UNITED STATES FEDERAL ELECTION COMMISSION

In the matter of:

ELECTIONEERING COMMUNICATIONS

NOTICE 2007-16

Washington, D.C.

Wednesday, October 17, 2007

PARTICIPANTS:

Panel 1

JAMES BOPP

MARC ELIAS

ALLISON HAYWARD

Panel 2

DONALD SIMON

LAWRENCE GOLD

JAN BARAN

Panel 3

PAUL RYAN

JESSICA ROBINSON

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P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN LENHARD: I'd like to open the hearing of the Federal Election Commission for Wednesday, October 17, 2007, on electioneering communications.

We will begin by welcoming everyone. This is the first day of two days of the Commission's hearings on how we should implement the Supreme Court's decision in FEC versus Wisconsin Right to Life.

The FEC published a notice of proposed rulemaking on electioneering communications in the Federal Register on August 31, 2007, and asked for comments on two versions of the proposed rule to implement the Supreme Court's decision.

The first alternative would create an exemption to the corporate and labor organization funding restrictions for electioneering communications in Part 114 of our regulations.

The second alternative would create an exemption to the definition of electioneering communications in Section 100.29 of our regulations.

The NPRM also raised a number of other issues for public comment regarding the effect of the Wisconsin Right to Life decision on our regulations including whether we should amend our definition of express advocacy in Section 100.22 of our regulation in light of the Supreme Court's decision.

I'd like to thank very briefly our staff and the Office of General Counsel for their hard work on this and while it is invisible to the outside world the Office of General Counsel has made a number of changes to the means and methods by which we promulgate regulations in this area and those changes sped up in a number of ways by a number of days our ability to get this out and I wanted to thank Ron Katwan, I want to thank Peg Perl, and I wanted to thank Tony

Buckley especially for their hard work on this. While the consequences of their hard work are not always visible outside of this building they certainly are inside and I wanted thank you all for that.

I'd also like to thank all of the people and the organizations that supported them in putting forward comments. We had over 25 comments by sometimes collections of groups on this. And they were very detailed and I think enormously helpful as the commissioners think through the problems before us.

And I also want to express particular appreciation to the fifteen individuals who have agreed to give of their time to come and present before us as witnesses. We are looking forward to their insights, their experience, and their expertise in this area.

This is the format we are going follow over the next two days. There are

fifteen witnesses who have been divided into five panels. There are three panels for today and for two tomorrow.

Each panel will last between one and two hours depending upon the number of panelists. We will break for lunch and we will also have a break between today's two afternoon panels.

Each witness has five minutes for an opening statement. We have a light system at the witness table to help you keep track of your time. The green light will start to flash when there is one minute left.

The yellow light will go on in 30 seconds and a red light means that it is time to wrap up your remarks.

The balance of the time is reserved for questions by the Commission.

After opening statements I will open discussion by asking for whether there are questions from the commissioner. The commissioners can seek recognition from me

and we have no particular order for proceeding.

We have done this in the past in a number of proceedings and it has worked fairly well in generating a conversation between the witnesses and the commissioners and hopefully it will proceed well again today.

The general counsel and staff directors are also free to ask questions of the witnesses.

We're going to begin with opening statements from commissioners and my understanding is that there is at least one commissioner who would like to make an opening statement.

Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. I left copies of it out there and people can read it, so I will try and do this quickly.

I just wanted to highlight three

questions that I have been grappling with as I have been going through the comments in the hopes that I can get a little bit of help on these from the witnesses.

The first concerns disclosure. Obviously that's the big difference between Alternative 1 and Alternative 2, is whether we are going to continue to have disclosure.

I have always been a big advocate of transparency and disclosures. So I will state at the outset that I am leaning towards Alternative 1, but I do think that some of the commenters have raised some interesting problems with Alternative 1, notably in those instances where Congress may not have thought through what it was going to mean for them to have disclosure because they were not anticipating that these entities would be able to make electioneering communications.

And I think some non-profit organizations have raised some issues and the unions have as well, so I would like some

help from the witnesses as to whether we have the flexibility under the statute to accommodate the concerns that have been raised by some of these organizations, and if so, how can we go about doing that.

Secondly, there is this issue that intrigues me about condemnation. In the Wisconsin Right to Life decision Chief Justice Roberts distinguished the Wisconsin Right to Life ads from the hypothetical "Jane Doe" ads that were described in the McConnell litigation, and Justice Roberts wrote:

"That ad, the one in the hypothetical McConnell litigation, condemned Jane Doe's record on a particular issue. The Wisconsin Right to Life's ads do not do so. They instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed one would not even know from the ads whether Senator Feingold supported or opposed filibusters."

So what do we do with this? Does this mean that in order to be permissible an ad can't state the position of the candidate or officeholder that is mentioned in the ad? Can they mention it as long as they don't condemn the position? And if so, how would we define condemning in a way that would give clear guidance for the regulated community about what they can and can't say?

And I'll note in this context that one of our later witnesses noted on his blog that whatever we do, we are probably going to be both condemned and criticized. All I can say about that is to paraphrase former Speaker Tom Reid who said something along the lines of, "I don't expect to avoid criticism, I just try not to deserve it."

The third issue that I wanted to raise was this issue of reasonableness.

If you look at the wording of the three different standards for express advocacy or the "functional equivalent"

thereof, I notice at least a striking similarity in the wording, although a number of our commenters seem to think there is a big difference.

So we've got 100.22(a) which in part defines express advocacy as communications of individual words which in context can have no other reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates, and that's in the "magic words" section.

100.22(b) defines express advocacy as a communication that when taken as a whole and with limited reference to external events such as the proximity to the election could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.

And then the Supreme Court said that an ad is a functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation

other than as an appeal to vote for or against a specific candidate.

It sounds an awful lot alike, and yet people make a whole lot of the differences. So any guidance that the witnesses would care to share as to why they think these three standards have such huge differences in interpretation would also be appreciated.

And that is really all I wanted to do and I am looking forward to hearing what people have to say.

CHAIRMAN LENHARD: Very good. Do any of the other commissioners wish to make an opening statement?

No one seeking recognition, our first panel this morning consists of James Bopp on behalf of the James Madison Center for Free Speech and also plaintiff's counsel in the decision of Wisconsin Right to Life versus FEC. Mr. Bopp, congratulations on your victory there.

We also have Marc Elias, from the law firm of Perkins Coie, on behalf of the Democratic Senatorial Campaign Committee and Professor Allison Hayward from George Mason University School of Law, who is also a very distinguished and former member of the staff of Commissioner Smith. Welcome back.

As a general practice here we go alphabetically unless the panelists have arranged otherwise. So we will begin with Mr. Bopp and then we will move to Mr. Elias and then to Professor Hayward. So, hearing no other informal agreement that has been reached, Mr. Bopp, please proceed at your leisure.

MR. BOPP: Thank you very much. And I appreciate the opportunity to speak to the Commission about this important subject and I certainly appreciate the willingness of the Commission to engage in this rulemaking.

I am hopeful that this rulemaking will result in a rule that will allow the

incredible number of organizations and labor unions out there who want to continue to be able to discuss issues, to lobby their members of Congress about upcoming votes, that a rule will allow them to do that without the necessity of hiring a lawyer, or going to court or getting permission from the government in order to do what is their right to do under the Constitution.

I want to speak broadly about several concepts and hopefully address a couple of the ones that Ellen asked about.

First, I think people need to recognize that we have a radical change in approach from the McConnell decision to the Wisconsin Right to Life II decision.

I don't think that ideas of deference and circumvention will enjoy a majority support on the U.S. Supreme Court. And I think that the Court has now gone back to a more faithful interpretation of the First Amendment, and most significantly, I

think, for this rulemaking and future actions by this Commission that the concept that "the tie goes to speech" that is certainly not the approach of campaign finance reformers, has not been often the approach of Congress using words like "influence" or "in relation to," et cetera, that "the tie goes to speech," but that is a very important concept that I see a majority of the court now implementing in their decisions. And I think that you need to endeavor to do that in your regulations.

Secondly, these as applied challenges are going have to be workable. I think the courts sent a very strong message that if it turns out that people are not able to engage in protected speech in a timely way because of the difficulties amounting as applied challenges then that means this whole statute goes down the tube.

That would be a welcome result, as far as I am concerned, that the statute goes down the tube, but I would be happy with an

effective "as applied" remedy.

Of course in the past the people who have sought to exercise their constitutional rights have been subject by the Commission's lawyers and the intervenors, the incumbent congressmen who benefit from these laws, with interim discoveries, scorched-earth litigation tactics, endlessly creative and contradictory arguments, case by case, cramped interpretations of decisions, in my judgment a defiance rather than compliance with court rulings.

Chief Justice Roberts has spent a number of pages explaining that that day is over, that those tactics, those approaches to people who have First Amendment rights and want to implement them will not be tolerated and that what we need is an objective standard that somebody can simply look at, and then two or three minutes later decide whether or not their ad fits within the rule or not and if it does fit within the rule

they can call their ad agency, and say, "Run the ad," and that should be the goal of the Commission if they are to salvage any part of the electioneering communication statute.

Third is the Court. If you look at Buckley first and then Mass Citizens, then McConnell, then Wisconsin Right to Life, you can derive a consistent theory of approach to federal campaign finance law and that is that the Supreme Court will only allow campaign finance laws to pass constitutional muster if they are unambiguously related to a federal candidate's campaign.

Those are words in Buckley. The court then proceeded in Buckley to apply those to disclaimer requirements and limited those to express advocacy. MCFL applied the express advocacy test to a corporate prohibition.

Then in McConnell upheld the electioneering communication prohibition on its face because the evidence proved that it

was the "functional equivalent" of express advocacy and then in Wisconsin Right to Life we get the test for functional equivalence which is no reasonable interpretation other than a call for a vote for or against a candidate.

So each of those applications of this general principle that campaign finance laws must be unambiguously related to a federal candidate's campaign I think is the governing norm that is applying First Amendment principles to these matters.

Are my five minutes up?

CHAIRMAN LENHARD: Yes, sadly.

THE WITNESS: Then I will quit. I can't see it from over here.

CHAIRMAN LENHARD: As we go around through the questions, I am sure you will be able to illuminate some of the other points. Mr. Elias.

MR. ELIAS: Thank you, Mr. Chairman, and members of the Commission, for

the opportunity to testify today on a topic that is important. Although I think it is important not in isolation, which is I fear how this rulemaking is going to proceed, but rather important for the continuation of something that I testified before this Commission on a number of occasions, most recently in hybrid rulemaking, and before that in the solicitation rulemaking, before that in the coordination rulemaking and the Internet rulemaking, which is the need for the regulated community to be told what the rules are and to not continue to change the rules.

Congress passed a very complicated law in 2002, and for in 2003, 2004, 2005, 2006, 2007, the regulated community has had to deal with a series of places where the Commission finds opportunities, sometimes because they are required to and at other times simply because the Commission chooses to find an opportunity to tinker with and

change the rules.

I understand the concerns that are being raised by Mr. Bopp and by others who are here to testify for an opportunity to grab little pieces of real estate in this rulemaking.

I understand the impulse, believe me. I am as often as not on the "grabbing real estate side" of these rulemakings, but I implore the Commission to take what the Supreme Court did and do that which you are required to do and not one inch more.

In the words of Justice Roberts, "Enough is enough." You are faced directly with the question of what to do about certain electioneering communications. That is all you are faced with. You are not faced with questions about disclosure. You are not faced with questions about how to rewrite the express advocacy standard. You are not faced with questions about public service announcements and other little carve-outs.

You are faced with a narrow issue which is that the Supreme Court upheld a certain set of ads and announced a discrete set of principles in an as-applied challenge.

So what I would urge you today on behalf of the Democratic Senatorial Campaign Committee and its members and the regulated community that has to deal not with just this one provision, but with how this provision intersects with the law more broadly, is to do that which you are required to do, that which you feel compelled to do under this opinion and not engage in what I think you're being invited to do.

Which is, number one, to speculate as to what the Supreme Court will likely do next.

Two, to speculate as the Supreme Court would have meant you to do in other circumstances.

Three, to predict what is coming down the road in 2008 or in 2010.

I think that the Commission will be well served in this case to take the direct holding of Wisconsin Right to Life and put it into the regulatory framework largely in the manner in which Alternative 1 suggests.

I would urge the Commission not to go beyond that, and in particular, not extend into the disclaimer arena, into the safe harbors, or into a rewrite of 100.22.

100.22 ties to a lot of things that this Commission does that have nothing to do electioneering communications and there are a lot of entities and parties that would no doubt have an interest in how 100.22 gets applied to their piece of real estate.

Whenever 100.22 gets imported, express advocacy gets imported into the coordination rules. Coordination rules are applied to hard money committees, and I am here on behalf of a hard money committee, because I read the Federal Register as it applies to all the campaign finance laws.

But there may well be hard money committees that didn't think rulemaking about electioneering communications that involves corporations and labor unions, that they had anything at stake.

Well, if you rewrite the express advocacy rules they got a lot at stake because it is one of the core provisions of the coordination rules that apply to all committees including the hard money committees.

So again I would urge in the spirit of conservatism that the Commission take a conservative approach, a modest approach, an approach to do that which the law and the courts have urged it and required it to do and not engage in activism and go beyond that which the court opinion addresses.

With that I am obviously happy to answer any questions that the Commission may have.

CHAIRMAN LENHARD: Thank you.

Professor Hayward, I think you are the one who coined the phrase, "the humble regulator," the theme just touched on. Professor?

MS. HAYWARD: I'm going to take the precaution seriously not to repeat in my opening remarks things I've already put in my comments, because I'm speaking for myself, I am not a hard money committee, not a client, not a commissioner, not anybody else. I've pretty much said what I mean to say in my comments.

Let me sort of provide a little context that I think is important anyway in this rulemaking that will cut both ways in terms of how broad you choose to go or how narrow you feel like you are restrained to go.

In Congress there was a pitched battle maybe just a year ago on the reporting of grassroots lobbying. And it was rejected. And that community is very sensitive about

invasive impositions of disclosure.

We have a presidential race coming up where everybody is looking at the Federal Election Commission and what you do and reading tea leaves.

And there is just more scrutiny because there is more interest in campaign finance law when a presidential election is coming up. Then you've got a decision that is an as-applied challenge with real facts.

Typically in this area, lots of times we are dealing with declaratory judgment injunction type cases where we have got some broad abstract invocation of constitutional rights.

A couple of people who are showing injury or a couple people who are showing that they are injured if we don't regulate, and it is all very sort of fluffy and up in the air.

You've got real people doing real stuff with real facts and a real evaluation

of whether or not that activity can be prohibited or it must be permitted.

So overall, I am counseling restraint in my comments. And so I think overall I am probably closer to Mr. Elias than Mr. Bopp, but I am not unmindful of the problems that the way Bickford was written to disclose electioneering communications would apply to an entity that isn't otherwise a reporting entity because of that sub (f) in there that says that, if you're not doing this from a segregated fund, you have to basically open up your books for the last year, thank you very much.

We get all of this information that Congress in its reasoned judgment decided not to require in the lobbying context with the lobbying reform law, through the back door, through the Federal Election Commission. Or at least that is how it might be perceived.

And so there's a real burden there and a real cost there, but I have to say,

trying to be an honest broker here, when I read the Wisconsin Right to Life decision, I don't see anything that goes beyond Bickford Section 203.

In fact, Justice Robert's opinion says four or five times, this is about this. This is about Section 203. It's not about anything else. I am not thinking about anything else. You can't tell me anything else, I'm not listening. Which is not helpful in a lot of ways, but as a federal regulatory agency, that's what you've got.

And so, again, I think I probably join Mr. Elias in counseling restraint, although I see the problems with that. And I'd like you to get rid of 100.22(b) just because it would be the right thing to do.

CHAIRMAN LENHARD: Very good. Questions or comments from the Commission. Any commissioners? Vice Chairman Mason.

VICE CHAIRMAN MASON: I am with Commissioner Weintraub on this three-standard thing.

We went through political committee rulemaking a couple of years ago. Some of us had reservations about adding, I think the issue then was a third standard for expenditure, and Mr. Bopp suggested that we need an objective standard that somebody could figure out in two or three minutes what it meant and I see two problems with these standards.

One is, how does someone who is not familiar with the jurisprudence and with this Commission's decisions interpret a phrase such as "no other reasonable meaning" and how does such person look at the three different, similar, but apparently related standards in the regulations -- "no other reasonable meaning" only interpreted by a reasonable person and no reasonable interpretation other than -- and to the extent that one can parse a difference between those three standards and figure out which one applies to them.

MR. BOPP: With respect to the

three reasonable standards, I think one and three are similar in the sense that they are directed at the meaning of the words.

Two is different in that respect because it is not directed at the meaning of the words, but going off and finding some reasonable person and just asking them what they think. And that is different.

And I think the "reasonable person standard" is not suitable for First Amendment protected activities because a reasonable person would look at inferences, external events, and all the things that the Supreme Court in Wisconsin Right to Life has said is completely illegitimate. So that's why I think the similarity of the two standards is that they relate to --

VICE CHAIRMAN MASON: Let me interrupt you so I understand. It is the interpretation part that you think makes it a subjective rather than an objective standard.

MR. BOPP: Well, it's subjective,

first, because you just simply go find this "reasonable person" and then you ask them what they think. That is the interpretation part.

Both of those are I think completely inappropriate for First Amendment activities because the speaker needs to know and not have the speakers be penalized dependant upon the interpretation some other person gives to what he said.

The person has to know what he said and whether or not what he says is subject to the law.

Two is also much different than both one and three because it calls up external events and external factors and things that the court has squarely rejected. So there are other ways in which that is different as well.

MR. ELIAS: I would add something much less technical to this, which is two reactions.

Number one, the campaign finance law is littered with places in which you can't figure out the answer in two or three minutes, so I'm not sure why uniquely in this rulemaking. Perhaps this will be the standard we will use in all future rulemakings.

You know, I'd like to be able to figure out whether or not the answer to some of your hypotheticals about the candidate who goes to the Virginia State party event out in the countryside where I think there were horses, and they're at a tent and somebody walks up and gives it a solicitation. Well, I would like to figure that out in two or three minutes too.

There are any number of areas in McCain-Feingold that are not susceptible to being able to figure out objectively in two or three minutes what the answer is.

I'm not sure why the corporations and labor unions get the two or three minute

test and everybody else has to muddle through.

The second thing I would say is that Justice Roberts did not say -- did not say -- that the ad was not express advocacy. He said that it wasn't the functional equivalent and that is different.

They cannot be the same standard. The functional equivalent of express advocacy by definition is not express advocacy. It may be the equivalent to express advocacy in function. It may be equivalent to it in effect, but it is not express advocacy and if the Supreme Court wanted to say it was express advocacy they would have just said, "It is express advocacy."

This is my fear about getting into this issue. In the old days, when we had just "magic words," you know, there were eight or ten things I knew my clients couldn't say in an ad and they were not going to be subject to the express advocacy test.

Now hard money committees, the DSCC included, run non-express advocacy ads under the coordination rules, ads that simply do not constitute express advocacy.

Now, it is going to be a truly unfortunate event if this Commission decides that it is going to take that bar and lower it so that there is now less speech that hard money committees can engage in because the standard of what is express advocacy has just dropped to the functional equivalent of express advocacy.

In other words, to me the functional equivalent of express advocacy prohibits corporations and labor unions to run certain ads that the express advocacy standard does not prohibit under the coordination rules for hard money committees.

This all may seem very puzzling and very complicated, which is a very good reason to exercise restraint and not get into this at this time, because we could have an entire

rulemaking about where those lines ought to be as a matter of policy and where they are as a matter of jurisprudence, but I don't believe that they are the same standard.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. I want to ask a follow up.

And much as I would appreciate it if the Vice Chairman and I actually did agree on this issue, I am not sure that we actually draw the same conclusions, which maybe highlights the whole problem.

One aspect of this that I have to admit leaves me completely befuddled, and you mentioned it, Mr. Bopp, and it was also mentioned by some of the other commenters, which is this vast distinction between a reasonable interpretation and a reasonable person interpreting words, and I know there is a lot of antipathy out there to 100.22(b) and there has been for a long time, and there

are a lot of people who would just love to see it knocked off, just sort of on principle.

But when I look at what the Supreme Court said -- "An ad is susceptible of no reasonable interpretation other than" -- I don't know how you get a reasonable interpretation or no reasonable interpretation without somebody doing the interpreting.

I don't know what your clients have to say about this, Mr. Bopp, but I am not expecting a voice from on high to come down and tell me what the reasonable interpretation is.

Somebody has got to figure that out. You know, it's courts, it's us, it's somebody.

There are people involved who interpret the words. So maybe you can help me, or Ms. Hayward could help me to figure out what is the big difference between a

reasonable interpretation and a reasonable person in making an interpretation.

MR. BOPP: The difference is whether it is considered as a matter of law or fact. For instance, what does a contract mean? That is a question of law.

MS. WEINTRAUB: It is a question of law applying to facts. They are all questions of law.

MR. BOPP: No. What the contract means is a question of law. It is not a question of fact. You look at the words and you don't take testimony. You don't bring an expert in who can testify as to what a reasonable person would think this means. You don't submit it to a jury, which is the reasonable man standard. Questions are submitted to a jury.

You know, what would a reasonably prudent person do in this circumstance? That is a factual jury question.

So the difference is a substantial

one.

If it is a question of law, it's an objective question, it is not submitted to the jury and subsection B incorporates a factual standard that would be submitted to a jury as opposed to a legal standard that would be a matter of law to determine.

That's the difference.

MS. WEINTRAUB: I would take a slightly different crack at that, although we get to the same place.

The way I understand it, the one standard just allows you to look at communication and is what Jim would describe as being his legal question, where the other one takes a reasonable person, takes the communication, gives him an instruction telling him to tell us what it means, and gives them a jury question where they may come up with some sort of community standard based on prejudice, or experience, or whatever it is that juries bring to the jury

room. But it is not as restricted in the sense that you are not just looking at communication.

And I think that's where the people who are part of the tribe of folk who don't like 100.22(b), like oh, me, get troubled by FERC action and this whole sort of querying the facts and circumstances surrounding that. So, you start doing that and there is no standard any more or nothing anyway that you can predict with any sort of regularity.

VICE CHAIRMAN MASON: Mr. Bopp, just in round numbers how many campaign finance cases have you taken to court?

MR. BOPP: How many have I taken to what court?

MR. MASON: To court.

MR. BOPP: To court? Oh, 70 or 80.

VICE CHAIRMAN MASON: Have you ever had a jury trial?

MR. BOPP: No.

VICE CHAIRMAN MASON: Neither has the

Commission. So, I appreciate your distinction between jury issues and legal issues, but that is not the way 100.22(b) has ever been tried out.

