside of Wisconsin Right to Life and it applies by the Commission's own submission, those principles apply in this context.

COMMISSIONER MCGAHN: Thank you, Mr. Chairman, for your indulgence.

CHAIRMAN PETERSEN: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: If I might, I think this is actually kind of important and I don't think we'll resolve it here today, but --

Mr. Cairncross said that you thought that the Wisconsin Right to Life test, there is very little daylight between that and the magic words, expressed advocacy. I was actually surprised when I read CU, the Citizens United case, at the way that the Court analyzed the movie. It said, in light of historical footage, interviews with persons critical of her and the voice-over

narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the presidency. That is not magic words. That is not close to magic words.

MR. CAIRNCROSS: But the Court made that analysis, Commissioner, in the context of the case saying that this restriction on that speech is unconstitutional and that an attempt to do so doesn't comport with the First Amendment.

COMMISSIONER WEINTRAUB: But what it could have done easily would have been to say, and we want to reiterate, what people have been saying since Buckley, all of those people who thought that we were saying something else in Buckley, let us make it very clear, nothing besides magic words can be regulated. This isn't magic words, full stop, and we are done, and it didn't do that.

MR. CAIRNCROSS: Sure, and it may be the case that we won't resolve it here today, but I would say the Court's language is important, and

it was talking in the context of expenditure, and expenditure does go back to Buckley, and expenditure was defined as for the purpose of influencing a federal election in the context of express advocacy and magic words. So, I think it is important to read that being sensitive to the Court's language as a whole in Citizens United.

COMMISSIONER WEINTRAUB: You have that frowned look on your face, Mr. Trister, so I will give you the last word on that. Do you see this as no daylight between, or is there actually a real difference between the functional equivalent of express advocacy and magic words express advocacy?

MR. TRISTER: Yes, I think there is. I think the Court intended there to be, and I think Wisconsin Right to Life -- I mean, express advocacy meaning magic words, but I think the harder question is whether there is any difference between the Wisconsin Right to Life standard and your part B of your regulation, but that is not what you are asking me, I don't

think.

COMMISSIONER WEINTRAUB: No, I was purposely avoiding the part B question.

MR. TRISTER: Good. We should all avoid it. I think the magic words part of it was quite clearly intended. I think in Citizens United, I don't think the Commission argued that it was express advocacy. They did not argue that. They argued it was an appeal to vote, a functional equivalent.

I think there are differences. It opens up certain kinds of language, certain kinds of references that are not magic words, and that was what Chief Justice Roberts and Justice Alito said in Wisconsin Right to Life. They were not ready to say only magic words. They think there is a difference. Time will tell. I think there definitely is a difference.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I appreciate the indulgence.

CHAIRMAN PETERSEN: Any further comments or questions?

As with our first panel, I want to thank the witnesses on the second panel. I think this has been a very enlightening discussion. I certainly appreciate your preparation and your availability for being here, for testifying and for answering all of the questions that we had coming at you, and even beyond the overtime clock. You don't even look the least bit fatigued. So, again, thank you for being willing to be here. This has been enormously helpful.

This will conclude our hearing for today. We will reconvene tomorrow at 10:00 to finish up. So, for now we will adjourn, and thanks once again.

(Whereupon, at 3:31 p.m., the hearing was adjourned, to reconvene at 10:00 a.m., March 3, 2010.)

CERTIFICATE OF REPORTER

I, CATHY JARDIM, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me stenographically and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

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CATHY JARDIM