I don't think that works as the -- the context I can understand, although I have a little trouble with Justice Roberts saying, "You can't look at context," but there is this rule that says 60 days from election, you know, defines the whole thing.

MR. BOPP: When 100.22(b) has been subject to a court determination, the judge is sitting as the jury when he finds facts because those court cases are in the context of --

VICE CHAIRMAN MASON: It is all disposed on summary judgment?

MR. BOPP: No. They can also -- well, some -- most are, true --

VICE CHAIRMAN MASON: That means there are no material facts.

MR. BOPP: Right, and federal Court

judges are making factual determinations to determine whether or not there is a material difference of fact.

Then, if it goes to judgment, because of context of declaratory judgment and injunction, or if there is a civil penalty because nobody has asked for a jury, it is the judge sitting as a fact finder, so that doesn't change what I said.

MS. WEINTRAUB: It has never happened. It has never happened. These are all disposed of on summary judgment, so yes, the judge has to decide if there is an issue of fact, but the summary judgment indicates that the judge decided there wasn't an issue of fact. There is nothing to go to a jury, so it's illegal.

MR. BOPP: But in that respect they are sitting as a fact finder.

VICE CHAIRMAN MASON: No, they are not sitting as a fact finder. They are determining that no fact finder is necessary

so they are deciding the issue as a matter of law, the party is entitled to relief.

MR. BOPP: There is no jury necessary to resolve a dispute of material facts, but as to the material facts and whether there is a dispute, he is sitting as a fact finder. He has a factual role in determining the facts.

MR. von SPAKOVSKY: Thank you, Mr. Chairman. Mr. Elias, I know when lawyers are in court they just hate it when judges give them hypotheticals. But if you don't mind, I would like to ask you one.

MR. ELIAS: Have at it!

MR. von SPAKOVSKY: You have a corporation that makes widgets and it's a unionized corporation and Congress for whatever reasons begins to believe that widgets are environmentally unsound and they start working on a bill that would outlaw the manufacture of widgets in the United States.

Now, the union and the corporation

are truly concerned about this and so they put a plan together to begin lobbying the congressional representatives, the senators and people in the House of Representatives who are working on this bill, in order to try persuade them that they should not do it.

Everything they do is purely lobbying activities. They are not contributing money to campaigns and they are not engaging in any federal election activities. And that lobbying activity, in addition to trying to meet with senators and the representatives, includes them putting together ads, perhaps, that tell people about this bill and what it's going to do and asking people to call their congressional representatives.

I would assume that you, as a lawyer representing the union and perhaps a corporation jointly, that you would be advising them that, yes, they do have to comply with the lobbying rules and

regulations that Congress has put out, but that in those kind of lobbying activities the Federal Election Commission has no jurisdiction over them and that they don't have to register with us and report to us their purely lobbying activities.

Is that correct?

MR. ELIAS: Well, there are a couple of things. Certainly the Lobbying Disclosure Act would govern their non-grassroots lobbying activity. And there is a distinction between grassroots and non-grassroots lobbying. If they triggered Lobbying Disclosure Act registration or reporting, then I would tell them that they have to abide by that.

With respect to the FEC, if they did not mention a federal candidate, did not trigger the electioneering communications rules, were outside the windows or what have you, yes, I would tell them exactly what you said.

I think the question is, what if they do trigger the electioneering communications rules? And under the hypothetical you have laid out, I would say, and obviously I haven't seen the ad, but they are probably within the ambit of Wisconsin Right to Life and they could probably run the ad, but depending on what the Commission decides with respect to disclosure, you know, that is going to be an open issue.

MR. von SPAKOVSKY: But that is the question I have for you. You're saying we should take the conservative approach, but isn't what is actually going on here that up until now labor unions, corporations, and advocacy groups like Wisconsin Right to Life, which are non-profit corporations, they were basically prohibited in that window from running electioneering communication provisions so there no reporting.

But you are saying that we should extend reporting requirements to them for

running grassroots lobbying communications and I do not see where in this book, which is our statutory code, where in here does the FEC have the authority and the ability to do anything with regard to lobbying activities? Which is what is going on with grassroots lobbying advertisements.

MR. ELIAS: Well, the question is not whether it has the jurisdiction to regulate lobbying activities. I mean, the fact is there are any number of lobbying activities that my clients engage in that in fact you do regulate.

Much of McCain-Feingold depended on whether my clients ads were real issue ads or sham issue ads and I am here to tell you that a number of the ones that people thought were sham were real.

So, the fact is you do regulate lobbying activity. You don't regulate it as such, but you regulate it to the extent that it is within the ambit of the agency's

statutory obligations.

My point, Commissioner, is this. I don't think you ought to read Wisconsin Right to Life as creating a need to go beyond that which Professor Hayward said, which is Section 203.

That's all the case was about. This wasn't a facial challenge. In fact, I would point out that, in fact, not only is the electioneering communications provision in that book, but it still is in the book.

The Supreme Court did not strike it down. In fact they upheld it. What they have now done is they have said, we are going to carve out this narrow little slice for ads that are -- well, they didn't even say that. They said, we're going to carve out a narrow little slice for the Wisconsin Right to Life ads.

Sensibly, this Commission -- I suppose sensibly -- is now trying to figure what that slice looks like so that it can

create a rule of application that takes that slice and mirrors it elsewhere, but I don't think that the Commission at this point should go beyond that.

MR. von SPAKOVSKY: Mr. Elias, isn't what the court did, isn't what they said, that the reason that the electioneering communications prohibition, basically, can't be applied to Wisconsin Right to Life is because they concluded that it was non-electoral speech?

By saying it wasn't express advocacy, nor the functional equivalent of express advocacy, they are saying it is not electoral speech. Would you agree with that?

MR. ELIAS: I don't know. I mean, this is my point. I thought the Supreme Court in Buckley told us that if you didn't use certain magic words you weren't regulated at all. And I appeared before this Commission hundreds of times arguing that position in written submissions that are

available in your enforcement query system.

I mean, no one is going to confuse me with an apologist for 100.22. I am too far down that road, but the fact is the Supreme Court told us in McConnell that I was wrong and presumably my two co-panelists were wrong in that and that, in fact, that isn't what was regulatable. In fact, they said, for example, promote a tax or oppose, were terms that a person of ordinary intelligence would understand and were not constitutionally inferred.

So now against that body of law, which is still the law, whether I like it and whether anybody else here likes it or not, that is still the law. They have carved out this narrow little slice for these ads running in Wisconsin and you are trying to now apply that beyond that?

I don't hazard a guess as to whether the Supreme Court was saying anything beyond what they said in that opinion. And I

would urge this Commission not to try to predict where that logic leads, which is why I do not think you ought to conflate express advocacy with the functional equivalent of express advocacy. They said functional equivalent of express advocacy.

I think that this Commission ought to take them at that word, and say, "There is now this thing called functional equivalent of express advocacy," and not try to predict whether that merges or doesn't merge or converges in some fashion with express advocacy, but just treat this case as what it is, which I think is a stand-alone narrow carve-out to what is still law of the land in McConnell.

MR. BOPP: That is so not what the Supreme Court held. It's true that that's what I asked for, but I am happy to report here that I got more than what I asked for.

I mean, the Supreme Court did not say, grassroots lobbying or these ads are an

exception to the electioneering communication prohibition.

Roberts did the opposite. Instead of defining the exception, Roberts defined the limited scope of the meaning of an electioneering communication, and that is, it is considered to be an electioneering communication only if there is no other reasonable interpretation, that the ad calls for the election or defeat of a candidate.

It is also true that he went on and said, yes, Wisconsin Right to Life falls under genuine issue ads which are now by definition excluded from the scope of the electioneering communication term.

So the court did much more than just carve out a narrow exception. They defined the scope of the prohibition.

Now, true, it was also a prohibition that was at issue in the case, but the reasoning and logic of the court is equally applicable to disclosure, just as

Buckley which narrowed the scope of disclosure, that rationale was equally applicable when they got to the corporate prohibition. Whichever way you start, the rationale is equally applicable.

And for this Commission now to seize the territory that Congress defeated, which is disclosure of contributors to grassroots lobbying, and, because of your coordination regs, do something no one has ever suggested as far as I know in the history of the expansive urges to regulate citizens in our democracy, that now coordinated grassroots lobbying would be prohibited.

CHAIRMAN LENHARD: Let me interrupt, and I apologize for this, because I want to back you up a step, because what the court did in Buckley on disclosure was, it was explicit, you know.

What we're struggling with here is the decision in McConnell, which upheld the

disclosure provisions, which were not challenged in Wisconsin Right to Life and the question of whether we should draw inferences from the logic or reasoning that the court expounded in Wisconsin Right to Life and change our regulations accordingly. And we have been counseled to be cautious in proceeding, either in trying to guess what the constitutionality of the disclosure rules would be in this context or even on a policy level. And I am struggling through that and I'd like your help.

Given that we've got -- and it raises a separate and similar problem which is, in Wisconsin Right to Life, Justice Roberts was very clear.

He was not overturning McConnell. In fact, he emphasized the degree to which the decision was consistent. So how do we wrestle our way through the problem that the disclosure provisions were specifically upheld in Wisconsin Right to Life and Roberts

was clear that he was not overturning, and in fact was loyal to the analysis there, and yet also draw the conclusion that we should remove the disclosure requirements in this particular context?

MR. BOPP: One way you can do that is look at McConnell's justification for upholding the disclosure on its face.

It says: "Vigorous disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertising influencing certain elections." Period.

The words "influencing certain elections" is exactly what Wisconsin Right to Life is dealing with and that is grassroots lobbying has absolutely nothing to do with influencing certain elections.

CHAIRMAN LENHARD: But you also argue, and I think you are correct, that what the court is protecting is more than

grassroots lobbying. That it is protecting, and Justice Roberts is explicit, as was Buckley, that there is a mix of speech, and sometimes there is election-related speech that is caught in this mix and we need to have a regulatory regime or a constitutional regime that is broad enough that even some of that speech slips by.

And given that these rules will allow certain speech that is for the purpose of influencing elections to go forward, despite the statute of prohibition because of the breadth of this constitutional protection, doesn't that, counsel, leaving in place at least until Congress or the Supreme Court acts, the disclosure requirements?

Because it will not simply be grassroots lobbying that is going on here and that is permitted under these rules, but also speech that is for the purpose of influencing elections.

MR. BOPP: Justice Roberts has

already told you that you cannot consider that, so why are you considering it?

What are you considering whether or not you think a particular genuine issue ad might influence an election when the Supreme Court has just told you, you cannot consider that. You cannot consider the effect that you think the ad will have on the election.

I don't understand why that would be part of your question.

CHAIRMAN LENHARD: Because I have a statute that is good law that requires disclosure and I have a Supreme Court decision that upholds it against constitutional challenge.

MR. BOPP: And I have Wisconsin Right to Life decision which is also binding on this Commission, that has explained that you may not take into account either intent or effect, that that is out of bounds.

So, your question assumes. And, you see, that's the troubling part here or

one of the many troubled parts. Your question assumes that in disclosure we can take into account effect. We just cannot take into account effect in prohibitions. Look, that is not what Buckley said when they were considering disclosure requirements.

They said, you cannot take into account intent and effect. Wisconsin Right to Life now reiterates that, so we have a nice fresh decision saying this. It doesn't matter if there is disclosure in Buckley. If it is a prohibition in Wisconsin, you are not to take into account effect.

CHAIRMAN LENHARD: But if we are not to take into account effect, this is in a context in which we are being asked to read the decision more broadly than the holding. And you are arguing that we should not take into consideration what the Chief Justice in that part of the decision that is the holding in this case identified as what would occur, which was that there would be election-

related speech that will be permitted despite the general statutory prohibition and we are not even supposed to take into consideration the Chief Justice's acknowledgement that is occurring as we decide whether to expand beyond the holding in this decision in establishing and setting of our regulations.

MR. BOPP: It is true that the Chief Justice said that "genuine issue ads can affect elections," and then he said, "but that is not a basis for prohibiting genuine issue ads and you are prohibited from taking that into account."

Of course, the application of this to commercial speech, it is perfectly obvious that it is utterly absurd and in fact this Commission decided in an advisory opinion that commercial advertising ought to be exempt from the disclosure requirement as well as the prohibition.

So you are going to have an auto dealership filing reports on $1,000 donors,

or in other words, reporting everyone who buys a car or gets service at this automobile dealership, they are going to be reporting the names and addresses of these people?

You will have on this advertising, you know, "Buy Our Used Cars," a statement, "not authorized by" a candidate? That's absurd!

This Commission recognizes the Darrow decision. If you adopt a regulation that places this all under the prohibition, then Darrow is repealed, as to the necessity of doing disclaimer requirements, then all of these commercial establishments are going to have to be doing that and that's ridiculous.

And it is ridiculous for the very point I made before. It has nothing to do with an election. Nothing to do with an election. Just like grassroots lobbying has nothing to do with an election.

CHAIRMAN LENHARD: But I thought you just told us we couldn't consider whether

it had to do with an election or not.

MR. BOPP: Yes, I did. Constitutionally, yes. What I was saying is that the court has decided.

You decided in the Darrow advisory opinion that it had nothing to do with an election, and therefore, disclosure was exempted from his dealership and the Supreme Court has said similarly the same point. It is that grassroots lobbying has nothing to do with elections.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: Mr. Bopp, it seems to me that what you're saying is that the court has told us that we are not allowed to consider, we are constitutionally barred from considering whether something is for the purpose of influencing an election, in which case the entire statute was just declared unconstitutional.

MR. BOPP: Actually, they have told

you this repeatedly and you are not listening. All right? In 1976, the U.S. Supreme Court --

MS. WEINTRAUB: This was struck down as unconstitutional.

MR. BOPP: -- even before you were on the Commission.

MS. WEINTRAUB: It has not been that long ago.

MR. BOPP: In 1976, the Supreme Court held that the words, "for the purpose of influencing an election," was limited to expressly advocating the election of or the defeat of a candidate.

This has been the law for 31 or more years and I know the Commission doesn't like it -- not you, but commissions in the past -- have not liked it and they have tried to circumvent it.

Subsection 100.22(b) is exactly that effort to circumvention. Oh, The Supreme Court in Buckley could not have

possibly meant it's a magic words test because that is subsection (a), so we will go to subjection (b) and consider external events and all this.

Now we have the Commission arguing to the Supreme Court and the Supreme Court agreeing in McConnell and in Wisconsin Right to Life that it is a magic words test, but now there are people who are saying, well, okay. The Supreme Court now has said it is a magic words test but we still get to get subsection (b).

MS. WEINTRAUB: Still the FEC trying to administer the FECA.

MR. BOPP: You always have to do it, and what the words say in that act includes what the Supreme Court says they say.

MS. WEINTRAUB: We invited you to testify, not to filibuster. Let me ask you a question.

Well, let me ask Mr. Elias a

question first because I am afraid once I get started with you, God knows how long it will take. Mr. Elias --

MR. ELIAS: Any hearing at which I am the reasonable one.

MS. WEINTRAUB: You are. Mr. Elias, I take it from your comments, putting aside the issue of the exclusions for commercial and business ads, that are at the end of, actually, both of the provisions, I guess, that if we were to adopt Alternative 1, would that comply with your goals of our doing what we have to do, and no less, or do you think we need to make changes to that?

MR. ELIAS: No, I think you have characterized my position correctly which is that Alternative 1 without the safe harbor is fine.

MS. WEINTRAUB: Okay. Now I am going to go back to fighting with Mr. Bopp.

MR. ELIAS: By the way, it's not to suggest that Mr. Bopp is not reasonable.

It's just that I am usually the one most stridently arguing that the Commission is overstepping its bounds. So I am glad -- I should be on his panel more often.

MS. WEINTRAUB: Is there anything left besides magic words express advocacy?

MR. BOPP: With respect to the court's interpretation of certain sections, influence relative to and in connection with, those are subject to the express advocacy test, the definition of electioneering communication subject to Roberts' test of "no reasonable interpretation."

MS. WEINTRAUB: Do you construe that as something broader than magic words express advocacy?

MR. BOPP: I think it is. I think it is electioneering communication, I mean, express advocacy plus, however its vagueness which I do think, if we just stop there, there is some vagueness in that test.

MS. WEINTRAUB: The Supreme Court

is unconstitutionally vague?

MR. BOPP: Well, obviously not unconstitutionally vague. There is some vagueness in it, but the vagueness is resolved in Roberts' opinion by the principle that "the tie goes to the speaker."

If the application of the test is uncertain or vague, then you get to do the speech. So the vagueness is resolved by the presumption that if you're uncertain or the application of it is vague, then you get to speak.

MR. ELIAS: Could I interject, because it's an important point. I am glad that there is at least agreement on this, which is one of the central things I came here to say. So let me say it again which is that there's a distinction between express advocacy and what was carved out by the Supreme Court.

It is the merging of those two things that I am most opposed to because

right now there is a regulated community out there that believes it knows when independent expenditure reports are triggered, when the coordination rules are triggered for express advocacy it believes it knows what that is.

If you want to repeal 100.22 then maybe I will switch, but you are not going to do that.

What I do not want to do is wind up at the end of this process with a merged express advocacy/functional equivalent to express advocacy, so that if the Democratic Senatorial Campaign Committee runs an ad commenting on the qualifications and fitness for office of a Republican senator, we are now engaged in express advocacy.

MR. BOPP: I agree with Marc on that. I think that's right because I think these are matters of statutory interpretation that the court has decided in Buckley, MCFL, and Wisconsin, and you now have those tests and they are different under different

sections.

MS. WEINTRAUB: If a corporation or a labor union wanted to run the Billy Yellowtail ad during the electioneering communications window, under your interpretation of Wisconsin Right to Life can they do it?

MR. BOPP: No. I think the Billy Yellowtail ad falls within the no reasonable interpretation other than a call for election.

MS. WEINTRAUB: How about Tom Keen?

MR. BOPP: I agree with six and seven, the Keen ads. In fact, I represented them in that. I do believe they are not express advocacy, but I do think that they flunk the Roberts test and will be subject to electioneering communication provision.

MS. WEINTRAUB: The Ganske ad?

MR. BOPP: All the rest are okay. All the rest are genuine issue ads, in my opinion.

MR. ELIAS: Let me point out that I agree with you on the Keen ads not being express advocacy.

MR. BOPP: Right.

CHAIRMAN LENHARD: Vice Chairman Mason.

VICE CHAIRMAN MASON: Mr. Bopp, just quickly, if you can, on the Ganske ad, "He has voted 12 times out of 12 to weaken environmental protections. He even voted to let corporations continue releasing cancer causing pollutants into our air."

That doesn't criticize the officeholder's position and it doesn't fit in the "Jane Doe" test.

MR. BOPP: I think Jane Doe can be run under the test, but in terms of Ganske, yes, it's a harsh criticism of his position on an issue or his votes, but so what? That's the nature of grassroots lobbying. Just talking about people's positions and saying they are wrong or evil or outrageous

or whatever.

VICE CHAIRMAN MASON: Let me put to Mr. Elias the problem I have, and I do understand that you are talking about express advocacy and the Wisconsin Right to Life test being different.

The problem I have in application is we've just been through this series of MURs on 527 where we assumed that McConnell meant 100.22(b) was constitutional, but a whole lot of circuit courts disagree about that, so we tried to render the meaning and in doing our honest best we came out with a number of cases that were the non-magic words express advocacy.

Now, how do we unwind that, because I have a hard time --

MR. ELIAS: You really don't want me to tell you how to unwind that.

VICE CHAIRMAN MASON: No, actually I do. Because if your position is that those were incorrect, and that the Commission should

restrict express advocacy to magic words or to 100.22(a), if you use that, then I think we are sort of at the position where we should repeal 100.22(b).

And so I want to understand, when you say, "leave express advocacy alone," what you mean and if you are satisfied going forward with the Commission's position in those 527 conciliation agreements.

MR. ELIAS: If I were able to write the rules, what would I do? Number one, I would say for hard money committees it is magic words.

Number two, hey, you said I could get to write the rules, so here is what I would do. I would have a different express advocacy, and by the way, I would also have a different coordination rule for party committees because you took a regulation that required you to repeal the old coordination rules and write new ones for everyone other than ads run by candidates and parties and

then proceed to write rules that apply to coordination rules for ads run by parties.

So what would I do? First, I would set aside the party committees and the other hard money committees and say for them it is magic words.

If you go back to the Furgatch ad, there literally was nothing else. It was about the Panama Canal and what the Ninth Circuit hinged on was there was nothing else that a person could do based on that ad other than vote for the president.

What I would do for that second category, for 527s and the other organizations that we're still talking about express advocacy, rather than upsetting the applecart entirely, I would probably take 100.22(b) and interpret it to really mean that there is no other interpretation.

If there is a call to action, if it's, you know, "Ganske is a bad guy and he shouldn't be in Congress, call him, and tell

him to stop being a bad guy." That is something other than vote. That is actually not Furgatch. Furgatch was without that call to action. So I might rewrite 100.22 in a way that the Commission wouldn't otherwise currently be contemplating.

MS. WEINTRAUB: That wouldn't cover Yellowtail though.

MR. ELIAS: It might not cover Yellowtail. Then, third, I would take Justice Roberts's tests for something that I think is a very different standard for corporations and labor unions where you cannot comment on qualifications for fitness for office, where I don't think a call to action in and of itself is a cure-all or a safe harbor to an ad that otherwise does not meet the criteria that Justice Roberts set out and I would probably create a three part test.

But, look, Commissioner, understand that I don't live in the universe in which

that is on the table.

VICE CHAIRMAN MASON: I understand all of that. And I assume you do not want us to rewrite the coordination rules.

MR. ELIAS: Correct. My point.

VICE CHAIRMAN MASON: The problem we have is that we have these enforcement precedents out there that do render these provisions of the regulations and they render them in a way that looks very similar to the outcomes I would see under the Roberts test, and so, when you're talking about what guidance is out there, that is available and valuable, whether to political committees or non-political committees, I think we have a problem and that is what we are grappling with.

MR. ELIAS: Fair enough. Let me offer two comments on the MURs that have been closed.

I have read them all, I think. I'm not sure I'll capture -- you probably could

come up with an example that doesn't fit here.

Number one, I do think there is a different line that the Commission has drawn in the 100.52 arena on the solicitation front where some of these settlements have been how the money has been raised and not how the money was spent.

You could actually solve some of the inconsistency that you're concerned about through that. In other words, you use a different standard.

Whether it is right or wrong, I will leave for another day, but there is a different standard on how the money is raised than what we have been talking about today.

The second thing is that there were some of the ads or some of the materials that triggered express advocacy in the closed settlements. I can think of the Swift Boat Veteran ads where there was no call to action, and saying, "John Kerry cannot lead,

John Kerry cannot lead," without any other non-electoral call to action, is awfully close to the Panama Canal Treaty ad.

In Furgatch you actually can square with some of those precedents within 100.22(b) even under the way in which I'm proposing it.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: I would like to go back to an issue that Mr. Bopp brought up which is the Darrow case.

And for members of our audience who don't know, the Darrow case was a matter where Darrow was the name of the candidate, but I think the candidate's family also owned a car dealership. And they were running very standard car ads, asking people to come into their dealership and that would violate the electioneering communications provision because even though it was a purely business advertisement, it had the name of the

candidate.

Mr. Elias, in your comment you said that the Commission should avoid drafting safe harbor provisions for so-called common types of communications especially true for subjects the court did not reach at all, such as commercial or business advertisements, public service announcements or charitable promotion activities.

I guess I don't quite understand that. Do you see some kind of constitutional difference between a business advertisement or a public service announcement such as when a candidate simply gets on, or a senator or congressman says, "Please support the American Cancer Society"? There is nothing in there that is the functional equivalent of express advocacy.

So how can we continue to enforce the electioneering communications provision against those kinds of ads?

MR. ELIAS: I don't think we say in

our comments whether you should enforce or not the electioneering communications provision.

Part of my argument today is substantive and part of it is procedural.

The fact is, as the Commission knows, my firm and I have been the requester in a number of advisory opinions that argue that the electioneering communication provision and other regulations should not apply to certain kinds of advertisements.

That does not mean that the Commission needs to use this rulemaking as an opportunity to make rules about it.

They are advisory opinions. They exist. People continue to be able to rely upon them to the extent that they are in materially indistinguishable facts.

My objection to this is not necessarily a substantive disagreement with you as to the outcome. It is a disagreement about what the Commission ought to be doing

today.

I was complaining slightly while we were waiting for you. So I hope you take this in good spirit. I have clients today who are trying to figure out how to pay for planes. It is just a bigger issue, to be honest with you, than PSAs.

So you want to put something in this rulemaking? Then why don't you put the plane provision in this rulemaking and worry about PSAs next time.

I have clients who are trying to figure out whether you are going to do something on hybrid ads.

There are a lot things that I would like the Commission to address. There are a lot of problems. There is a lot of real estate, to use the phrase I used at the beginning.

There is a lot of real estate I would like fixed while we are at it, but I don't think this should turn into a Christmas

tree bill where we solve a lot of perfectly reasonable public policy positions.

What this rulemaking ought to be, since it has been started and it is clearly going forward is to address the narrow issue that this Commission feels compelled to deal with because of this court case.

There may be any number of other really good ideas about how the regs can be changed. I just don't think that this ought to be the place to do it. So I don't necessarily disagree with you on the substance. It is more of a process concern.

MR. BOPP: Could I address that? I don't understand that position.

MR. ELIAS: I can explain it.

MR. BOPP: I know. You tried. I don't mean I don't understand. I do understand your position, but what I mean is, I don't understand how that serves the law, the public, the Commission or anyone.

If the Commission agrees that there

ought to be other safe harbors that are perfectly obvious, and some have been proposed, then to put it in the regulation means that somebody can just read the regulation and decide whether or not to go forward.

If you don't write it in the regulation then they are going to have to hire Marc -- I suppose that's the reason -- yes, he does very well at that and I do congratulate him on his practice. But then you have to file an advisory opinion, then wait 60 days, or if you hurry up 30 days, or file a lawsuit.

So what is the point of all that? What principle is served? Don't tell the people what they can do even if you all agree that they can do this.

MR. ELIAS: Briefly, let me respond to this. Joel Hyatt ran for the Senate a number of years ago and got in trouble over ads that were run.

He settled. He paid his little penalty. I believe it was an ice cream milk ad.

MS. HAYWARD: Yes, it was a dairy situation.

MR. von SPAKOVSKY: Oberweis.

MR. ELIAS: Yes, Oberweis. If we want to do a rulemaking where we solve all of the concerns that my clients have about PSAs, and businesses that they own, great, let's do that rulemaking. But why are we solving the narrow little problem of a car dealership?

I have clients all over the place that are not into electioneering communications who want their problems solved relating to how their business's ongoing activities intersect with the campaign finance.

I don't think that Joel Hyatt should have had to pay that fine. I agree. I can probably largely agree with Mr. Bopp on what the outcome is but it doesn't strike

me that it is an electioneering communications problem.

One little slice of it is an electioneering communications problem, but there are coordination rule issues that relate to that. There are 100.14 rules and corporate facilitation issues that relate to it.

This Commission has struggled in the past with the use of logos and whether or not the use of a corporate logo has qualified somehow as some kind of a contribution because of goodwill that was built up in the logo.

My point is, and I am glad we are here to solve the problem of one group of the regulated community, but I would like this Commission to understand that is a privileged group because they are jumping to the top of the line.

The Joel Hyatts and those who own businesses have been waiting for 20 years to

have their problem solved about how their business ads and how their businesses get dealt with.

Congressman Oberweis, he would have loved to have had this rulemaking to solve his dairy's concerns a few years ago.

My point is, I don't think solving the electioneering communications provision piece of it really frankly does much.

It's great for the people who run electioneering communications, but for the candidates, their concerns are much broader than that.

CHAIRMAN LENHARD: These people were fortunate to jump to the head of the line because Mr. Bopp prevailed in the Supreme Court and our efforts to enforce the statute were struck down.

So we have taken this on in an effort to try and provide much clarity as is possible as we go into the election year about what kind of speech we are going to

pursue in an enforcement action and on which kind of speech we are not.

One of our goals in this area is both with the safe harbors and with the provision that Commissioner von Spakovsky was just describing was to provide as much clarity as possible about where there was real consensus on the Commission that we would not proceed against people who have engaged in that kind of speech.

MR. ELIAS: Just on electioneering communications, or writ large?

CHAIRMAN LENHARD: We have raised both questions. We have certainly addressed in the context of electioneering communications and our regulations related specifically to them, but the decision has also raised the broader question of whether our definition of express advocacy as written in our regulations is inappropriate in light of these decisions.

MR. ELIAS: Then forget about

express advocacy. What about all the 114 issues, the use of --

MR. BOPP: Marc, file your own petition for rulemaking, will you?

MR. ELIAS: I have. I'm waiting.

CHAIRMAN LENHARD: And then it's slated against us, as there are too many changes in the rules because we have all of these things pending.

One of the points that Mr. Bopp fairly raises is the problem with doing as you suggest, which is to be moderate and humble and deal with only the specific holding in this decision and not look beyond it, is that it does lead to some, well, I was going to use the word absurd. They are not truly absurd, but some unusual or unexpected results.

For example, people who are truly engaged in grassroots lobbying suddenly finds themselves within our disclosure regime and similarly within the restrictions on

coordination of their lobbying activities.

So that is unusual. Congress obviously could grant us the authority to require disclosure in the context of lobbying and it hasn't. It may have stumbled in through the consequence of this litigation to that being the effect.

But what do we do with the fact that there are these problems that are left in our regulations that are very real practical problems for people going forward in legitimate activities, not in the gray areas, but in legitimate activities, if we do nothing?

MR. ELIAS: Much of the Federal Election Campaign Act, the pre-McCain-Feingold, rather than being a coherent scheme were the remnant pieces of a bill that had been partially struck down as to the contribution limits, so that you had 441(a)(d) sort of hanging over there not as a public policy choice to grant parties

extraordinary authority, but rather the remnant piece of what was essentially a series of contribution limits that got struck down and expenditure limits that didn't.

That is to some extent the nature of the beast. I'm not sure, but again, and is probably my overarching theme, is probably coming through loud and clear, I am not sure that in the list of absurdities that I am not going to start or put much higher on the list the example -- and I keep pointing at Commissioner von Spakovsky, because it is actually he who was proffering this to show the absurdity of it all -- that I have a federal candidate who wants to go to a grassroots fund raising event for state candidates and state PACs and I am supposed to have someone with a sign walk behind them that says that he is not soliciting more than $2,300 or contributions from corporations or labor unions.

So where do we start with the

absurdity? Is the most absurd thing we can find in this bill or what is left in the law that corporations and labor unions cannot run ads in 30 days of a primary or 60 days in a general election without disclosing?

That's where we're going to start with our concern about the absurd results of what we are left with?

That's the kind of the nature of where the law is, post-McCain-Feingold. There are a lot of these provisions.

Why can't the DSCC solicit any money for charities? Why is that? Which is more absurd? Why don't we put in a provision in this bill and why not make the safe harbor provision saying that they can raise up to federally permissible amounts for non-profit organizations? Why don't we solve that in this rulemaking?

There are all kinds of little niche weirdnesses and absurdities that are left either as a result of the court decisions or

as a result of the bill itself or frankly the result of the way in which the Commission has implemented some of these provisions.

That may be a motivating reason to do an omnibus cleanup of the FEC's regs, but I don't think it is a reason though to be motivated to do anything more in this rulemaking than what the court has instructed to you do.

CHAIRMAN LENHARD: Vice Chairman Mason.

VICE CHAIRMAN MASON: Well, first I just wanted to note that one of the pending rulemaking petitions was filed by a fellow named Bob Bauer, who thought we really needed an exemption for movies, which on my list is at the bottom, frankly, of compelling things to look at.

But here's what I think the problem is and where let me just try to understand why there is a difference.

The reason that I think the express

advocacy question is inescapably before us in Wisconsin Right to Life is because I read 100.22(b) as broader, as capturing more speech than the Roberts test in WRTL.

And if that reading is correct, then what you have is a decision that says, well, yes, as a matter of fact a corporation may run an ad mentioning a candidate in the time period, and so on like that, and it's exempt under the electioneering communications prohibition, but it is captured under the Commission's express advocacy regulation. And that's not just an absurd result, but it's a result then that we have to reconcile somehow in our enforcement and then it gets to this issue of being able to tell people what they can do in this upcoming election season.

Let me ask as a factual predicate if you read it the other way.

MR. ELIAS: I do read it completely the other way.

VICE CHAIRMAN MASON: You are reading it that the Roberts test is more expansive than 100.22.

MR. ELIAS: Let me put this clearly so that we do not get tripped up on expensive and narrow, because I did the same thing.

I think there is a zone of speech that can be regulated and it's this big. Express advocacy covers less stuff, less of that real estate than what Roberts's test does, so I read it the complete flip of the way you do.

MR. BOPP: How can that be when you can look at external events under subsection (b) and under Roberts you are prohibited from doing that?

External events -- if you are required to consider them, on occasion, that will mean that speech is swept in because of those external events and Roberts says under his test you cannot use external events. How can that be?

MR. ELIAS: For example, the Roberts test seems to say commenting on qualification for fitness for office.

MR. BOPP: He doesn't say that in no reasonable interpretation. Looking at the ads as an example of a grassroots lobbying.

MR. ELIAS: He mentioned it because obviously he thinks it is relevant.

MR. BOPP: For one particular set of ads called grassroots lobbying, but for his general test he doesn't say that. His general test doesn't refer to that at all.

When you talk about comparing general tests, you can consider external events in some, which would encompass the speech just because of an external event, but not in another, and it is obvious that the one that allows you to consider external events is broader.

MR. ELIAS: First of all, I thought we had finally reached an agreement, earlier, that you agreed with me that it actually was

narrower.

But in any event, I have always read 100.22(b), and it goes to your point before about how these cases have actually been litigated, and in my experience how they have been dealt with by the Commission, that with the exception of the FEC actually having paid attorneys fees as a sanction in the Fourth Circuit Christian Action Network case, that seems to break the Commission of any interest in actually getting into the background of what these ads were and what the external events were other than the objective content of the ad.

In my experience 100.22(b) has basically been an objective test that makes limited reference to external events, but basically asks the fundamental question, is there another reasonable interpretation of this ad other than an exhortation to vote?

I have seen the Commission apply it. I agree with you. The most recent

applications in some of the 527 cases are harder to square with that history, although I do not think they are impossible to square with that history.

I have read the FEC's history of interpreting 100.22(b) to those situations like in Furgatch itself, which is what it was modeled on, where there really is no other conclusion you can draw other than it was an effort to exhort someone to vote for or against a candidate.

MR. BOPP: Why are we even talking about Furgatch when the Ninth Circuit itself has construed Furgatch, rejected this broad interpretation and said that it requires explicit words of advocacy? It is the Ninth Circuit itself and that is what Furgatch means now.

MR. ELIAS: Because it's where 100.22(b) came from.

MR. BOPP: Then that just demonstrates that 100.22(b) is at least an

anomaly, something that was based on an incorrect interpretation of the Ninth Circuit Furgatch decision which the Ninth Circuit has now corrected and explained.

CHAIRMAN LENHARD: What do we do, Mr. Bopp, with the Supreme Court's decision in McConnell where they indicated that the express advocacy test, at least as defined by magic words, was not effective and that it was functionally meaningless?

MR. BOPP: What it means is, and which the court of course emphasized, is that the construction gloss on those statutes remain. They are emphasizing what I have said since the 1980s, that it's a magic words test, it is an explicit words of advocacy test so that means that (b) is completely illegitimate.

Third, it provided the predicate for the court saying, well, the Congress can go farther by a statute if it is the functional equivalent of express advocacy,

which they found the electioneering communication on its face to be so.

Then the court talked about the applicable as applied challenges, and said, now here is the test for functional equivalent. So it led the court to certain holdings or decisions.

If Congress wants to go farther, because all of the applicable statutes have now been construed. They have all been construed by the court, so you're stuck with that and if Congress wants to go farther, then that's Congress's job.

MR. ELIAS: In the spirit of the humbleness and modesty, I would suggest that if this Commission views this rulemaking as about express advocacy, then it ought to put out a revised notice of proposed rulemaking that says it's about express advocacy, and you will be flooded with comments.

The fact is people read this rulemaking and that this was a rulemaking

that affected this narrow group of people, corporations and labor unions, and what I am hearing today is that, no, no, there is no way to actually deal with this narrow little problem without reopening what is express advocacy, which means what are independent expenditures, what constitutes political committee status, what triggers reporting by individuals who run certain ads? What are the coordination rules?

This definition spans across a whole lot of the regulations and the rulemaking that we're here I thought to talk about is a fraction of one percent of the conduct that that section intersects with.

The volume of activity that goes on in connection with federal elections or not in connection with federal elections that this Commission worries about, where the question of what is express advocacy, and what is not, I am just concerned that what the commenting universe looks like and what

the range of concerns that have been brought to the table here, are not reflected because, like I said, most people who looked at this said, well, if I don't have a corporation or a labor union, this is not about me.

It now sounds like it may be really about them and they're all going to wake up one day and be awfully surprised that the definition of express advocacy has been rewritten.

VICE CHAIRMAN MASON: I just want to point out though, that was in Mr. Bopp's petition and it was in our notice. I can understand your policy point that it is too much to bite off, that there are too many other implications, but the idea that somehow somebody was without notice about this just doesn't stand up because it was in the petition and it was in the notice.

CHAIRMAN LENHARD: Professor, would you like to chime in?

MS. HAYWARD: Yes, just chiming in

about what do you do with McConnell now that we have Wisconsin Right to Life.

Recognize McConnell for its limitations, I think, which was a facial challenge, a complicated statute, and the bar to jump to make an unconstitutional claim against a facial judgment is awfully high. We are not in that world anymore because we are talking about real people and real activity now.

So to the extent that the McConnell court says as facially challenged this would withstand scrutiny doesn't mean that when you come upon somebody who looks a lot like Wisconsin Right to Life, you have to say, well, gosh. That is not exactly like this.

You cannot make a fetish out of what McConnell says as though it is the last word on the constitutionality of the application of BCRA for a particular set of facts, because it's not.

It is the last word with regard to

the application of BCRA to the majority of facts and nothing more, because of the procedural posture of it.

MR. BOPP: If the consideration of 100.22(b) will hold you up significantly from coming up with a final rule under the electioneering communications definition, then I am sympathetic to that concern and the Alliance for Justice and others who have suggested that you simply, rather than just drop it and pretend there is not a problem here that needs addressed, open up a second rulemaking.

But that is based really upon the ability of the Commission. I understand it is more urgent at this point to get out the electioneering communication rulemaking.

One other point about the Alliance for Justice. I would identify myself with their comments on the technicalities of the particular proposals you have made. I really share their concerns about how the

particularities have been structured.

CHAIRMAN LENHARD: Thank you. Commissioner von Spakovsky.

MR. von SPAKOVSKY: This question is for all three of you if you want to discuss this.

Going back to the disclosure issue, while we may disagree about the exact language, I think we are all agreed that the reason the Supreme Court said we could not apply Section 203 to Mr. Bopp's client's ads was because they decided they were genuine issue advertising.

Now there's a whole series of Supreme Court cases on the issue of compelled disclosure of funding issue advocacy starting with NAACP vs. Alabama and the Bellotti case, and Watchtower, so do we as a commission need to take into account that jurisprudence and those holdings in making a decision on this particular issue of disclosure?

In other words, there was no

discussion in those cases in the Wisconsin Right to Life decision, but that is outstanding Supreme Court law and precedent on this. I would like to hear your opinions about that.

MS. HAYWARD: I will start out while they think about what to argue about.

Disclosure gets fundamentally less scrutiny than prohibitions or limits in this constitutional constellation of law that we apply and not just law related to the federal election campaign act in BCRA, but other laws related to other kinds of disclosure and notices and other sorts of things.

And so I don't know if somebody brings the claim that electioneering communication disclosures are unconstitutionally burdensome what answer you get because the level of scrutiny is less and the court looks at different interests.

It is not just corruption or the appearance of corruption anymore. It is also

voter information and the ability to assist the government in enforcing the law, so I honestly cannot say.

My hunch is, given the prevailing wind, that if that case is postured properly that the court will say, we really meant it. We really meant that it has to be the functional of express advocacy for you guys to get your mitts on it in any way, shape or form, and we mean it this time.

And then you'll go, okay. Now we know. And they will apply some sort of test to it that probably doesn't look like any other disclosure test we've ever seen before and they'll find some precedents like Bellotti that are very favorable to independent speech and we can go on for a while until something else happens.

Perhaps I am cynical but I think that is how this area of the law works.

So honestly, I don't know. It's a good question that reasonable people can

disagree about. I could write briefs on both sides, I think, and feel pretty good that my research was sound, but that's where we are.

It is not your fault. It is partly the fault of Congress and partly the development of the law through the years where it has come across very inconsistently and very deferential to Congress in terms of disclosure.

MR. ELIAS: I'm not sure I disagree with anything Allison has said, but I just come back to my basic point which is, if you don't know, then it is not the role of the Commission to divine what the Supreme Court will do next, even if her predictions are right.

Your job is to interpret the statute as it has been given to you.

There were many predictions when McCain-Feingold passed about provisions that were going to be struck down for sure as unconstitutional and I was a prognosticator

of many of those predictions.

But the Supreme Court does what the Supreme Court does. Sometimes it confounds the Commission, but the Commission has got a right. A lot of people thought the Millionaires' Amendment was unconstitutional. Maybe it is. We're going to find out, I suppose. It is being litigated.

But the Commission didn't sit around and say, we're really not going to enforce the Millionaires' Amendment for now because probably the court will eventually strike it down. It is probably not way the law is developing.

The statute is there.

CHAIRMAN LENHARD: If I can change the topic a little bit? Mr. Bopp, I want to talk a little bit about the way we look at context of speech and the degree to which we can, because one of the problems we have as we sort of struggle through this in a very practical sense is that it's almost sometimes

impossible to understand the meaning of speech without understanding the context in which it occurs.

And the amusing hypothetical I developed last night was the person who says, "Yay, Yankees" -- which is interpreted very differently if you are riding a subway up to the Bronx in September or if you're at the parking lot at Stone Mountain, Georgia, on Confederate Remembrance Day.

So those words, "Yay, Yankees," have dramatically different meanings in those two contexts.

So it's impossible to understand what is being said without the context and it is true even with the magic words, if we looked at some of them without knowing more of their context.

What is the court really teaching us there? Is it that we are not to go beyond context which is easily perceived without intrusive discovery? Is there sort of a

common understanding of timing and words and the identity of particular people who are mentioned in the ads, or is it even narrower than that?

MR. BOPP: The court is allowing the consideration of relevant context and that was a phrase we used in our briefing. That is, here's a candidate, in the Senator Feingold context, he's a candidate and the election is within 60 days. So that's context.

It is not in the ad and there was one little increase in that, I would suppose in the consideration of grassroots lobbying, is the pending issue, although I think more has been made of that than is justified.

So there are relevant contexts and I think those the court is certainly saying you can consider. And then on the opposite side, which was part of the problem, by the way, of the way that you've drafted these things, is you are putting all of the weight

on what you can consider in the regulations themselves, but no weight at all on what the court has said you cannot consider.

You cannot consider context like subjective intent or the effect that somebody speculates this ad might have on this election.

As a general statement the court said there will be little if any discovery, so the whole force of the decision will be very very little that the court will consider to be relevant context and probably nothing that is not readily ascertainable as a matter of judicial notice for this to be workable.

See, that is back to the challenge. The challenges will make this workable. Otherwise the statute will be overturned in my judgment, on its face. It will be gone.

So, you're kind of in a salvage mode to save this statute in terms of some applications.

CHAIRMAN LENHARD: Commissioner

Walther.

MR. WALTHER: Thank you. In connection with the reporting issue in the disclosure standard that is mentioned, and yes, I am thinking of the different standard that would possibly apply when you have disclosure obligations as opposed to prohibition.

First, Mr. Elias, you asked us to confine our rulemaking to 203, but then there is nothing there that authorizes reporting for corporations and unions since before it was prohibited.

What would you propose at this point?

MR. ELIAS: The Commission's approach to this ought to be that the statute, all things being equal, requires disclosure and it is, at its core, a disclosure statute.

Yes, it is 201(a)(f). Until you get to a place where a court has told you

that that doesn't exist anymore because it is unconstitutional, then I think you are left with it.

The fact is this provision, the electioneering communications provision in its entirety, was not struck down by the Supreme Court in McConnell. In fact, it was upheld.

As the chair said there was an effort by the Chief Justice here not disassociate himself with McConnell as he could have, but rather to harmonize his decision with McConnell.

So I hate now to try and read the tea leaves, having told you not to, but I think what you are left with is the statute as it is and the Supreme Court that went out of its way, or it seemingly went out of its way, and I grant you that is tea leave reading, to not do anything more than deal with the 203 issues.

MR. WALTHER: Then, Mr. Bopp, let

me ask you this. First of all, I'd be interested in your reaction to the comments of Mr. Elias since you're not totally in synch today. Do you consider WRTL to have basically obviated the ability for the Commission to require disclosure at this point?

MR. BOPP: Yes.

MR. WALTHER: You do.

MR. BOPP: Yes, I do.

MR. WALTHER: That is because it changed the definition, in your view.

MR. BOPP: Because it changed the definition of my view. It went beyond what I was asking for which was an exemption from the prohibition and sought to define the scope of what is encompassed within electioneering communication, subject to Roberts's test.

The argument that prohibitions would be struck down, but disclosure would be upheld is an argument that Buckley was

wrongly decided. The Supreme Court in Buckley did exactly what I am saying the Court has done in WRTL. That is, they defined the limited scope of what is unambiguously campaign-related in that case to only express advocacy and it was a disclosure statute and you cannot apply disclosure beyond what is unambiguously campaign-related. And now in the electioneering communication area we have the court explaining what is now unambiguously campaign-related and that is it has to flunk the test.

MR. ELIAS: In Buckley, though, if my recollection is correct, the original statute would have banned all expenditures from individuals over a certain amount -- over $1,000, thanks -- and that was struck down as to independent expenditures made by those individuals, but they still require disclosure.

MR. WALTHER: The point I am making

is that historically there has been a standard in terms of what the court requires in terms of regulating disclosure versus prohibition and communication and here you're saying that now there is no more standard left in that regard? Because --

MR. BOPP: No, I am not saying that.

MR. WALTHER: I can see in your brief that you are quite complimentary of how it could turn out the way you originally proposed it.

MR. BOPP: It is not that I am saying that a different standard applies to disclosure versus prohibitions. I am not saying that. And I'm not saying that has been changed yet.

What I am saying is, whether it's disclosure or prohibitions, the court has been consistent in narrowing the scope to only that which is unambiguously campaign-related by either the express

advocacy test in Buckley or Roberts's test in Wisconsin Right to Life.

That has implications. That means disclosure similarly. Because if they are right, Buckley would have upheld disclosure and then struck down the corporate prohibition, but they did not do that.

When they say "influence elections" they mean it. They mean unambiguously federally candidate related. They don't mean grassroots lobbying. They don't mean commercial speech. They don't mean PSAs. They don't mean those things.

MS. HAYWARD: I am not sure the parallelism with Buckley works because Buckley's construction was applied because of concerns about vagueness. It seems to me what we are talking about in this line of reasoning concerns about overbreadth and lots of times vagueness concerns are about overbreadth. Oh, gee, if the law is vague, then prosecutions will be pursued that ought

not to be pursued under the First Amendment.

But this is not about vagueness any more, where in both of those contexts in Buckley it's about vagueness.

MR. BOPP: If you look at page 80 of the US Reports, this is where they use the phrase "unambiguously related to a federal candidate's campaign" and they do speak about overbreadth there.

They say one of the concerns is that it means political committee definitions would be applicable to organizations involved in issue advocacy. Now, that is an overbreadth.

MS. HAYWARD: Right, because that is the registration law too.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: Mr. Elias, you are a practical campaign finance lawyer.

MR. ELIAS: That's exactly right. You can tell I am a fish out of water.

MR. von SPAKOVSKY: But let me tell you what I do not understand. Let's go back to my earlier example of the widgets bill that Congress is contemplating.

The corporation uses its general treasury funds, which are derived from sales, investment, capital to pay for the electioneering ads.

The union uses its membership dues that go into its general treasury account to pay for the ads. They are joined by an advocacy group, let's say the ACLU, which is concerned about the Congress outlawing this industry and the ACLU also pays for these kinds of ads and they get their money from corporate donations, membership dues, et cetera. In those circumstances what I do not understand is what are you going to tell your clients they need to report?

MR. ELIAS: Well, a couple things. First of all, going back to the Lobbying Disclosure Act, the Lobbying Disclosure Act

faces similar sets of issues, where you have coalition activity and under what circumstances you have to pierce beyond the coalition and look at the funders of the coalition. So, this is not actually that foreign a concept. I raised LDL only because you raised it in the last hypothetical we were talking about. So it is not something that is completely foreign, number one.

Number two, that is what the FEC is for. The fact is, it wasn't self evident that if Senator Dayton lends $100 to his campaign and then gets reimbursed that somehow the Millionaire's Amendment goes up and doesn't come down. But you know what? The FEC told us that was the answer.

The fact is, the FEC, that is presumably part of what you will do in the creation of the forms and the disclosure rules -- does 24 hours mean a calendar day? Does it mean 24 hours from the time the check is written?

The Commission faces these kinds of questions all the time in how far back you want to peel the onion to figure out the source of the funding for the ad is. That is something the Commission will deal with.

MR. BOPP: So why wouldn't you want to help him?

MR. von SPAKOVSKY: The reason we are here is so you can help us determine how to do that. Let's go back to the ACLU example.

They have large donors, over 10,000 individual donors giving them money, but the donors are not giving the money tied to this particular advertising campaign. So how are we supposed to figure out what they report?

MR. ELIAS: I assume, since I have three times tried to get the Commission to answer that question on the Millionaires' Amendment, you will say you can use "first in first out" or any other reasonable accounting method.

I don't know, but the Commission faces that exact question all the time when trying to identify what the source of funds are in an account and it faces it for contribution limits, for transfer issues, and it faces it for aggregation purposes, it faces it with Millionaires' Amendment questions, so I would assume you would say these are reasonable.

VICE CHAIRMAN MASON: The difference is that we have asked some specific questions in this rulemaking. You have said that your client has an interest in knowing who funded these ads, and so we're asking --

MR. ELIAS: I would say a reasonable accounting method.

VICE CHAIRMAN MASON: So we should require that we should not allow an organization, for instance, just say a corporation that runs the ads and they say, we just did it out of our corporate funds, but rather they should apply "first in and first out" or something

else and report some specific funds? You know, the last $10,000 worth of widget sales? Or the last $10,000 in new stock issues?

MR. ELIAS: Certainly in the case of a membership organization where the identity of the funds are clearer, they are not the proceeds of business operations, I would urge the Commission to have some reasonable accounting method.

VICE CHAIRMAN MASON: So, membership organizations, which presumably get some protection on the First Amendment --

MR. ELIAS: They do.

VICE CHAIRMAN MASON: -- have more onerous disclosure than business corporations.

MR. ELIAS: I think the disclosure is easier.

VICE CHAIRMAN MASON: Yes, it will be easier, but I'm just asking about what we ought to apply. What is our rationale for saying that we are going to require membership organizations to peel back and reveal their

dues payers, but for business corporations we are not.

MS. HAYWARD: If you want to be bold, I might suggest, if I still worked here and worked for the same commissioner I used to work for, and we felt like being bold which was on any given day, sub (f) requires the disclosure of contributors, not customers, not people who pay fair market value in the marketplace for your services, not even necessarily members who are joining your group for its general activities, not contributing to this specific fund and that is even in sub (f) where you don't have a separate segregated fund.

All you need to do is ask people to disclose those contributors of $1,000 or more in the preceding year. It seems to me if you want to define bold, just find a contributor for this purpose in some way that captures the isolated and idiosyncratic donor who is giving for this particular ad campaign, and

no one else, and so then what you would have is the entity who is making the funding out of their general treasury funds reporting that on X date they spent Y for Z.

VICE CHAIRMAN MASON: I appreciate that, but I'm trying to understand from Mr. Elias because he says his client wants to know who is behind these things.

MS. HAYWARD: Well, his client's out of luck.

VICE CHAIRMAN MASON: Is what Professor Hayward said satisfactory? Or invasive disclosure is necessary?

MR. ELIAS: What Professor Hayward said in the first part I agree with, and the second part I don't agree with.

It is what I was trying to say before, but perhaps less artfully than the professor can.

There is a difference between organizations that have contributors, that have people who are giving them money, than

Ford or General Motors and in the instance if the Commission wanted to draw a line, and said, we're going to treat organizations where they are collecting funds, presumably as, if not earmarked for this purpose it is among their purposes, to disclose on some reasonable basis who those donors are. I think that is a perfectly reasonable proposition for the Commission to adopt even though it might treat Ford differently.

VICE CHAIRMAN MASON: The trouble I see though is that the government's interest, such as it is, in disclosure is the same.

MR. ELIAS: Really? It is?

VICE CHAIRMAN MASON: Well, in those ads the ad content is the same, so I don't know what difference it would be. And if there is a difference, then what you're saying is that we have a greater interest in compelling disclosure of non-profits and there we are with NAACP vs. Alabama.

MR. ELIAS: First, let's be clear.

This is not Alabama in the segregated 1960s dealing with an organization trying to secure the right to vote.

All of the over reading of the NAACP case gets a little stretched every time we talk about disclosure.

The fact is that we face a world right now in which people can fund advertisements whether constitutionally protected or not, and they are constitutionally protected, are, at least as the chairman said, "mixed in their effect" and having an election-related effect as well as issue-related effect.

And I think Congress could make a judgment that they want that disclosed. Now, it may be that the Supreme Court -- you're right -- winds up saying, no, no, Congress, you couldn't have made that judgment.

But that is a decision for the Supreme Court to make with respect to what Congress wrote. I don't think the Commission

here ought to say, no, no, this is covered by NAACP.

VICE CHAIRMAN MASON: No, but you are telling us to draw a line between for-profit and nonprofit corporations.

The Commission didn't advocate that. Congress didn't advocate that and the Supreme Court didn't advocate that, and I am trying to understand your rationale for drawing the line between for-profit and nonprofit corporations.

MR. ELIAS: Let me go to the professor's point, which is the part I agree with, there is a difference between contributors who are giving their money to organizations not for services, not as part of a commercial transaction, but are supporting their ideological causes presumably in most instances, Congress can make a decision that those organizations --

VICE CHAIRMAN MASON: But Congress didn't make that decision. You are telling us

that --

MR. ELIAS: That's the language of the statute.

VICE CHAIRMAN MASON: But Congress made the decision between prohibition or not, so that's gone. So we now have to decide how, if we are going to keep the disclosure requirements, how --

MR. ELIAS: You will interpret the language of the statute?

VICE CHAIRMAN MASON: -- how to apply it.

MR. ELIAS: The language of the statute.

VICE CHAIRMAN MASON: That goes to corporations. The language of the statute does not distinguish between for-profit and nonprofit corporations.

MR. ELIAS: But it requires the disclosure of contributors. So the question is, are there contributors to Ford?

CHAIRMAN LENHARD: For me that seemed to be the point at which some of these

problems fell away and that the disclosure provisions of the statute seemed to be more limited to contributors or contributions that had to be reported, as we were sort of wrestling through the implications of this as we moved from sort of the kinds of entities or organizations that Congress was really thinking about when they drafted these disclosure rules to entities that they never contemplated being covered by disclosure rules because they were banned from making these kinds of expenditures, that there was value in the statutory limitations as to what had to be disclosed.

MS. HAYWARD: I don't know what the research will find, but this problem comes up in state context with disclosure of ballot measure activity where you have issue activity, issue speech, but is it about a ballot measure? Is it about the issue generally? Or do we pierce the veil of the committee that is doing the ballot measure

expenditure to figure out who gave it to them? When do we get to do that? That sort of thing.

I don't know what staff research might indicate, because I've never done it, but it seems to me there might be tests for contributor in some of the state laws that would be useful to compare with the problem here.

CHAIRMAN LENHARD: The harder problem that the Vice Chairman's question poses is in the context of organizations that are non-profit organizations that are raising money generally, that generally do not have disclosure rules apply to them. Does the fact that they run an ad like the one that was run in this particular case then lead to a degree of disclosure that is far beyond the funding of that particular ad.

This has been a question that organizations have wrestled with for a long time which is, is this money really coming

from the donors to the group or have they made general donations to the group and the group makes the decision to run the ads? And it would seem it is the group that has made the decision to run the ads rather than the donors guiding that money to the ads, that the disclosure would reasonably fall on the group and not its members --

MR. ELIAS: This is a narrow subset of what Allison mentioned. Well, I should not say narrow subset, but it's an analogous situation to what Allison is talking about.

But this happens all the time when you have national organizations that operate in states that require disclosure. And there is usually in most states, and they are all different, but in most states will allow you to figure out if you spent $50,000 in their state what did that $50,000 represent?

And it's not that it had to be earmarked. It is just reasonable accounting. In most states it is a reasonable accounting

method. It is "first in first out" or "last in last out," so you go back and you figure out, so there is $50,000 worth of activity that we spent in state X, and that becomes the reportable activity.

CHAIRMAN LENHARD: In most of those states those funds are deemed as having been "contributed by" the entity that spent them.

MR. ELIAS: Correct.

CHAIRMAN LENHARD: Rather than by the last fifty people that made their membership contributions. I can think of only one state which required that. Commissioner Weintraub.

MS. WEINTRAUB: This is for Professor Hayward. Is there any insight on the Jane Doe footnote, what we should make of it and how we should define condemnation?

MS. HAYWARD: Yes, I would look at that as Chief Justice Roberts trying to be helpful by providing some example and not look at it as a necessary modification of the

general test that is provided in the case.

So to the degree that it has any independent significance beyond the "no reasonable interpretation" language, I would set that aside.

I think it's interesting. I don't think a condemnation is any -- you know, it starts sounding a little like PASO to me and I have never known what PASO meant.

MS. WEINTRAUB: Me neither.

MS. HAYWARD: Whether he is trying to suggest that negative ads somehow can become the functional equivalent of express advocacy under some sort of lesser test, I would not even try and guess because I don't think he has made it clear.

It is a gloss on the general test, so I think you got the general test to work with.

MR. BOPP: Wouldn't it also make it unworkable? I mean, this Commission say it's okay to obey a regulation, and say it's okay

to criticize, but not to condemn.

Everybody would look at that and know, particularly in light of the fact that your Commission lawyers in Wisconsin Right to Life, and the amici on your side, and the intervenors all said that Wisconsin Right to Life's ads criticized and condemned Senator Feingold when they didn't -- obviously no such thing -- but these reasonable people out here who are interpreting what the ad said decided that these ads do.

So, if you inserted that as a test it would be completely unworkable.

CHAIRMAN LENHARD: In my youth I believed that "Paso" was a dangerous town in Texas. Commissioner Walther.

MR. WALTHER: Just for our perspective, and looking at it from the perspective of we have a law to uphold, it is pretty clear to us that the law is not constitutional and that's our job, so I am obviously concerned about the reporting issue

in this particular comment.

Why would we want to abandon the issue of our ability to require disclosure when Wisconsin Right to Life didn't seek to have that issue resolved?

It wasn't briefed. It wasn't directly touched on by the court. We have some fairly strong language saying disclosure has potentially a different standard of review than prohibition. Then where do we go as a Commission without more guidance than we have now to abandon our disclosure requirements?

If you don't mind, I would like to read a couple of sentences from your brief, because this is the context in which I asked the question.

"Because WRTL does not challenge the disclaimer in the disclosure requirements there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering

communications both as to disclaimer and public reports. The whole system will be transparent. With all of this information, it would then be up to people to decide how to respond to the call for grassroots lobbying on a particular government issue and to the extent there is a scintilla of perceived support or opposition to a candidate the people with full disclosure as to the messenger can make the ultimate judgment."

This is the struggle that I think some of us have, which is where we go here and take a big leap to remove disclosure as a requirement?

MR. BOPP: Because I am familiar with those words --

MR. WALTHER: Yes, I know you are. They are directed to you.

MR. ELIAS: Very eloquent.

MR. BOPP: Thank you. Because we got more than what we asked for. What

difference does it make what we asked for? What difference does it make what we thought the state of the law would be if we got what we asked for when the court did not give us what we asked for?

We did ask for an exception to the prohibition. That is what we asked for and if the court would have given it to us, that would have been the state of the law as we described it.

They didn't give us that. They gave us something broader. They did not define an exception.

They defined the scope of the electioneering communication provision that it's limited to only when there is no other reasonable interpretation and there is an implication from that that this Commission should recognize.

It is so obvious, it just seems to me to be so obvious, when you simply try to apply the whole idea, grassroots lobbying is

now going to be subject to disclosure and disclaimer requirements or commercial speech is now going to be subject to disclosure and disclaimer requirements under the Federal Election Campaign Act which this court has already held, "this is not election-related."

Those activities you acknowledge commercial, the court says grassroots lobbying, and then you try to apply this scheme. That is half the reason why this is such an incredibly long notice of proposed rulemaking, because there are so many implications that are completely unexpected and untoward and in the face of Congress refusing to pass a bill that will do very thing you are being asked to do.

I never said that it is required by the decision. I have never said that. I said that it is appropriate for you to consider what the court has held and its implications for your regulatory scheme. That is what I said.

MR. WALTHER: I understand that, and if you say it is not required by decision, then I see where we are communicating, and I tend to agree with that and whether it is an implication that is sufficient to cause us to speculate about the future when you go back there, that is the hard part here. Thanks.

MR. ELIAS: Could I just say a word? Because it has come up several times now that Congress chose not to regulate this.

I assume what we are talking about is revisions to the Lobbying Disclosure Act and whether or not there would be as a part of those revisions disclosure of grassroots lobbying activity.

These are really apples and oranges. First of all, they are totally two different regulatory regimes, but more importantly, the Lobbying Disclosure Act amendments or discussions or proposals, or however you want to put it, would have dealt

with a lot of activity, a lot more activity, than is at issue here.

Let's just take a step back. We are talking about radio and television ads that run within 30 days of a primary or 60 days within a general election.

That is not what the Lobbying Disclosure Act provisions that were being debated in Congress would have dealt with. They would have dealt with all modes of grassroots lobbying activity, whether on radio or television or not, whether there were people making phone call programs to Senate offices or to House offices would have been covered by the lobbying proposals that were at issue.

So I am not sure that you can read all that much into Congress's decisions to amend the Lobbying Disclosure Act one way as really speaking to what they thought the impact would be on the electioneering communications provision of the campaign

finance laws.

CHAIRMAN LENHARD: Ms. Duncan.

MS. DUNCAN: Thank you, Mr. Chairman. I want to come back for a moment to the examples that we cited in the NPRM.

Mr. Bopp addressed those, but I could not tell, Ms. Hayward and Mr. Elias, whether your silence indicated agreement in his positions.

And I am most interested in your view of whether examples number 4, which talks about Congressman Ganske, and number 5 which I believe refers to Congressman Bass, whether those examples fall within either the general exemption or the grassroots lobbying safe harbor that the proposed regulation would create?

MS. HAYWARD: We vote no on four and what "no" means is it's outside of the bounds of regulation.

MR. ELIAS: Just parenthetically, to me, it is several miles -- if that's the

bounds -- then it is several miles from express advocacy. This is where I just have a fundamental disagreement with the functional equivalent of express advocacy could not be express advocacy.

MS. DUNCAN: It would be helpful if you could say a little more about your rationale, maybe along the lines of answering a few of the questions that we have outlined in the NPRM, just a little bit more about why "no."

MS. HAYWARD: Part of the problem is that a lot of the questions focus on purpose. I don't care what the purpose is. You have to look at the communication.

Communication is all about somebody's legislative activity and the importance of that legislative activity in the greater scheme of protecting the environment. What say you?

MR. ELIAS: Yes.

MS. HAYWARD: Yes. Let's go on to

five. Five is different because of invocation of the status of the candidate.

MR. ELIAS: Yes, exactly. I agree. I think five is in a different place though.

I would, again, say that five is not an example of express advocacy. But I would say that it is something that would be covered by what the Supreme Court would rule as being out of bounds.

MS. DUNCAN: Thank you.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: I just want to make sure I understand you. Both of you agree that number 5 is the functional equivalent of express advocacy?

MR. ELIAS: Correct, although it is not express advocacy.

MS. WEINTRAUB: Right.

MS. HAYWARD: To answer the question about "call to action" I think that does change the analysis, since "call to

action" is to have people calling about legislation.

CHAIRMAN LENHARD: Are there any other questions or comments? Then we will recess until 1:30 when the next panel will begin. Thank you.

(Recess)

CHAIRMAN LENHARD: I would like to reconvene the meeting of the Federal Election Commission for October 17, 2007.

We are considering revisions to our regulations related to electioneering communications in light of the Supreme Court's decision in Wisconsin Right to Life.

Our second panel consists of Jan Baran who is here on behalf of the Chamber of Commerce, Larry Gold, who is here on behalf of the AFL-CIO, and Don Simon who is here on behalf of Democracy 21.

The procedure will be as it was this morning, which is each witness will have five minutes to make an opening statement.

There is a green light provided at the witness table which will alight soon and then it will start to flash when you have one minute remaining. Thereafter a yellow light will go on when you have 30 seconds left and the red light means that your time has expired.

The balance of the time will be used for questions from the commissioners and in addition general counsel and the staff director and its representatives will have an opportunity to ask questions as well.

We do not have a particular organizational format for the questions. Commissioners will simply seek recognition and I will recognize the commissioners as this has generally provided a more free flowing form of discussion which has been more constructive as we pursue solutions to the problems that sit before us.

In general we go alphabetically which would mean that Mr. Baran will go

first, followed by Mr. Gold, and then finally by Mr. Simon. So unless you have arranged otherwise amongst yourselves, we will proceed accordingly. So, Mr. Baran, you may begin at your convenience.

MR. BARAN: Thank you, Mr. Chairman and members of the Commission.

The Chamber of Commerce would like to address three specific areas of concern at this hearing.

First, I would like to point out that the proposed grassroots lobbying exemption does not protect all the speech that is permitted under Wisconsin Right to Life.

The second proposed exemption should be included in the definition of electioneering communications and thereby exclude exempt communications from reporting.

Third, as our comments noted, we believe this is the appropriate opportunity for the Commission to formally repeal Section

B of its regulations of finding of express advocacy.

Regarding the proposed exemption, the Wisconsin Right to Life case clearly sets forth guidelines for the Commission to follow in fashioning this so-called safe harbor which otherwise is known as the First Amendment, and the Commission has to be diligent in insuring that all electioneering communications are susceptible of any reasonable interpretation other than as an appeal to a vote for or against a specific candidate and fall within that safe harbor.

These communications are not the functional equivalent of express advocacy and therefore are outside the scope of the McConnell holding.

Unfortunately, in our opinion the Commission's proposal fails to encompass all communications that are not express advocacy or its functional equivalent.

The proposed rules impermissibly

limit the scope of grassroots lobbying to speech that discusses pending issues only, to speech that addresses current officeholders only, to speech that does not mention voting by the general public, and to speech that makes no mention of an officeholder's position on an area of public policy.

The Wisconsin Right to Life case does not limit grassroots lobbying so drastically. Issues in question need not be pending, the subject of an ad need not be limited to an officeholder, and voting by the general public may be mentioned and discussion of public policy positions is permissible so long as the call to vote for or against based on that position or on any other imputations that are per se inconsistent with the public office are not made.

The Commission in crafting its safe harbor should carefully hew to the language of the case and straying too far

inappropriately adds a degree of uncertainty and a limitation of scope that will cause permissible speech to fall outside the very safe harbor that is meant to protect it.

Secondly, we urge the safe harbor would thereby exclude reporting. The Supreme Court has never mandated disclosure for communications that are not either express advocacy or its functional equivalent.

Because the grassroots lobbying that must be protected in this rulemaking is not express advocacy or its functional equivalent, no compelling government interest exists that justifies its regulation and to impose such a disclosure requirement or any other regulation on an entity conducting grassroots lobbying simply is contrary to the judicial command.

Therefore the Commission should remove permissible lobbying from such speech-chilling regulation.

Finally, the Wisconsin Right to

Life case in its tailoring of the definition of electioneering communications also impacts the regulatory definition of express advocacy.

Express advocacy is defined as words that expressly advocate the election or defeat of a clearly identified candidate.

The definition of electioneering communication must be limited to cover only communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

In demanding that any standard be clear, the Supreme Court cautions against a review of factors outside the four corners of a communication including the ad's timing, its effect on listeners, and the context surrounding the ad.

Subsection (b) of the express advocacy definition by contrast is unconstitutionally vague, the determination

that every court that has addressed this, what I would call discredited Furgatch-based standard, has made.

It requires consideration of all of those factors that the court in Wisconsin Right to Life rejected, specifically including references to external events, such as the proximity to the election and usage of an effects-based and context-based reasonable person test.

The Commission should take the opportunity to finally remove this unconstitutional section from the definition of express advocacy.

In making the changes that I have touched on today and is more fully explained in the Chamber's comments to this proposed rulemaking, the Commission will enact rules and the parties are free to make grassroots lobbying communications free from the chilling effect of unconstitutional regulation while having set forth clearly

defined guidelines as to what is and what is not express advocacy or electioneering communications.

Thank you.

CHAIRMAN LENHARD: Thank you very much. Mr. Gold.

MR. GOLD: Thank you, Mr. Chairman. In my opening statement I would like to address two of the points that the four labor organizations made in our comments.

Of course, I welcome questions on any other aspect of our submission.

First, why it would be better to revise the electioneering communications definition rather than revise only the prohibition on union and corporate pay electioneering communications.

And second, if however the Commission pursues a version of what we have labeled Alternative 1, what incoming receipts ought to be required to be reported.

With respect to the basic approach

that we think the rulemaking should take, what WRTL II did was to adopt a narrowing construction of the definition of electioneering communications, much like Buckley and MCFL did for other provisions in the act.

The Congressional intent here was very clear. Congress equated the prohibition with the requirement for disclosure.

The same line applied to both. If you were prohibited from doing it you didn't have to disclose it. What they were prohibited to do, there was no contemplation. But unions and corporations would never be in a position to have to report electioneering communications because they were simply banned from doing so.

That was the assumption. It is very clear from the legislative history that electoral speech, electioneering speech, if you will, was the target of this.

After all, the Congressional Record

is replete with many, many statements about sham issue ads, negative advertising, losing control of our campaigns and the like. That is what drove this legislation.

In the comments I note that in the comments of two national political committees today that same spirit remains.

They say that the disclosure requirements continue to perform an important function in informing the public about various candidates' supporters and that the party committees have a real direct interest in having access to information of this character which is essential to their own strategic decision making.

But that is not really what WRTL decided.

WRTL took a very different view of much of the communications and that is why it arrived at its narrowing construction.

You obviously are acting in an unexpected situation. Congress did not

foresee a class of electioneering communications that unions and corporations couldn't undertake and what the consequence of that would be.

However, one aspect of the statute that has been unremarked in this, including by us, is the so-called backup definition of electioneering communications.

Congress did foresee the possibility that the Supreme Court would strike down some aspect of the law and it provided a backup definition, and again, it was a definition.

This is Section 434(f)(3)(a)(2), and it says, "if clause one, the primary definition of electioneering communications, were held to be constitutionally insufficient by final judicial decision to support the regulation provided herein."

That's the language. And then it provides the backup.

Now the Supreme Court in WRTL II

did not facially invalidate it, of course, or at least on the surface preserved McConnell. But the spirit is clear, I think, that Congress intended that if there was any invalidation of the statute that the definition would change accordingly.

It is important to underscore that the act nowhere regulates the non-electoral activity of non-registrants in requiring disclosure of so-called electioneering communications broader than how the WRTL II narrative would be an unusual departure.

And we believe that the approach taken by the statute for the regulations for reporting of independent expenditures provides an appropriate model.

There, again, the line of prohibition also defines the line of disclosure.

However if you do take a different course it is a very important matter, as Commissioner Weintraub noticed and is noted

in one of her questions, "What is to be disclosed?"

Again. this is a situation not contemplated by Congress.

The statute itself, at 434(f)(2)(e) and (f) talks in terms of contributors who contribute $1,000 or more since January 1st of the previous year.

The Commission in its reporting regulations appropriately corrected that terminology to donors who donated funds because we are not talking about contributions within the meaning of the act, but either way, whether you're talking about contributed or donated, those words only mean some type of voluntary transfer, without any consideration, and without an exchange, without purchasing value.

That means that such income and receipts, dues, investment income, damages awards and other commercial income and the like ought not to be subject to disclosure.

In reading the comments I see no commenter who has argued otherwise. Even Democracy 21 and its allies, when talking about corporations, acknowledge that if there's business income that is paying for this, the corporation itself ought to be designated as the contributor of those funds, as the source of those funds.

So, we would urge that you adopt that course, just on the basis of what the statute and the regulations already say.

In addition, I think very strong policy reasons against taking a broader approach to this -- there would be a tremendous burden on unions in particular. The obligation to report income at the $1,000 level would be remarkable in comparison to a regulatory requirement by the Labor Department under a long-standing law, the Labor Management Report and Disclosure Act, which requires unions to disclose all receipts at the $5,000 threshold.

This would supersede that merely if any labor organization engaged in any electioneering communication.

Let me close with an example.

I am aware of a situation where a union in a large city in the United States has a weekly radio broadcast. It just pays for that time and on that broadcast it can do whatever it wants and say whatever it wants.

It is on an AM station and it costs the grand total of $150 a week, which is rather astonishing because it's in a large municipality.

But nonetheless the point is you can see an argument where, if within the electioneering communications timetable there is reference to a clearly identified federal candidate, no matter what the context, that union under a broad disclosure rule could be required to disclose the sources of any thousand dollars or more of receipts from January 1st of the previous year and that

could not possibly be good public policy.

Thank you.

CHAIRMAN LENHARD: Mr. Simon.

MR. SIMON: Thank you, Mr. Chairman. I appreciate the opportunity to testify this afternoon. I want to focus my comments on two points.

The first relates to the question of whether the Commission should maintain the disclosure requirement for electioneering communications.

As we indicated in our written comments we believe that you should.

At the oral argument in the WRTL I case, Chief Justice Roberts memorably asked the Solicitor General whether the government was not playing "bait and switch" by first holding out on McConnell the possibility of "as applied challenges" to Section 203 and then arguing in WRTL that McConnell foreclosed "as applied challenges."

The same kind of "bait and switch"

is being played here. The plaintiff in WRTL did not challenge the Section 201 disclosure requirements and repeatedly reassured the Supreme Court that if it did permit corporations to make some electioneering communications there would continue to be full disclosure of the spending and the whole system would be transparent.

But now having won the Section 203 argument on that basis many urge the Commission to reach out and eviscerate the disclosure requirement.

The argument made is that the court gave WRTL more than it asked for, but at least insofar as disclosure is concerned, it clearly did not.

The court said nothing about disclosure and the analysis used to evaluate the "as applied" constitutionality of Section 203 cannot logically be extended to invalidate the disclosure required by Section 201.

The standard of review is different. Strict scrutiny versus intermediate scrutiny. The nature of the burden is different -- a ban on spending versus a disclosure of spending that, as the court previously said, "does not prevent anyone from speaking." And the nature of the governmental interest is different -- an Austin-type interest versus a public informational interest.

Yet, notwithstanding these differences on every level of the analysis and notwithstanding the court's own silence on the matter in WRTL, and notwithstanding the court's eight to one majority ruling in McConnell that the disclosure provision is facially constitutional, you are being asked to make a determination that Section 201 is unconstitutional.

Surely the fact that Justices Scalia and Kennedy, as well as Chief Justice Rehnquist in McConnell, agreed that Section

201 was constitutional while at the same time voting to strike down Section 203, indicates that they think the analysis of the two provisions is completely different and there is nothing in WRTL that indicates that they or any other member of the court has changed their mind on this question.

My second point is perhaps an obvious one but you should keep it foremost in mind.

The controlling opinion in the WRTL case is the one written by Chief Justice Roberts. Not the one written by Justice Scalia. Many of the comments before you are written as if Justice Scalia's opinion sets the law of the case.

Although these comments acknowledge the susceptible of no reasonable interpretation test, they then urge you to impose the kind of Bright Line magic words clarity on it that Justice Scalia says the First Amendment requires.

For similar reasons these comments urge you to repeal sub Part (b) of the express advocacy definition, a position that would almost certainly be required by Justice Scalia's opinion.

The Chief Justice, and Justice Alito for that matter, could have joined Justice Scalia's more extreme opinion and certainly they were tweaked for not doing so.

So we have to assume it was a very deliberate choice on their part, and you have to give effect to the important differences between Justice Scalia's opinion, which does insist on Bright Line magic words standard, and the controlling opinion which does not.

As unsatisfactory as many believe the test set forth in the controlling opinion may be, you have no choice but to implement it.

That opinion says the test is objective and that opinion also says that the test meets the imperative for clarity in this

area.

Ultimately, there is no escaping the fact that it leaves the Commission in the first instance, and beyond that a court, in the position of exercising a judgment about whether the text of a given ad is susceptible of a reasonable interpretation as something other than electoral advocacy. Because that standard is constitutional, necessarily so since it is the controlling standard of the Supreme Court, then so too is the virtually identical sub Part (b) standard that the Commission adopted twelve years ago and more recently started applying.

We support the safe harbor proposed in the NPRM, but, since we think more guidance is better than less, we also urge you to make clear in the rule and in the commentary that ads which contain what the controlling opinion called indicia of express advocacy, such as the mention of an election or candidacy or comment on the candidate's

character or fitness for office, those will be factors that will weigh against an ad's eligibility for the exemption.

We are not suggesting that these indicia be per se disqualifying in the same way that the safe harbor is per se protective, but we think that the Commission should state that it will view indicia of express advocacy as precisely that -- indications that the ad contains express advocacy or its functional equivalent. Thank you.

CHAIRMAN LENHARD: Thank you very much. Questions from the commission? Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. I am delighted that we have Larry and Don on the same panel because I want to ask Don about something Larry was talking about. And that is, suppose we wanted to adopt Alternative 1, but we had some concerns about the kind of issues that Larry raised.

Could we do it in such a way that we exempted from disclose membership dues, business income? Do we have permission to do that under the statute? And would your organization cry foul if we did?

MR. SIMON: In terms of business income, you can exempt that and I think there's actually a precedent in your regulations in this area.

I would point you to 114.14(c)(3) which sort of on the flip side in terms of when money received from a corporation can be used for electioneering communication, that exempts money received from a corporation in exchange for goods or services provided at fair market value.

That's the concept of business income that you already have applied in this context and could reasonably apply sort of in the reverse situation.

Membership dues I find harder to deal with, frankly, and I will be honest

about this, or straightforward about it.

I don't know that, based on just a reading of the disclosure provisions of the statute, you have the authority to exempt union membership dues. It's a problem Congress could address and fix.

It is frequently the case after a Supreme Court opinion that Congress has to go back and amend the statute and that may be the situation here.

The problem I have with membership dues is that there are membership dues for union, but then there are membership dues for other types of organizations like nonprofit organizations. Take the Chamber of Commerce.

If you exempt one, does that drive you to a kind of a slippery slope analysis of exempting them down the line? And if you do that you may then have eviscerated the donor disclosure requirements of the statute.

And that you should avoid, because I think Congress crafted those donor

disclosure provisions for important reasons that the court in McConnell specifically pointed to and quoted at length the district court's discussion of them, where it talked about the importance of these provisions in order to avoid sort of "false front" organizations.

And if you don't have the donor disclosure you get Republicans for Clean Air or Citizens for Value and the court discussed those examples. That's the importance of the donor disclosure.

And let me say one more thing.

Congress in crafting these provisions put in two levels of protection. One is the $1,000 threshold, which is a much higher threshold than we have in other parts of the law, for instance in independent expenditure reporting, so that's one protection that membership dues that don't reach the $1,000 are not subject to disclosure.

The other protection to put in, which shouldn't be undervalued, is the ability of an organization to set up a segregated fund and engage in the disclosure only insofar as donations to the segregated fund are concerned.

What Congress was doing here was trying to balance the importance of disclosure on the one hand versus the intrusiveness or burden of disclosure. And these are the balances that Congress struck and the protections they tried to build in.

If at the end of the day Congress in this new context, after the Supreme Court's opinion judges that those protections that were initially built are not sufficient, then it might have to recraft the disclosure provisions, but your ability to do so is limited. I think you have to take the statutory language at face value.

MS. WEINTRAUB: Are there any policy reasons why we would want a union that

ran an electioneering communication to have to disclose the names of all of its dues-paying members? Are we going to get any useful information?

MR. SIMON: I don't think so. I don't think so. From my point of view, the virtue and the policy importance of the donor disclosure is in the context that the court talked about, in terms of having the spender disclosure meaningful by the public knowing who is behind it and getting around the problem of this kind of "false front" type of organization.

MS. WEINTRAUB: Well, then I turn back to you, Larry. Is there some way we can exempt membership dues and still catch the Wyly brothers?

MR. GOLD: The statute, as I said, the main point is that the statute talks in terms of "contributing contributions" and you have interpreted it to mean "donating donations."

Union dues are neither. Plainly they are neither.

There is no public policy value whatsoever in requiring any organization to reveal its members just because they engage in a single electioneering communication and I don't hear any policy reason either from Mr. Simon.

The fact is that any organization that truly has dues, including -- I don't know what the Chamber's dues are, but I am sure they are a lot more than union dues ordinarily are, and that's because there are corporate members -- but whatever they are, there are dues levels.

It seems to me that if somebody gives funds at the dues level -- pays dues -- that is not a donation, that is not money contributed. If that individual voluntarily gives more, that is truly a donative act and then you are beginning to count perhaps towards the $1,000.

But you do clearly have the authority to make these distinctions and you ought to do so. And the availability of the option that you're suggesting in one of the alternatives -- a separate fund, even a union or corporation having a segregated fund, and just dealing with that -- that doesn't really address this issue completely.

MR. BARAN: If I could opine here. This discussion underscores that Congress, and perhaps in BCRA, never contemplated this disclosure issue, because unions and corporations are going to be banned from making electioneering communications.

Since that time Congress has had no further comment on this issue, not that it is an issue that is not getting attention of Congress.

Grassroots lobbying is not a new issue. It's something that is strongly and is extensively debated in Congress, but not in the campaign finance context.

It is debated in the context of other legislation which more appropriately addresses this issue, which is lobbying disclosure.

I would like to point out that Congress had an opportunity after the Wisconsin Right to Life case to opine on disclosure involving grassroots lobbying which is what Supreme Court has said this has now become. It is grassroots lobbying. It not campaign finance. It is not meeting any compelling governmental interest. It's not prohibited. It is actually protected by the First Amendment.

What has Congress done since the Wisconsin Right to Life case? Well, it passed a major lobbying disclosure law, the Honest Leadership and Open Government Act. And they rejected any disclosure of any sort regarding grassroots lobbying, because it was so controversial and it was so intrusive into the internal affairs of membership

associations.

MR. SIMON: One comment on the first part of what Jan said. I don't think it is actually true that Congress never contemplated disclosure in the context of corporations, because if you look at the original statute, the original statute contemplated that at least C4 corporations would have the ability to make electioneering communications under certain circumstances subject to this disclosure regime.

That provision was functionally repealed by the Wellstone amendment. This is in 441 BBEC.

If you sort of freeze-frame the statute prior to the Wellstone amendment, there is a requirement for disclosure by a C4 either of all of its donations over $1,000 or donations put into a segregated fund, and although that became a sort of meaningless section, given the Wellstone amendment, it does provide an indication at least of an

original congressional intent on this.

MR. BARAN: By a sponsor. Not by Congress. It was never adopted.

MR. GOLD: Isn't that precisely the point? That you can find a whole lot of stuff in the legislative history. Somebody proposes something, the law had some form, and then it was an amended, but the only thing that really reveals Congress's intent is what they ended up doing.

That history that Mr. Simon describes proves exactly the opposite point.

CHAIRMAN LENHARD: Well, I think he was rebutting the notion that Congress never considered it.

MR. SIMON: But that provision is in the statute. It is in this book. And then, as a practical matter, overridden.

MR. BARAN: But there was never a debate in Congress about how unions or associations ought to disclose these contributions, or at least I don't recall

that, but I would like to be corrected if there was a debate about that, but I don't recall it.

CHAIRMAN LENHARD: Yes, certainly one of the problems that we are wrestling with here is that in the Wisconsin Right to Life decision the court makes clear that there are lobbying type communications and other issues of types of communications which are protected by the First Amendment and cannot be prohibited in the way they have been and that this draws in a broader group of entities to the regulatory regime than was initially contemplated, and we have to wrestle through that problem in some way.

Vice Chairman Mason.

VICE CHAIRMAN MASON: I want to ask about the relationship of the three definitions that we are concerned about here -- really, just the two.

And I previewed for Mr. Simon, but Mr. Baran, and Mr. Gold, the Wisconsin Right

to Life standard in 100.22(b), which is broader? Which is narrower?

MR. BARAN: Which standard?

VICE CHAIRMAN MASON: Comparing 100.22(b) with the Wisconsin Right to Life standard, which is broader and which is narrower?

MR. BARAN: The issue is which one is more vague and possibly unconstitutional.

I think that we are trying to compare these two concepts in a potentially inappropriate way, for the following reasons.

First of all, sub Part (b) is supposed to be the definition of a term called express advocacy. It is not a definition of the functional equivalent of express advocacy. It is express advocacy which, by the way, was defined in the Buckley case and after the Buckley decision Congress decided, that's a pretty good definition of what we are regulating and prohibiting and we are going to put it into the Federal Election Campaign Act, and that is in the statute.

What you have done in your sub Part (b) regulation is two things.

Number one, you have interpreted that statute in a way beyond the way it was defined in Buckley and in the statute in my opinion. But, more importantly, you have done that in a way that creates constitutional uncertainty, and therefore it is constitutionally void in my opinion.

Over in the electioneering communications portion we have the reverse in the Wisconsin Right to Life committee because the analysis begins with a statute upheld in McConnell.

That is clear. It regulates certain advertising at a certain time that refers to a candidate or a political party and now what the Supreme Court has done is it says, that clear definition is too broad, and now we have to carve out from communications that fall within that definition in regulations so that people can engage in what

the court has determined is their First Amendment rights and you're having some difficulty in creating clarity in the carve out, although the court has told you, if in doubt, you should fall in favor of more speech. Not more regulation.

The idea that's embedded in sub Part (b) is in essence part of the electioneering communication issue which Congress has addressed by passing the electioneering communication statute.

So I don't think that sub Part (b) really defines the term as it was adopted in Buckley or incorporated in the statute.

VICE CHAIRMAN MASON: You think it's void? All right, you have a client walk in your office and they have an ad and they want to run in the 30 or 60 days relevant period and you look at it and you say, "Well, under Wisconsin Right to Life you can run this."

Now, as a counsel advising your client, what do you tell them about

100.22(b)?

MR. BARAN: I actually start with 100.22, and I say, I'm going to look at this ad and I want to see if it has any explicit words that expressly advocate --

VICE CHAIRMAN MASON: Now, when you are doing that, what is the result? Does 100.22(b) kick out more ads or does the Wisconsin Right to Life kick out more?

MR. BARAN: Kick it out? Do you mean you --

VICE CHAIRMAN MASON: Prohibit.

CHAIRMAN LENHARD: Protected speech? Leads to enforcement actions -- you can choose another framing.

MR. BARAN: Well, my trouble is I don't know what 100.22(b) means.

VICE CHAIRMAN MASON: But you said you tried to advise your clients.

MR. BARAN: I am advising my clients as to whether there are magic words. That is express advocacy as defined in

Buckley and in the statute.

Of course we didn't worry about sub Part (b) because it had been declared unconstitutional three times and you have just recently decided to resuscitate it and try your luck again in court and I am here hoping that you will just repeal it so we will not have to go through all that litigation again.

VICE CHAIRMAN MASON: I understand. Mr. Gold, please.

MR. GOLD: You're asking a question. I think the answer is, what's the difference? Which is broader? Which is narrower?

I don't know from the language actually which is broader and which is narrower. If you look at -- Commissioner Weintraub has helpfully, in her last question, laid out the three different formulations, and I think the reason I don't know is that 100.22 which was adopted by your

predecessors well before BCRA and well before Wisconsin Right to Life II and well before the Roberts-Alito formulation of what is the functional equivalent of express advocacy, setting this particular language aside, the functional equivalent of express advocacy has to be different than express advocacy. Otherwise it wouldn't have a different designation. It has to be different.

Express advocacy, of course, is a prohibition for unions and corporations that applies all times in all media.

Electioneering communications, the functional equivalent, is a narrower prohibition that only applies in the broadcast media at certain times and locations.

What the Commission really needs to do is to take a fresh look at 100.22 in light of the fact that Congress enacted BCRA and enacted the electioneering communications definition that the court has now defined

with language that calls into question 100.22.

That's just the simple reality of it. I don't think it is a matter of accepting and parsing the differences, because the language is extremely similar. It is what is plausible here and what is reasonable there.

In a way you are dealing with apples and oranges and you have to go back to the first principle I said, which is, they are different because the court has said they are different.

The functional equivalent has to be different. It must be a little bit broader. I assume it must be a little bit broader. Otherwise it is completely redundant, because if a union or a corporation cannot do an electioneering communication on the basis of express advocacy, then functional equivalent must be something different, but it is not much different. I mean, I cannot imagine it

is very different at all. And that is something that you need to wrestle with, not necessarily in this rulemaking as we suggested, given the timing and the imminence of primaries and caucuses and the like, and just the realities of the situation.

VICE CHAIRMAN MASON: Mr. Simon, you say they are the same. What do you mean by that? Do you mean they are actually the same? Because we run across times when courts, for instance, use different language, but really it is the same test and sometimes we will get an opinion that finally resolves that and says, well, it is same.

Is that what you mean? Or do you mean, as Mr. Gold says, they are kind of the same or almost the same? Because it makes a difference in how we think about applying this.

MR. SIMON: I don't know if that is a question on the epistemology or law.

VICE CHAIRMAN MASON: Then let me ask it this

way. Is there real live example of an advertisement? Or can you think of a hypothetical where one would apply and the other would not?

MR. SIMON: I cannot. I think they would have the same outcome, whether you phrase it as susceptible of no reasonable interpretation other than, or you phrase it as, could only be construed by a reasonable person as.

To me it is the same test and it will yield the same results.

What that means as a practical matter is that anything which will be a prohibited electioneering communication or an electioneering communication for which corporate and labor union treasury funds cannot be used is also a prohibited corporate or union expenditure.

I don't look at these tests and say they are going to have different outcomes when you get one result under 100.22(b) and a

different result under the electioneering communication provisions.

VICE CHAIRMAN MASON: The problem with that is that the electioneering communication prohibition and the expenditure prohibition would be identical.

MR. SIMON: Yes, they would, except ironically there are a couple of jurisdictions that Jan pointed out where as a matter of court ruling currently you cannot apply under 100.22(b), but you certainly can apply the electioneering communications provision. So at least in those jurisdictions they have independent significance.

Let me just say one other thing which is that for the twelve years that 100.22(b) has been in the regulations it has been subject to lot of controversy and it has been subject to questions about its constitutionality, principally on grounds of vagueness.

I think the WRTL opinion actually strengthens the Commission's position in having sub Part (b) because if the test set forth in the controlling opinion meets, in the words of Chief Justice Roberts, the imperative for clarity in this area, if it meets that imperative for purposes of the definition of electioneering communications, then it also meets that test for purposes of the sub Part (b) standard.

CHAIRMAN LENHARD: But isn't the Chief Justice's position that the situation is strengthened by the fact of interpreting a statute that has a very narrow and concrete time frame in which it applies, and 100.22 applies in all settings?

MR. SIMON: I don't think so, because he's talking about whether this is a standard, this reasonable person, reasonable interpretation standard, applied acontexturally just to the text of an ad in what he calls an objective fashion, because

you are not examining intent, you are not examining effect, you are examining essentially the text of the ad, that standard is sufficiently clear for constitutional purposes.

And whether it derives from the electioneering communications statute or whether it derives as an interpretation of the express advocacy standard, the question of whether it is vague or clear I think is the same in both contexts.

MR. BARAN: No, because in one context you are using a standard, assuming they are the same, which I disagree with, you are using a standard to exempt certain speech from regulation.

Whereas, in the other context you are using it to try to regulate.

Sub Part (b) is regulating speech. It is saying that it is certain speech under that standard, which I believe is subjective, vague, and inconsistent with the standards

that are enunciated in the Wisconsin Right to Life case, that standard is going to regulate speech.

The exemption under Wisconsin Right to Life is permissive. You are going to say, notwithstanding a very clear statute that says you unions and corporations may not pay for broadcast communications, during certain times in certain areas you can still engage in --

MR. SIMON: But that's just two sides of the same coin. Whether you frame it as you can regulate from here to here, or whether you frame it as you have to exempt from here to here, the line is drawn in the same way by this reasonable interpretation test.

MR. GOLD: Two points. The electioneering communications provision in WRTL II standard is susceptible to reasonable interpretation is not acontextural.

It is in the sense that Chief

Justice Roberts explained as far as how you determine something, but the context is precisely with 30 and 60 days of an election and is something that can be received by 50,000 or more people in the relevant electorate. That is the context. So that does bear on, as the chairman suggested it might, that does bear on how you interpret it.

Let's not forget that functional equivalent of express advocacy was a McConnell term, not a WRTL term. I think it forces 100.22 in the Commission's definition of express advocacy back into a subsection of 100.22(a). I think it crowds out 100.22(b) as a practical matter.

And, as Jan Baran said, every court that has looked at (b) has struck it down. I do not think express advocacy can be defined any longer to read as if it were the functional equivalent of express advocacy. That is the main point.

You do have two different standards and they are very close together. I cannot give you chapter and verse as to how close, but very, very close together, but (b) I think is gone because of WRTL II defining a different concept.

CHAIRMAN LENHARD: What do we do then with the language in McConnell where the court in describing the interpretation of express advocacy as the magic words test found it functionally meaningless as a test or a standard by which to evaluate that?

The Chief Justice was very clear. He was finding his decision in line with McConnell. He was not reversing McConnell. So what do we do with that language? How do we interpret that in looking at our regulations?

MR. BARAN: The answer is simple. Which is once something like the express advocacy "magic words" test becomes ineffective as a statute, what McConnell says

is that Congress can pass another type of statute which it did. It passed the Electioneering Communications.

CHAIRMAN LENHARD: But it wasn't the statute that had become ineffective. It was the Supreme Court's interpretation of the statutory language that had lots its --

MR. BARAN: Again I would point out that it was Congress that adopted the language from Buckley and put it in the statute, and said, okay, we are going to regulate this. We are going to regulate the magic words statute.

What the McConnell decision says, and therefore refutes several prior court of appeals decisions, is when the Buckley court came up with the "magic words" test in interpreting the original statute they did not intend to say that that is the only way constitutionally that Congress can regulate political speech.

And it is because of that ruling in

McConnell that they can then turn to electioneering communications, and say, Congress has now come up with something in addition in electioneering communications. So let's analyze that under First Amendment principles.

This analysis is reflected in several of the court of appeals decisions since McConnell. There was a decision in the Sixth Circuit, one in the Fifth Circuit, and there was just a consent order that we engaged in with the Attorney General of Pennsylvania.

Each of those jurisdictions had an express advocacy standard for independent expenditures but their legislators had not adopted any other regulation like the electioneering communications regulation.

What those courts basically say is, what we have learned from McConnell is, that if you, the state, want to regulate additional speech beyond express advocacy,

well then go pass a law, an electioneering communications law, but it has to be constitutional and now we are discussing Wisconsin Right to Life II, starting with the circumscribed limits of regulating electioneering communications, but that is what you have to do in Congress or a state legislature.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: But in crafting it you can cannot go beyond a standard that is the functional equivalent of a standard that we've already declared to be functionally meaningless.

MR. BARAN: The functional equivalent language justifies Congress's purpose in creating electioneering communication. They have decided that they want to regulate, not just express advocacy, they want to regulate the functional equivalent of express advocacy.

What was their proposal that they created? Well, let's ban corporations and unions from funding certain types of advertising that refer to a candidate over a period of time.

So that's the current solution for regulating the functional equivalent of express advocacy.

Now you are faced with this new Supreme Court decision that says that while that type of regulation withstands facial constitutional attack as applied to certain speech it is unconstitutional.

So, you, the commissioners, have this burden of coming up with a clear safe harbor to carve out that will protect everybody's First Amendment rights to engage in that type of speech. I do not envy your job. That's where you are, and that's where all the analysis comes to.

MS. WEINTRAUB: Let me just follow up one more time because I was struck by your

written comments. I'm basically going to ask you the same question I asked the earlier panel.

I know that a lot of people have a long-standing antipathy to 100.22(b), and are just chomping at the bit for an excuse to throw it out, and I get that.

But when I look at the language, first of all, 100.22(a), which is the one that nobody ever complains about, it includes within its definition of express advocacy communications of individual words which in context -- that nasty word, "context" -- can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates.

I will note that in the Wisconsin Right to Life opinion Chief Justice Roberts, right after he said, you know, we should avoid contextual factors, or rather that they should seldom play a significant role in the inquiry, the opinion goes on to say

immediately, "Courts need not ignore basic background information that may be necessary to put an ad in context such as whether an ad describes a legislative issue that is either neither subject of legislative scrutiny or likely the subject of such scrutiny in the near future."

So there is some amount of context that the Chief Justice is willing to let us look at.

When I look at 100.22(b) next to what Chief Justice Roberts said, I have a really hard time coming to the conclusion that an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, provides clarity and constitutional lack of vagueness, but an ad that can only be interpreted by a reasonable person as containing advocacy of the election or defeat or one or more clearly identified candidates -- suddenly this is horribly vague.

Because it doesn't look that different to me and I want to particularly ask you, because I know you commented on this, about the interjection of the "reasonable person" somehow making it wrong.

Who is supposed to come up with the reasonable interpretation or make the determination that there is no reasonable interpretation under Justice Roberts's test other that a reasonable person?

I mean, clearly an unreasonable person is not going to make that determination and I don't think we are going to get the word from on high so somebody has got to figure that out.

MR. BARAN: My approach has always been to look at the words and do the words expressly advocate the election of or defeat of a clearly identified candidate?

MS. WEINTRAUB: And you, as a reasonable person, think you can figure that out?

MR. BARAN: Interjecting "the reasonable person" interjects something the Wisconsin Right to Life case rejected, which is effects-based subjectivity.

That is saying, well a reasonable person is going to look at that ad and say, "It looks like they are trying to persuade me to vote one way or the other," right?

MS. WEINTRAUB: But somebody has to come up with a reasonable interpretation.

MR. GOLD: If I may, and as I said, I think the discussion in WRTL II, and the narrowing construction of the electioneering communications provision points to the fact that express advocacy itself really is confined to the classic "magic words" and that the extra language in (a) and (b) is not supported and Buckley was clear.

I think McConnell and WRTL both affirmed the classic definitions of express advocacy and neither of them talks about express advocacy in terms that stray from the

magic words. They simply don't.

For sure this is really difficult because you can read these decisions and nobody can come up with a completely convincing way to square everything. That's just the fact of the situation, because nobody takes responsibility, ultimately including the Supreme Court, for having it all make sense. That is unfortunately true.

Having said that, some things must mean something and one way go is to treat express advocacy as every court that has looked at 100.22 has -- magic words -- and then you take the Roberts formulation of the functional equivalent and you try to give that some definition.

It is different from express advocacy and the only way you can do it, really, without all of it kind of merging together in a very confusing way with very important consequences, again, electioneering communications apply to specific places and

times and media express advocacy at all times everywhere.

That is the best approach to take and you can hardly be faulted for doing so. It makes a lot of logical sense.

MR. BARAN: By definition let me say that the functional equivalent of express advocacy is not just express advocacy. Otherwise it would be express advocacy.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: Thank you, Mr. Chairman. I am going to take us down from the 60,000 foot level of constitutional law and the Supreme Court down to the practical.

Both of you have occasionally appeared before us obviously representing clients who haven't followed your advice.

MR. BARAN: Or didn't ask for it in advance.

MR. von SPAKOVSKY: While grappling with constitutional issues is very

interesting, what we do every day is look at enforcement cases, and that's the vast majority of what we do. In the time I have been here I think I've cast probably a thousand votes on enforcement matters.

In your comments, Mr. Gold, you suggest, and some other commenters have suggested this too, that the language that we have come up with for this exemption, which is basically that the prohibition won't apply if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate, you suggested this impermissibly shifts the burden over to the person who is doing the communication.

I take it what you mean is that once a complaint is filed with us and we start looking at it the burden should not be on the individual or the organization to prove that there's any other susceptible interpretation or reasonable interpretation.

I think you are saying that it should be up to the Commission to prove that there is no other reasonable interpretation other than this.

The practical question I have for you is how should we change this to keep the burden on us to prove this case as opposed to someone who is engaging in a political speech basically having to prove that they were acting within the law?

MR. GOLD: The regulation clearly needs to reflect the controlling opinions formulation about what is the definition, number one.

The key language, the susceptible of no reasonable interpretation, has to be in there. Because that is the standard that you have. That is the standard.

Now, in regulations it is useful, we think, to include a safe harbor, but it is also very important to make clear that the safe harbor is just that. It is some level

of certainty.

If certain boxes are checked, then you know, guaranteed, that it is not susceptible of reasonable interpretation otherwise, but the regulation has to be clear that there may be other kinds of language that do not fall within the safe harbor that also would be protected.

And in all cases, yes, it would be the Commission, the government, that would have the burden to demonstrate otherwise. I am not sure that is a satisfactory answer, but that's the basic template that the regulations ought to proceed on and we have some specific comments about the safe harbor that has been proposed. The AFL-CIO and the NEA, which also joined these comments a year and a half ago, proposed effectively a safe harbor well before WRTL II.

We don't necessarily stand by that because the law has changed. The Supreme Court has now spoken. You waited to see what

they would do. Now they've done it. Here you are. It would have been easier to do what we asked.

MR. BARAN: We gave you a chance.

MR. GOLD: I know you did, and you wrote a very helpful and interesting suggestion at the time. But anyway, what I have just described is the template for approaching defining this.

The regulation is not going to be able to explain in every single circumstance what is in and what isn't. I don't think that is really something that we need to attempt.

MR. BARAN: It could provide non-exclusive examples where a message urges a viewer or the listener to contact the elected official to go somewhere, to learn more about the issue, to sign a petition.

There are a variety of different things. I assume they have come up in comments. Again non-exclusively. You would

be in a sense providing examples of calls to action, if you will, that if included in certain types of communications would fall within the safe harbor.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOVSKY: Thank you. I have another question. Mr. Gold, you said in your comment that the best course now would be to harmonize the statutory exemption authority of WRTL by constructing PASO to mean the functional equivalent of express advocacy.

If I understand that correctly what you are saying is that basic constitutional logic of the WRTL decision would require us to exempt disclosure.

But that sentence seems to be saying that we could rest a disclosure exemption on the statutory PASO exemption that we were provided by Congress.

Do I understand you correctly?

MR. GOLD: I am not sure we are exactly saying that, but what we are saying, and this was one of the questions posed in the NPRM is, what about this limitation on the Commission's exemption authority with PASO?

Unless PASO defines a class of communications that are in between the functional equivalent of express advocacy and express advocacy, and it is really hard to figure out what that might be, that is not a limitation that you really have to deal with any more.

That phrase cannot be broader because the court in this decision has overridden what Congress said, if anybody considers it to be broader.

The most logical thing to do is to finally give guidance as to what PASO means by saying it means the functional equivalent of express advocacy.

Again, what we're trying to do is

to square a bunch of things that are very difficult to harmonize, as I said just a few minutes ago in a somewhat different context, but that is one way to do it. And you're tasked to do it.

It is very easy for Congress to throw things at you and it is very easy for the court to come down with great phrases as Chief Justice Roberts did. We are mindful that your task is to really deal with it at a micro level, but a service you can perform is to make as much sense as you can with what has been provided to you.

And you may be criticized by some, but you can hardly be faulted in a defensible way if you do that.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: Since we are talking about examples and the value of examples, I believe that Mr. Simon in his comments actually did weigh in on each of the

examples in the NPRM, but I don't think that you guys did.

So I am going to put you on the spot here, Mr. Gold, and Mr. Baran, and ask you if a corporation or a labor union within 60 days of an election wanted to run the Billy Yellowtail ad, can they do it under Wisconsin Right to Life?

MR. BARAN: I am looking to be reminded of what the issues were that were implicated in that ad because I don't recall any.

VICE CHAIRMAN MASON: It has to do with family values. He took a swing at his wife.

MS. WEINTRAUB: "Who is Billy Yellowtail? He preaches family values, but took a swing at his wife and Yellowtail's response? He only slapped her, but her nose wasn't broken. He talks law and order, but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support

payments, then voted against child support enforcement. Call Billy Yellowtail. Tell him to support family values."

MR. GOLD: If I may, that's the only full ad text that the McConnell decision addressed. Period. That's the only one that the McConnell decision addressed and the McConnell decision fairly considers that to be the functional equivalent of express advocacy. I think it does, even though it was discussed elsewhere in the opinion.

The only other partial text of an ad was a hypothetical, the so-called Jane Doe ad and that's one worth discussing, but that in itself is what that ad means, and I think there are versions of that that clearly are protected.

It isn't that if you condemn a candidate's record that's the functional equivalent, but the Yellowtail ad, if you look at the Supreme Court's guidance, and again this is just one of these items on the

table that you've got to harmonize, that's the only text that the Supreme Court has ever said is the functional equivalent.

One of the striking things about the McConnell decision is, despite the voluminous record that we all put before it, including disk after disk of seven years of about a hundred or more broadcasts that the AFL-CIO had done, the court did not unfortunately dignify the record by discussing it, which does give you some flexibility, but that may be the only ad that you can say is the functional equivalent for sure.

MS. WEINTRAUB: But both of you would agree that we can regulate the Billy Yellowtail ad. Do you agree, Mr. Baran?

MR. BARAN: Yes.

MS. WEINTRAUB: Yes, well how about Tom Keen?

"Tom Keen, Jr. No experience. He hasn't lived in New Jersey for ten years. It

takes more than a name to get things done. Never, never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Keen, Jr. may be a nice young man and you may have liked his dad a lot, but he needs more experience dealing with local issues and concerns. The last five years he has lived in Boston while attending college. Before that he lived in Washington. Oh, gosh, how bad can it be? New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Keen, Jr. New Jersey needs New Jersey leaders."

Can we regulate that?

MR. BARAN: Well, your proposal wouldn't allow it because he was not an incumbent congressman or senator at the time, was he?

CHAIRMAN LENHARD: It wouldn't fit within safe harbor. I do think we have drawn a distinction, certainly intellectually, and

maybe not clearly enough in the text, that there is a standard or test within that, a subset of that speech that is protected by that, is protected by the safe harbor.

We may not have been clear enough about that. We can fix the clarity. It may not fit the safe harbor, but that does not necessarily mean that it would not be protected speech.

MS. WEINTRAUB: So, the question for the two of you is, do you think if we were to apply the Wisconsin Right to Life standard that we could regulate that ad?

MR. GOLD: I don't think it is express advocacy, number one. Because, again, I think express advocacy really ought to be considered as the magic words formulation and the magic words are not there.

CHAIRMAN LENHARD: And that was true of Yellowtail as well.

MR. GOLD: Right. That's exactly

right and that's why we're here. It is a fair question. I am not going to give you a definitive answer. It's a very fair question but I think it is important to say that it is not express advocacy. I would want to think about it a little bit more.

MS. WEINTRAUB: What is it if it's not a campaign ad? Is there an issue in there? Is there lobbying going on?

MR. BARAN: You have accurately pointed out that neither of us or our organizations' comments address these hypotheticals. I think we each would be glad to supplement the record --

MS. WEINTRAUB: That would be helpful.

MR. BARAN: -- with comments that we could submit, and giving it the appropriate thought and analysis that is clearly deserves.

MS. WEINTRAUB: Fair enough, but could you do that for all the seven ads that

we put in the NPRM because that really would be helpful to us.

CHAIRMAN LENHARD: I sometimes paraphrase this problem by saying, "Can you have an issue ad where the only issue is should someone be elected to office?"

One would think not. But if the only issue in the ad is whether somebody should be elected or not you are advocating their election or defeat, and yet, this hypothetical obviously puts that in a somewhat more concrete way.

MR. GOLD: It comes back to the formulation that you have to deal with which is, "An ad is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than." That's the question.

CHAIRMAN LENHARD: I think what is being suggested is that the constitutional law at this point is that those ads that cannot be reasonably be construed by

individuals as anything other than a call to elect or defeat people still are not ads to influence federal elections so long as they avoid the use of the magic words.

MR. BARAN: One would wonder whether the Yellowtail ads, sponsored by a group advocating increased protection from domestic violence, be viewed in a different way.

CHAIRMAN LENHARD: Commissioner Mason.

VICE CHAIRMAN MASON: One of the many things that bothers me about the Roberts opinion, and you have put your finger on several of them, is the section in there where he says, well, we've got to avoid the hurley burly of factors, and then in the very next paragraph he lays out a four-prong, eleven-factor test.

Now, it's October. It's going to be hunting season next month. If I see a four-prong eleven-factor anything, I am going to drill it, but how do we --

MS. WEINTRAUB: I'm sorry, but you've lost me.

VICE CHAIRMAN MASON: My apologies to Mr. Simon, but I don't think the right answer can be that you have to meet all eleven factors.

And with apologies to Mr. Bopp, I don't think the answer can be that any one of them gets you off the hook. So how do we possibly balance this sort of positive and negative factors?

In other words, to what degree, Mr. Baran, because you suggested this, does the presence of a genuine issue, and let's say Yellowtail at least at one time was in the Montana legislature and what if that bill had been up for a vote, how do we weigh that against the indicia of express advocacy on the other side of the test?

And, by the way, how in the world is that clear if we have kind of multi-factor balancing test to apply?

CHAIRMAN LENHARD: Let me add to

the hypothetical, could we even consider whether the bill was up for a vote if it wasn't specifically mentioned in the ad?

MR. BARAN: Obviously, I could give this more thought, but my reaction is --

CHAIRMAN LENHARD: When we do it it's called delay.

MS. WEINTRAUB: You guys are wimps.

MR. BARAN: Actually I am following up on an earlier comment where I proposed one approach to these regulations is to tell people if they include certain things in their ads it is clearly protected. And I previously referred to some urging of action other than voting. You could combine that with the articulation of a clear issue as well, but I would like to give it a little more thought, as I said.

MR. SIMON: Let me just state for the record that my silence over the last ten or fifteen minutes is not assent to anything said by my colleagues and in particular on

the questions about the meaning the PASO test from Commissioner von Spakovsky. I have different views than were expressed, but since the question wasn't directed to me I didn't respond.

A couple of things on Commissioner Mason's question. My reading of Chief Justice Roberts's opinion is that what he's trying to separate out -- and I overstated it before when I said that his test is acontextural. It isn't entirely acontextural.

I think what he was trying to separate out is a determination that is going to depend on a lot of discovery and depositions and document production and that sort of understanding of the intent of an ad that for better worse is exactly what happened in the WRTL case and which I think he found objectionable.

He stresses that his test is essentially about the text of the ad and

that's the grounds on which he calls his test objective. He does say, well, some context is okay. Is this an issue that is up before the legislature?

In an ultimate sense context always necessary just in order to understand what words mean. And I don't think you are precluded from that kind of readily accessible obvious context, but I do think he is saying the Commission can't go start taking depositions about what people were intending when they decided to run a given ad.

I think you are more or less limited to what the ad says and making a reasonable person determination about that.

VICE CHAIRMAN MASON: I think four corners or something like that is great, and that is understandable, but how about the real ad that has a whole bunch of different things in it?

For instance, do you think the

Chief Justice meant for us to weigh -- and let's say the Yellowtail ad was the same except that there was actually a child support bill then pending in the Montana legislature, and the ad said, "Call Billy Yellowtail and tell him to support HB whatever."

MR. SIMON: Yes, you could take into account and still determine that that ad is the functional equivalent of express advocacy.

Whatever it is you did in the series of recent MURs where you looked at ads that did not have magic words in them and concluded that those ads constituted sub Part (b) express advocacy, and I presume basically what you did is look at the text of the ad in some general context and concluded in your own judgment whether those were susceptible of a reasonable interpretation only as electoral advocacy. Whatever you did in that process I think is what you have to do in

terms of implementing his decision.

You have already done this. You already do this. You know how to do this. You are just doing it now in a related context.

MR. GOLD: I think that's incorrect because what the Commission did in those enforcement cases that Mr. Simon is referring to all preceded WRTL. And I do believe, again, what the Commission at the time should have been doing, but now clearly what it should do is, insofar as applying an express advocacy standard, it is a magic words standard.

Now what about this standard though, that you have to articulate in this regulation?

The Yellowtail plus ad that Commissioner Mason just described is susceptible of a reasonable interpretation and that is the standard here. Is it susceptible of a reasonable interpretation

other than?

It doesn't mean it can be in addition to. But is there something in there other than? And a call to action at the end of that ad to vote on a particular bill I think does take it out. Some people may not like it, but I think it does.

It's not an eleven-factor test as such, that Chief Justice Roberts spelled out. This was an as applied challenge.

He was examining the ads before him and he said, well, look at these. They do have indicia of issue advocacy.

He didn't say all indicia. He just said they do have indicia and they do have no indicia of express advocacy. He did, with respect to express advocacy, discuss a complete landscape there. But he was just analyzing the ads before him.

I don't believe anybody is really suggesting that you have got to have the complete presence of some and the complete

absence of others.

But the presence of some I think is sufficient to make it susceptible of a reasonable interpretation other than an appeal to vote for or against a specific candidate.

MR. SIMON: If I could just correct what may be Commissioner Mason's misinterpretation of our position.

When we say you have to have all the indicia we were talking about in order to qualify for the safe harbor and not in order to qualify for the umbrella exemption. And I think that's an important distinction.

CHAIRMAN LENHARD: One of the other things that struck me as I went through the comments on the safe harbor was that people were encouraging us to drop out factors or add factors that could produce the unusual circumstance of ads meeting the safe harbor, but not meeting the rule and we have to make sure that that doesn't happen because it

would be awkward in the enforcement context.

Commissioner Weintraub.

MS. WEINTRAUB: Thank you, Mr. Chairman. Following actually directly on that comment, I wanted to ask Mr. Simon about some of the factors that we have been urged to take out of our safe harbor criteria.

Things like whether the ad is exclusively about a legislative or executive branch issue, and whether it has to be a pending legislative or executive branch issue, because maybe that group wants to drum up interest in some legislation, and whether a legitimate ad could be directed towards candidates who are not officeholders in the interests of getting them to commit to a position, should they win.

MR. SIMON: The first two I don't so much care about. The third, I do think that should not be in the safe harbor.

Let me just say two things about the safe harbor. The first is, I very

strongly second what the chairman just said. I think the kind of guiding star in how you craft the safe harbor is to avoid a situation wherein an ad would qualify for the safe harbor, but not meet the umbrella test. That's a misuse of the safe harbor.

The second point is, with a safe harbor you are conferring per se absolute protection. So I think you have to be very careful and I think the safest course is to stick very closely with what the Chief Justice outlined in his opinion and he did outline a set of factors which are indications that an ad is an issue ad and another set of factors which an ad doesn't have, which are indications of express advocacy.

Then he applied all of those factors to the ads in front of him. That is a good model for the safe harbor that you should create by rule.

MR. BARAN: Do you agree when in

doubt a tie goes to the speaker, and not to the Commission?

MR. SIMON: No, but if the ad is not within --

MS. WEINTRAUB: You might want to correct that, Mr. Simon.

MR. SIMON: The important point is, and this was stressed in the NPRM, and I think it is very important, that the importance of a safe harbor should not be overstated in the sense that an ad can fall outside the safe harbor and still be exempt.

So the determination of whether an ad is or is not within the safe harbor is very different than a determination of whether the ad is exempt.

MS. WEINTRAUB: And that's how you would address the problem raised by one of our commenters, that one could never run an issue ad on election reform under the safe harbor.

MR. SIMON: Right. Exactly.

CHAIRMAN LENHARD: One of the themes that was advocated vigorously by our first panel was stability in the law and that the Commission should approach this and do as little as necessary because of the constant changes in this area of the law, the difficulty of regulated entities and coping with that and an overall sort of regulatory theory that regulators should not go boldly off analyzing the Constitution on their own but should wait for the courts to tell them what to do.

I wanted to see if anyone wanted to comment on that because it was a theme that some of the witnesses felt fairly strongly about on the first panel.

MR. SIMON: Well, I'll start and I say this from the point of view of representing a client who is often accused of destabilizing the law.

But I think you have very specific job in this rulemaking, which is to implement

the Supreme Court opinion. That should be the guide star here. In my mind that means you are addressing precisely what the court addressed in terms of the application of Section 203 to certain kinds of ads.

You should do just that which is necessary to implement what the court said.

MR. BARAN: Bringing clarity to any regulation is always helpful to both the regulating community and to the Commission. So anything you can do to be clear in how these rules are going to actually operate, that would be helpful.

Secondly, I do think that repealing sub Part (b) is not going to be destabilizing, particularly since it has already previously been declared unconstitutional. And in fact by repealing it you inject some further clarity as to how communications are going to be regulated between express advocacy and electioneering communications.

Finally, I would also comment that no matter what regulation you actually produce part of its effect is going to depend on how you enforce it. So a regulation is just the beginning. It is not the end, obviously.

CHAIRMAN LENHARD: Commissioner Walther.

MR. WALTHER: On your comments, I read with interest your argument that the reasonable person standard should be eliminated, and that there could be no reasonable interpretation other than X.

But, in getting back a little earlier, doesn't it just transfer that responsibility from some amorphous person to the person making the communication or his or her lawyer? And then what standard is improved at that point?

What is the reason for the transfer if I am correct in that?

MR. BARAN: I believe that either

of those approaches are inappropriate in the definition of express advocacy because I believe express advocacy means what sub Part (a), although there are still some problems with it, says -- basically, the magic words test.

And thereafter, the other method of regulating other types of speech that doesn't contain the magic words is subsumed in electioneering communications.

I would like to point out, not that I am advocating this, but Congress may at some future date decide, well, we are going to amend the electioneering communications statute. We are going to make it apply for 90 days instead of 60 days. Or we'll extend it to newspaper advertising in addition to broadcasting.

I don't see the regulatory legislative process as being limited by what exists currently. I do think that there is confusion created in the regulation by

attempting to bootstrap the concept of express advocacy into something that it's not.

So I would focus on electioneering communications and if Congress wants to regulate in another fashion, then they have the opportunity to legislate.

CHAIRMAN LENHARD: Are there any other thoughts, comments, suggestions? Gentlemen, any closing thoughts?

Good, and with that, thank you very much. We will take a 15 minute recess and then convene the next panel.

(Recess)

CHAIRMAN LENHARD: We will reconvene the meeting of the Federal Election Commission for October 17, 2007.

We have our third and final panel today which consists of Jessica Robinson, here of behalf of the American Federation of State, County and Municipal Employees. And Paul Ryan, who is here on behalf of the

Campaign Legal Center.

You will have five minutes for an opening statement at the beginning. We have a light display in front of you. The green light will be on during your five-minute time period until the last minute at which point it will begin to flash with 30 seconds left. The yellow light will come on and a red light will indicate that your time has expired.

We will go alphabetically. And with two people whose last names begin with "R" so we will go by the second letter, so Ms. Robinson you get to go first and Mr. Ryan will follow.

Ms. Robinson, you may proceed at your convenience.

MS. ROBINSON: I am delighted to be here on behalf of the 1.4 million members of the American Federation of State, County and Municipal Employees.

I hope I can be helpful to you in conforming your regulations to the Supreme

Court's decision here in WRTL II.

I have to say I was surprised at the breadth of the court's decision. And I would urge the Commission to resist any attempts to narrow it or constrain the amount of speech that is protected under the court's opinion. Which brings me directly to the proposed safe harbor for grassroots lobbying communications.

I find the idea of a safe harbor very appealing in theory, but I do worry about how it may be applied in practice.

My fear is that when the government tells you that there is a permissible way of speaking that it becomes the only permissible way of speaking and that it becomes a device for shifting the burden from the government to the speaker.

A union or corporation may run an ad that is not the functional equivalent of express advocacy, but because it doesn't fall within that safe harbor they are left dealing

with complaints explaining why protected speech is protected speech or they are left responding to complaints and explaining why their protected speech is protected speech.

You may not view this as a huge burden for unions and corporations, but I want to remind you that there are a lot of small local unions without in-house lawyers who have to waste their resources paying for a lawyer to explain to the government why lawful speech is lawful speech.

In my experience the lesson learned in this area by those with limited resources is not to speak or to speak only in the way the government says is appropriate.

What I'm getting at here is that I think the proposed safe harbor for grassroots lobbying communications is too narrow.

That is not to say that the entire universe of communications protected under WRTL II should fall within the safe harbor.

But if the Commission is going to

take the time and effort to draft and prepare a safe harbor and codify it, then you should at least make it useful to the people it is supposed to protect.

It should be more of a shield for the speaker and less of a sword for the censor.

Along that line, I would also urge the Commission to reject proposals to specify in the rules discrete content constituting strong evidence or some other term that would specifically say when an ad is not protected by WRTL II unless it is express advocacy.

I don't really see any reason to adopt that type of language unless the purpose of it is to create a presumption of guilt on the part of the speaker that has to be rebutted, which I believe under WRTL the court clearly states that it is the burden of the government to show that they have a compelling interest in regulating a particular ad.

On the matter of whether to adopt Alternative 1 or Alternative 2 for disclosure, AFSCME supports the option of Alternative 2.

My colleague, Larry Gold, did a fine job of explaining our position on that point. I just want to press the point that the jurisprudence in this area shows that mandatory disclosure is generally limited to disclosing funds used to pay for ads that are regulable by the government.

If the Commission decides not to adopt Alternative 2 and instead adopts Alternative 1, I beg of you to simplify the disclosure requirements.

Again, Mr. Gold did a good job in presenting to you the issues in this area. It is really the breadth of the definition of donation. What is a donation? Is it interest? Is it royalties? Is it dues?

I don't want to get into the arcane complexities of dues structures for labor

unions, but when you're using dues to report that they were spent for something it is hard to identify who the donor is.

Is it the dues payer or is it the affiliated labor union who's required to pay per capita taxes? The easiest way to address these issues is to require reporting only for those people who earmark funds to be used for WRTL II type communications and other funds should be reported just as a donation of the labor union.

CHAIRMAN LENHARD: Thank you. Mr. Ryan.

MR. RYAN: Thank you, Mr. Chairman and fellow commissioners, it is a pleasure to be here this afternoon on behalf of the Campaign Legal Center.

There are two issues that I believe are key issues in this rulemaking and I want to address both of them briefly in my opening remarks.

One is the question of whether to

exempt WRTL type ads from the BCRA disclosure requirements. The second one is whether the WRTL decision requires a change to the FEC's definition of expressly advocating found at Section 100.22 of the Commission's regulations.

With respect to the first point, the disclosure point, commenters proposing exempting WRTL type ads from BCRA's disclosure requirements through this rulemaking include on the one hand the Center for Competitive Politics, Professor Allison Hayward, who you heard from this morning, and Mr. Bob Bauer, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee.

And on the other hand you have a group with which this first group very rarely agrees on matters of campaign finance law.

You have Senators McCain, Feingold, Snowe, and Representative Shays. You have my organization, the Campaign Legal Center,

which filed comments jointly with Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters, and USPERC, you have public campaign, you have public citizen and now you have Professors Hasen and Briffault.

These commenters undoubtedly have varying opinions regarding how the Supreme Court would and should resolve a legal challenge to BCRA's electioneering communication disclosure requirements, but there are two things they all agree on.

One, that the Supreme Court in McConnell upheld BCRA's electioneering communications disclosure requirements against facial challenge by a vote of eight to one.

Two, BCRA's electioneering communications disclosure requirements were not challenged in WRTL and consequently the Supreme Court did not consider or decide the legal question of whether WRTL type ads may

constitutionally be subject to disclosure requirements.

Indeed, WRTL's complaint stated explicitly, "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications. Only the prohibition on using its corporate funds for its grassroots lobbying advertisements."

This is a point that was repeatedly stressed by WRTL in its brief to the Supreme Court. It was also raised in oral argument.

Mr. Bopp assured the court that WRTL's challenge to the statute, if successful, would leave a fully transparent system.

In addition to these widely agreed upon facts, namely that the plaintiff in WRTL did not challenge the disclosure requirements, the WRTL court did not address the constitutionality of these disclosure requirements, and the McConnell court by a large majority specifically upheld the

constitutionality of these disclosure requirements, the Campaign Legal Center urges consideration of three other reasons why the Commission should refrain from and not alter BCRA's disclosure requirements in this rulemaking.

First, fundamentally different constitutional tests apply to funding restrictions and disclosure requirements.

Whereas a reporting requirement is constitutional so long as there is a relevant correlation or a substantial relation between the governmental interest and the information required to be disclosed, a restriction on political spending is constitutional only if it meets the more rigorous strict scrutiny requirement of being narrowly tailored to further a compelling government interest. That is the first reason.

The second reason is that broader different governmental interests, public information interests as opposed to the

Austin-type corporate corruption interest, support disclosure requirements.

Third, the burden on those subject to disclosure requirements is lesser than the burden on those subject to restrictions on expenditures.

As the Buckley court stated, "unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities."

The Buckley court noted that, "disclosure requirements, certainly in most applications, appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."

I will conclude this first point by taking a welcome opportunity to quote Allison Hayward's comments because it's a very rare occasion that we actually agree with one another on anything regarding campaign

finance law.

Professor Hayward wrote in her comments, "the Commission should promulgate regulations to reflect this opinion and not venture to predict how or whether the court would extend the same analysis to disclosure laws which are typically subject to less rigorous scrutiny. It is better for the Commission's litigation record and more appropriate to its role as a federal agency to adopt a rule that hews closely to the court's holding."

With respect to the second question, whether the WRTL decision requires a change to the FEC's definition of expressly advocating in Section 100.22 of the Commission's regulations, the Commission correctly notes in the NPRM that the court's equating of the functional equivalent of express advocacy with communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or

against a specific candidate bears considerable resemblance to components of the Commission's definition of express advocacy and the Campaign Legal Center agrees with this.

Sub Part (b) standard of the Commission's regulations are virtually identical and indistinguishable from the WRTL test.

The Commission has been applying this test recently in the context of 527 enforcement actions and we think the Commission has got it right in that respect with regard to the 527 conciliation agreements, and we encourage the Commission to interpret this decision as an affirmation of the constitutionality of the sub Part (b) express advocacy test.

Thank you and I look forward to answering any questions you might have.

CHAIRMAN LENHARD: Thank you. Questions from the Commission? Commissioner

von Spakovsky.

MR. von SPAKOVSKY: Ms. Robinson, I should have said this when Mr. Gold was here also, since I think he was involved in drafting this comment.

But as an undergraduate of MIT, I very much appreciated the comment where he said that if we define a classic communication that lies between express advocacy and the universe that would be the equivalent of the Dark Matter of the universe, and I thought that was a very interesting comment.

My question is, you were worried in your testimony about the safe harbors becoming basically the only way to fit within the exemption.

If we added language that said something like, "among communications that satisfied the exemption are the following," or "within these paragraphs" or after giving an example of safe harbors, saying something

like, "although a communication may be a permissible communication even if doesn't satisfy under safe harbor," would that go a long way towards satisfying your concern or worry about that?

MS. ROBINSON: I certainly think that would be helpful. In a preface to the safe harbor you said that the whole of WRTL II communications is not reflected by the safe harbor.

I would also appreciate a statement that makes it clear that the burden is on the Commission to show that the communication is not protected in WRTL II.

CHAIRMAN LENHARD: How would we do that? How do we prove that there is no possible reasonable interpretation? There is no way to prove the negative.

It's a practical problem that I struggled with a little bit as we were drafting this thing. I think your interpretation of what the Supreme Court is

telling us is true, but in terms of as a practical matter, as we task our lawyers to brief this up for us, it does present them with a particular problem that it's hard to figure out how they would solve.

MS. ROBINSON: It is. It's a difficult task that you have and I do not know how to prove a negative. I have had experience where that has been the task that has been placed before me by the Commission, so I can tell you that it is a very hard thing to do.

In drafting a safe harbor, if you're going to do that, then a good thing to do is to use some examples. It's impossible to show never, especially when you're stuck with this situation where there is a reasonable interpretation involved.

CHAIRMAN LENHARD: I was just being hopeful given Commissioner von Spakovsky's reference to the Dark Matter that there might have been a breakthrough.

Mr. Ryan, I have a question for you. Mr. Bopp's approach to us is somewhat more subtle. It's certainly odd to use that reference considering Mr. Bopp's testimony earlier today, but his point is, which is not so much that that's a matter of constitutional law Congress could not pass a disclosure regime for these sorts of communications, but that in briefing this matter up to the Supreme Court he was seeking as an applied challenge for which he thought he would get an exemption from the electioneering provisions.

Instead what he got what he interpreted to be a redefinition of what an electioneering communication was, and as a consequence, as a matter of policy, it is reasonable for us to take the definition of what constitutes an electioneering communication and take those things that fall outside of it and have them simultaneously fall outside of the disclosure regime, and

consequently, as has been pointed out by the commenters, the coordination regimes and that this is entirely appropriate as a matter of policy because the court has highlighted that these ads consist in many cases of lobbying communications that would not normally be regulated by the Federal Election Commission or genuine issues speech which also but for their timing in reference to the candidate would not be regulated by us either.

It's much more out of a sense of a desire to fairly interpret what the Supreme Court is doing and also to cleave to the policy, goals, and guidelines that Congress has set for this agency that animates or motivates the thinking about whether the changes to the regulations that flow from this decision should fall into Section 114 on the regulations of expenditures by labor organizations and corporations or in the definitions of what constitutes an electioneering communication.

And in your comments you focus on the constitutional concerns, as did a number of other commenters, because I think what was sort of animating our thinking in this probably wasn't as apparent from the notice of proposed rulemaking as it could have been.

But I'd like you to turn to that problem, which we discussed with the panel a little earlier and whether the court isn't really in Wisconsin Right to Life telling us what an electioneering communication is, and then, as a consequence it would be that these things are not electioneering communications and that they should appropriately fall outside of our regime for electioneering communications.

MR. RYAN: This particular disagreement between Mr. Bopp's position and the Campaign Legal Center's position relates perhaps in large part to our understanding of what the court did.

I believe the court did not hold

that WRTL's ads were not related to an election. Instead the court held that WRTL's ads are susceptible to another equally reasonable interpretation and that such dual interpretation ads cannot constitutionally be subject to BCRA's spending or funding restrictions.

The court gave no indication as to whether dual interpretation ads could constitutionally be subject to disclosure requirements.

They did address that issue in McConnell and in McConnell the court held that on its face any ads that meet the definition could be subject to the disclosure requirements in BCRA.

So at the end of the day there is a temptation here by Mr. Bopp and others to say these ads raised in WRTL, these are grassroots lobbying ads. These are not in the election ad box.

What I think is more accurately is

the case is that these are dual interpretation ads. These are ads that were argued all the way up to the Supreme Court as having at least a purpose in influencing elections. And Mr. Bopp arguing on the contrary, no, they are grassroots lobbying ads, and then in oral argument I believe Seth Waxman addressed this point explicitly on behalf of the intervenors in the case that our position in the case -- and by "our" I mean the defendant intervenors, and I was part of that legal team although I am not representing them here today -- but our position in that litigation was that, when dealing with dual interpretation ads, we believe they should be subject to both the funding restrictions and the disclosure requirements.

Mr. Bopp's position in that litigation on behalf of his client was, we're not challenging the application of the disclosure requirements to such dual

interpretation ads. We are challenging funding restrictions and they should not be subject.

The court only ruled on that funding restriction piece of this. The court has not said that these ads are not related to an election.

CHAIRMAN LENHARD: That's interesting because while the ads are susceptible to many interpretations, my assumption has been that the organization that are funding them, some of them are funding them for lobbying purposes and some of them are funding them for issues purposes and some may be funding them for electoral purposes, but given the text of the ads it is not possible to discern that, and as a consequence, there are multiple interpretations, but there is some driving impetus in these organizations and it may be in some cases they have multiple purposes.

MR. RYAN: If I may respond to

that, briefly. I was here this morning when you and Mr. Bopp had this conversation.

And Mr. Bopp challenged your use of the terms "intent" and "purpose." He said the court made clear that that can no longer be considered.

I want to be abundantly clear that we are not suggesting that these are dual purpose ads in the aftermath of WRTL.

I am referring to these ads as dual interpretation ads. And Congress that made the determination, when they passed this statute, that it believed that any ad that met this statutory definition of electioneering communications had at least as one of its reasonable interpretations as influencing elections or advocating the election or the defeat of a candidate.

I think that's what this Commission is left with. You are left with Congress's intent to require disclosure of any ad meeting the definition and the Supreme Court

considering the application of that definition in a narrower or in different context, which is the funding restriction.

CHAIRMAN LENHARD: Vice chairman Mason.

VICE CHAIRMAN MASON: Mr. Ryan, I wanted to ask a question about something Ms. Robinson brought up that is essentially from your joint comments that I thought was an interesting point, and that is this "strong evidence" rule.

Doesn't that in effect become a chill, and in fact, isn't it kind of intended to be a chill? To put people on notice, that, well, you better not say that? Because isn't the likely effect of someone using some of the words that constitute "strong evidence" to be that they'll have a complaint filed and be subject to investigation by the government?

MR. RYAN: I'm not sure the extent to which speech would be chilled, but I will

say that --

VICE CHAIRMAN MASON: Oh, come on.

MR. RYAN: -- a plain reading of Chief Justice Roberts's opinion is that you have this sort of two-tiered test.

You have the umbrella test and then you have the specific characteristics of Wisconsin Right to Life's ads that led the Chief Justice and his colleagues who signed his opinion to reach the conclusion that those specific ads were exempt under the umbrella test.

I believe that there is some distance between the safe harbor, the exact criteria of Wisconsin Right to Life's ads and the broader umbrella test.

I don't know exactly how to measure that distance, or what it is, but I do know that Chief Justice Roberts articulated in his test several indicia of express advocacy and indicated that the absence of these is one of the very important criteria that led him to

reach the conclusion he reached.

VICE CHAIRMAN MASON: But, but --

MR. RYAN: The converse of that -- allow me to just finish, very briefly -- is that in the presence of such indicia of express advocacy we aren't sure how Chief Justice Roberts would have come out.

VICE CHAIRMAN MASON: But that leads to exactly the issue that Ms. Robinson brought up. You know, I had asked the questions before in terms of a balancing or something like that.

The problem I see with the approach you are suggesting is not that they are not two different things. They clearly are. There's the general test and the application. There clearly are some ads that will not meet the same application, but will be protected by the general test. Everybody agrees with that.

The trouble is that by introducing this "strong evidence" concept you do what

Ms. Robinson fears, which is you push everything back into the safe harbor and you rob the general test of its meaning.

When you say you don't know, I mean, I think we frankly do know in the real world, and your organization will be out there and other organizations will be out there, ready to file complaints, which is your right, okay, but that is why I am asking what is the basis for this "strong evidence" test and isn't that, in fact, going to throw a chill on people? And isn't it intended to do that? Just kind of push people back, and say, look, if you say this, you know, you're going to be subject to government scrutiny.

MR. RYAN: I strongly suspect that Mr. Bopp wrote, along with his clients, or he advised his clients to write the ads they wrote for a reason.

Mr. Bopp, I suspect, was looking for ads that he thought he could get in --

VICE CHAIRMAN MASON: I am not asking about

Mr. Bopp. I am asking about the test that your organization has propounded and why you are supporting that test.

MR. RYAN: Because in the absence of that "strong evidence" test it is quite possible that ads that Chief Justice Roberts himself indicated, the Jane Doe type ads, could be exempt under the umbrella and push well beyond.

I mean, this margin that we are talking about between the safe harbor and the umbrella, is really a margin of where groups will be pushing beyond what Wisconsin Right to Life wanted to do and beyond what the Supreme Court, the actual ads before it that the Supreme Court considered an as applied challenge.

Certainly, to be clear, the court's umbrella test is slightly broader than exactly what Wisconsin Right to Life, the characteristics of its ads, but we do not know what the difference is and how much room

there is.

This Commission, for better or worse, has been charged with employing this no reasonable interpretation test at the end of the day and yeah, there's been discussion of burden shifting.

My understanding, given the way this Commission's enforcement process works, is that the Commission always bears the burden of proving, whether in the context of attempting to convince an organization or persons entering into a conciliation agreement, or, if that is unsuccessful, convincing a court that the Commission is in the right and that there is no reasonable interpretation another than for a particular item.

The burden is clearly still on the Commission to do this, but again, not having this "strong evidence" elements that we propose in our comments, I think leaves open the distinct possibility that Jane Doe type

ads, which Chief Justice Roberts explicitly distinguished Wisconsin Right to Life's ads from, could possibly get in under the umbrella with very little consideration.

We are simply urging the Commission to take into consideration whether or not the ads before the Commission possess some characteristics that the court in Wisconsin Right to Life did not consider and to exercise your judgment as you did in the 527 enforcement actions.

You exercised it well in those capacities and as Don Simon said earlier, keep doing what you're doing as far as the outcomes you have reached with regard to those ads.

VICE CHAIRMAN MASON: I am glad you think so because Mr. Witten was not persuaded.

MS. ROBINSON: I just want to comment on a point that Mr. Ryan made. I do not believe the Chief Justice applied a two-step test in the case.

I believe he used a one-step test and that test was whether or not the ads at issue were susceptible to a reasonable interpretation as something other than an appeal to vote for or against a candidate.

The indicia of express advocacy and the characteristics of grassroots lobbying ads were characteristics of the specific ads at issue that he thought made it clear that they didn't fall within that, but those indicia and those characteristics were the specific tests that Mr. Bopp proffered to the court.

Chief Justice Roberts says he rejects that test. Instead he chooses his own one-step test that he felt was more protective of political speech.

I think that, in footnote 7 I believe, makes it clear that the court is not requiring any or all of those indicia or characteristics.

MR. RYAN: In brief response to

that, to the extent that this Commission were to decide that all it wanted to promulgate as a rule was the umbrella test, a one-step test, the Campaign Legal Center wouldn't complain.

We believe that safe harbors provide added guidance and clarity for the regulated community, but we certainly don't think it would be unconstitutional for this Commission to adopt a rule saying, the exemption, the WRTL-type test, is the umbrella and no reasonable interpretation test.

If that's what members of the regulated community would prefer, so be it.

CHAIRMAN LENHARD: This talk about safe harbors and our trying to articulate clearer standards nearly drives me screaming out of the window in part because I so often hear that our standards are vague and unclear, and provide people with no guidance and then we try to provide people with

greater clarity and more guidance and we are accused of corralling speech into these narrow little pens that we are all able to find four or five or six commissioners to agree on.

It's hard because we are trying to provide some clear guidance, and yet, I am very aware that people have different levels of willingness to take on risk.

Some people are very risk-averse and if the government says, if you do the exact three things here, there's no risk of enforcement, that is what they want to do.

Then there are other people who have more willingness for risk and they are willing to do something broader. And then there are some people who are utterly inattentive to risk, so we see them in enforcement.

We were obviously well aware when we put this out that we could simply replicate the Chief Justice's language and be

done with it and that would provide people with no further guidance other than that we were aware that the Supreme Court had issued its decision and we had read it or at least we read that part of it.

So the safe harbors and the wrestling with the factors we know brings both a hope that they are helpful and provide clarity and yet also an awareness that that clarity will lead the most risk-averse to scurry to that protection.

Any there other questions?

Then I will continue. I wanted to ask both of you sort of flip sides of a similar question of the same problem, and I will start with Mr. Ryan.

My question is, is it possible for us to read the Wisconsin Right to Life decision and as a consequence the earlier decisions in McConnell and Buckley as telling us anything other than when we look to define express advocacy we are left with the magic

words test? Is it possible to read Wisconsin Right to Life as leaving more there than that, or is that what the court is telling us?

MR. RYAN: I don't believe that is what the court was telling you and I think a fair reading of the Wisconsin Right to Life decision is that express advocacy language or communications that meet the Roberts test can be treated as express advocacy.

Anything that is express advocacy and/or its functional equivalent may be treated as express advocacy.

CHAIRMAN LENHARD: Before you go on, how do we wrestle our way through that linguistic problem because there must be some difference.

MR. RYAN: I don't think it is a huge linguistic problem. I will use the dreaded word "context" here, and the important context here is in the McConnell decision where the court was discussing

express advocacy and determined or declared that the express advocacy standard was functionally meaningless, I believe the court was referencing the magic words type interpretation of express advocacy.

And I believe the court was doing so because this Commission had not relied upon or enforced sub Part (b) of its express advocacy test in many years and had not done so, to my understanding, since the late 1990s.

In fact BCRA itself was in large part pushed through Congress or enacted by Congress because of the functional meaninglessness of the magic words type express advocacy test.

So in the McConnell decision, I think that is what we are talking about when the court said express advocacy or its functional equivalent, I don't think it was envisioning the sub Part (b) test as part of what it meant by express advocacy.

CHAIRMAN LENHARD: But doesn't that make our problem harder because they are doing so in the context of interpreting a different set of statutory language where Congress has sort of set very clear numbers of days prior to the election in which the speech can be regulated, and then very broad content restrictions, so in that context my sense of the McConnell decision was that the court said, well, given these tighter statutory limits, and the fact that the magic words test is functionally meaningless, then Congress can constitutionally regulate more precisely in this other way.

But it leaves us back in the part of the statute that we are enforcing here in terms of just expenditures in general with the earlier statutory language and potentially with the earlier Supreme Court interpretation of express advocacy that is limited to the magic words.

So my concern is that that is what

the Chief Justice was articulating in Wisconsin Right to Life.

MR. RYAN: What is different after Wisconsin Right to Life -- one of the things that's different after Wisconsin Right to Life -- is that up until that point in time we did not have a firm understanding, constitutionally speaking, of the outer bounds of what this Commission may regulate in terms of funding restrictions.

In Buckley we had a statutory phrase in the definition of expenditure that the court found to be unconstitutionally vague and they articulated this express advocacy test in that context.

The court made clear in McConnell that back in Buckley they were not defining a constitutional test there. They were just dealing with an unconstitutionally vague statute and then they sort of set that aside and they said, here we have a statute that is not unconstitutionally vague so we don't need

to necessarily talk about express advocacy in this case. But the test we have here is within the bounds of what is constitutionally permissible in terms of regulating funding restrictions.

And then in Wisconsin Right to Life they were dealing with a funding restriction and they employed what is, essentially, an express advocacy test more broadly defined than magic words.

In the context of defining the outer bounds as to what this Commission can regulate, it went from Buckley, only dealing with express advocacy as a means of construing a vague statute, to McConnell saying, yes, everyone wants to talk about express advocacy and Buckley but this statute is not vague, so we're not going to worry about it here, to Wisconsin Right to Life, saying, yes, this statute is not vague, but as it turns out we are kind of worried about the reach of it. We are kind of worried

about the Commission getting at speech and Congress getting at speech that the First Amendment prohibits it from getting it and declared Congress cannot regulate speech with respect to funding restrictions, that is not the functional equivalent of express advocacy, and then they set forth their test.

That is how I see the sequence of events.

I also want to point out that this widespread belief that the sub Part (b) test was not being relied upon by the Commission and I believe that the court was relying on in McConnell and what the parties were relying on in McConnell, is also reflected in the Shays II litigation.

Getting back to Commissioner Mason, who mentioned my colleague Roger Witten, for the record I also want to make clear that the Campaign Legal Center does not applaud every aspect of the way that the Commission has dealt with 527 organizations, and we have

made our thoughts clear in another arena and in the litigation in that context.

We are happy with the outcome that you have reached with respect to analyzing the text of the ads at issue in those cases.

But, getting back to Shays II. In Shays II, the court's decision early on and the papers filed by the parties in the case largely depended on an understanding and on a presumption that this Commission was only going to rely on express advocacy or on the magic words part of the express advocacy definition.

When the Commission made clear through conciliation agreements as well as through revised explanation and justification that it was, you might say, resurrecting the sub Part (b) standard, the court's concerns were largely allayed at that point for perhaps understandable reasons.

But this resurrection of sub Part (b) is something new and it is important not

to read too much into the McConnell language saying that express advocacy is this, and functional equivalent is this, and now assuming that the Roberts test is something other than and distinct from express advocacy.

CHAIRMAN LENHARD: Ms. Robinson, the other side of the coin is, if Mr. Ryan is wrong and you are right, do we find ourselves in the position where we are left with a test of express advocacy which the Supreme Court in the McConnell decision considered to be functionally meaningless?

MS. ROBINSON: Well, I guess what I would say about that is that it may be functionally meaningless but it is legally significant.

What the court is getting at here is you have these ads that basically do the same thing. You have these ads that are magic words and you have these ads that are not.

Take the Yellowtail ad, for instance, is what the court used as an example of something that was not magic words, but would be regulated under the electioneering communications provision, and the court said the distinction between magic towards and Billy Yellowtail is functionally meaningless.

The significance here is, one of them, you have this vague statute that is construed very narrowly so that the Commission or the government cannot reach speech that may be campaign-related but the public is not advised about where the line is drawn. So here you have this.

The court knew in Buckley, they said explicitly that they realized that there were going to be a lot of ads that were campaign-related that this wasn't going to reach. Then you get to McConnell and the court said you know, we realize this distinction is functionally meaningless.

That's the reason that Congress can use this new standard that is easily understood and objectively determinable to regulate these ads.

Congress can always go back and amend FECA to make it also the definitions of expenditure and contribution to a political committee to make those easily understood and objectively determinable, but until they do that you are stuck with magic words.

In this new area, which Congress specifically identified as an attempt to regulate beyond express advocacy, that's where you get your functional equivalent of express advocacy. Because it was a construction on the statute that was already easily understood and objectively determinable.

CHAIRMAN LENHARD: Vice chairman Mason.

VICE CHAIRMAN MASON: The functional equivalent of a non-functional test. That's

our problem.

CHAIRMAN LENHARD: It defines it.

VICE CHAIRMAN MASON: I suppose the other legal category out there that all the lawyers are taught to think badly of are formal tests. And I think that's sort of the clue to the riddle, that express advocacy is a formal test. The converse of a functional test isn't a non-functional test. It is a formal test.

Let me ask Ms. Robinson about dues. I take it that the monthly dues of a typical individual member is less than $100.

MS. ROBINSON: I would say it depends from union to union. I know that we certainly have members who pay dues that would have to be disclosed on an electioneering communications report.

VICE CHAIRMAN MASON: So there are members, in other words, whose dues are in excess of $85 a month, or whatever it would be, and more than $1,000 a year.

MS. ROBINSON: Yes.

CHAIRMAN LENHARD: Certainly in Alpha, the airline pilots would, because they all make a lot of money. Or the Screen Actors Guild.

MS. ROBINSON: AFSCME certainly represents doctors and dentists and college professors.

VICE CHAIRMAN MASON: I always thought of union workers as --

CHAIRMAN LENHARD: Most are, but there are these pockets.

VICE CHAIRMAN MASON: The question I want to get at and I think there is an answer to this, but I would like to try to get your help.

How in carving out an exemption for dues payers would we address the problem of the Wyly brothers? I am very sympathetic, too. I think they were trying to do a nice thing or at least what they thought was a public-spirited thing.

What if Republicans for Clean Air filed itself a charter, and said, to be a member of the Republicans for Clean Air all you have to do is pay dues of $500,000 a year.

And the two brothers sign up and they are dues paying members. Now how do we deal with that, because we have these inventive people who out there who try to use every tool they can to promote their speech interests?

MS. ROBINSON: I suppose one thing you would look at is donative intent. Assuming the Republicans for Clean Air, whoever they are, they meet your test for membership organization so they are not formed for the major purpose of supporting a candidate for a political office. I mean it's difficult if the organization does something else.

Union dues, they are not donations because they are required for union

membership. So one of the ways you would look at it is you would look at the intent of the members of Republicans for Clean Air. Are they doing it so the organization can pay for electioneering communications?

VICE CHAIRMAN MASON: It's one of those things that we would have to get into discovery for and that would be a bad thing.

MS. ROBINSON: This is quite true. It's a dilemma.

CHAIRMAN LENHARD: It's hard here.

MS. WEINTRAUB: It also sounds like intent-based test.

CHAIRMAN LENHARD: We are doing that on the solicitation side and for solicitation it says that the purpose of a solicitation, the words -- we are looking at the speech, yes, the specific speech that's used to discern what was the purpose of the solicitation.

VICE CHAIRMAN MASON: Think about that and see if you can provide us with any help. I'm

in agreement on legitimate dues, that it would be a good thing to exempt, but it is too easy for me to imagine someone coming up with a membership organization with a dues structure that I've described, and they'll probably have a list of benefits and governing documents that comply with our membership organization rules.

CHAIRMAN LENHARD: Are there further questions? Vice chairman Mason.

VICE CHAIRMAN MASON: Would the two of you address the Ganske ad? This is the one that says, "It's our land, our water. America's environment must be protected. But in just 18 months Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions.

Call Congressman Ganske. Tell him to protect America's environment for our families, for our future."

Is that a prohibited electioneering communication or not under the WRTL test?

MS. ROBINSON: I certainly don't think it is. I assume that there are people, probably reasonable people, that would interpret it as an appeal to vote for or against Greg Ganske.

I view myself as a reasonable person and I can interpret it as something other than as an appeal to vote for against him.

In looking at WRTL II, I really don't see anything in the case that says you cannot compare your position with the candidate's. Or you cannot create a sense of urgency about a legislative vote that is about to be cast. Or you cannot engage in hyperbole. I think that there are at least two ways to interpret that ad.

MR. RYAN: I, by contrast, do not believe the Ganske ad would be exempted and certainly not exempt under the safe harbor that contains an indicia of express advocacy which would disqualify it from the Safe Harbor Act as the Commission has proposed in the NPRM.

Beyond that, I would characterize it as really the classic Jane Doe ad and as a personal attack on the character of the candidate identified.

This is an ad of the sort that the under umbrella test it's going to depend on who is doing the reasonable interpreting. I don't think the ad is susceptible to any reasonable interpretation other than as an effort to oppose a candidate.

VICE CHAIRMAN MASON: What makes it an attack on his character? That was the term you used. Or I suppose, under the Roberts test, qualifications or fitness for office?

MR. RYAN: I would point to the

language saying that he took campaign contributions in exchange for his votes which is an attack on fitness for office, I think pretty clearly.

The ad essentially says that he supports cancer, because after all he voted to let corporations continue releasing cancer-causing pollutants.

This ad is very different from Wisconsin Right to Life's ad. It is also very different from the Christian Civic League of Maine ads that were at issue in other related litigation here.

VICE CHAIRMAN MASON: I understand that, but what I am trying to understand is, it's interesting to me that people seem to disagree about whether Chief Justice Roberts intended Jane Doe to be in or out. How would we draw a line between this and any other very pointed criticism of an officeholder's votes?

The fact that he voted to continue

to let corporations release cancer-causing pollutants, that's probably a factual statement that can be caveated with how many parts per billion or whether there could have been competing proposals. And the environmental groups could have had a proposal up there that could be characterized that way because it wasn't a zero threshold, right? So how do we make that distinction?

MR. RYAN: One of the most difficult issues facing the Commission now in the aftermath of WRTL is drawing that line if it is possible to draw a line between criticizing and condemning.

I am one of those who believes that Chief Justice Roberts intended for Jane Doe type ads to be out. He mentioned Jane Doe ads and distinguished Wisconsin Right to Life ads from Jane Doe ads for a reason. It is important not to ignore that reason.

This is going to be an ad of the sort that creates a challenge for the

Commission that will come down to whether there is a majority of commissioners who believe that there is a reasonable interpretation other than.

CHAIRMAN LENHARD: But the thing we are struggling with is just this. We talk about who is the reasonable person here and we also speculate about what the court is going to do on the next challenge which isn't very helpful, I mean in terms of the fact that it is not predictable.

But none of us feel particularly comfortable with the idea that there are five or six of us who are going to sit up here as some kind of jury of reasonable persons rendering these decisions.

Because all of us, even when we disagree about the applications, would like some standard that we could look at and render and that people would actually, you know, a vast majority of at least, let's say, people who are trained in the area, would be

able to look at it and render an opinion and do it reliably so.

MR. RYAN: I humbly submit that your complaint should be directed at Chief Justice Roberts and not at me.

Chief Justice Roberts gave you that standard. The Ganske ad is not about the environment as an issue. It's about Ganske. It's an attack on him. It is not an effort to lobby him. It doesn't even mention a piece of legislation.

This may be one of those ads where you're talking about a difference in degree as opposed to a difference in kind that makes the difference between an acceptable statement of a candidate's position on an issue versus condemnation of that individual, that candidate.

VICE CHAIRMAN MASON: Isn't that kind of like the dues thing, in the sense that there's an easy way around it. "Call Congressman Ganske. Tell him to protect America's

environment. Tell him to support HR 1234."

MR. RYAN: I'm not submitting that that's the only magical element, the mention or the lack thereof of a piece of legislation, but when looking at the text of this ad it certainly --

VICE CHAIRMAN MASON: Oh, I understand, but the text of this ad would be changed materially.

In other words, if you talked about his prior votes on environmental issues and how he basically voted wrong on the environment and how much that hurt the environment and the families in Iowa, and so on like that, and that there was this bill pending, that would make it all better, and by calling and telling him to support that, seems to me changes the character of the thing pretty dramatically.

MR. RYAN: Are you calling me unreasonable?

VICE CHAIRMAN MASON: No, not at all. I am

just saying this is our problem in rendering this. I am trying to see if you can help and if there is a good solution.

MR. RYAN: That's why we supported the Bright Line test of the statute and we didn't advocate its curtailment through the Supreme Court's decision.

I look forward to seeing how you do resolve these issues, but the simple fact is that it is your burden and responsibility to.

MS. ROBINSON: I will just remind you that "the tie goes to the speaker."

CHAIRMAN LENHARD: That's what I wanted to get at because we did lose that case. We lost the Bright Line and we are living with the aftermath.

You had mentioned something which we have also struggled with internally and a part of what you are watching is sort of the debates and struggles that we have had internally over how to interpret these things.

It goes to that question of the language in the decision where the Chief Justice talks about the tie going to the speaker and the question is, do we really need to find four votes to resolve whether this particular ad is or is not protected speech or does the presence of even a single reasonable voice teach us that that's the end of the inquiry and that we should approach these cases really significantly differently because of this notion that to the degree that one cannot clearly discern this, that the regulatory machinery must stop.

MR. RYAN: When the question is posed to me, I am the reasonable person, I am in those shoes. To me, it is not a tie.

If I were a commissioner I would say, "No, this is not a tie," and I would cast my vote for this ad not being exempt. I don't think there is anything in the statute that created the Commission and the regulations that govern its procedures, but

perhaps you need a change in the statute from Congress or a change in your regulations to say, "One vote is enough to block something."

But the way the Commission currently operates is that it would be necessary for four commissioners to in their own minds view this as either a tie or as clearly susceptible to a reasonable interpretation other than as an attempt to influence an election and then you have got four votes.

CHAIRMAN LENHARD: Certainly we will have a statutory requirement that it takes four votes to proceed on any matter, but we are also interpreting a test which says to the degree that a reasonable person can construe this as something other than a call to elect or defeat a candidate, then it is protected speech.

And there appears to be a reasonable person who is sitting next to you at the table and you sort of listen to those

arguments and you don't believe that that is the correct outcome, but it doesn't seem like the person voicing them was unreasonable. And doesn't that under the Roberts test lead you to conclude that a reasonable person has in fact construed that this is something other than a call to vote for or against, and doesn't that, because of the nature of the test, have to guide your thinking about how you cast your vote?

MR. RYAN: I certainly do not want to make about the person who is sitting next to me at the table. I will stick to my initial position that I do not believe there is a reasonable interpretation other than.

And to the extent that some of your colleagues can convince you otherwise and you change your mind and it pulls you from being on the fence to a tie and you change the way you want to vote, then so be it.

CHAIRMAN LENHARD: I didn't mean to single you out. I actually do what the

people up here do. I will let Commissioner Weintraub ask her question and then you can then follow up.

MS. WEINTRAUB: Just a follow up. I am deeply disappointed that the vice chairman doesn't appear to think that the five of us are the epitome of reasonable people. We were what they were thinking of when they invented the reasonable person test.

VICE CHAIRMAN MASON: Oh, I don't think so. I have great affection for my colleagues, and respect too, but I don't think that is the case.

MS. WEINTRAUB: No? I am just so disappointed. I want to push Mr. Ryan a little bit on what he just said, that he doesn't think there is any way of reading this other than as a call to vote against Congressman Ganske.

What if this precise text, word for word, no changes, is run in January of a

non-election year and there's a big environmental bill about to come up on the floor? Would you still say, with an election almost two years out, that running this ad, there is no reasonable way of interpreting it other than as a call to vote against him two years from now?

MR. RYAN: That's a great alteration of the hypothetical, or actual ad.

MS. WEINTRAUB: No, I am not changing the words at all. I am just asking how in any way that these words can be read with a reasonable interpretation of something other than a call to vote against him?

MR. RYAN: I will say, given that I took such context into such small consideration in rendering my initial opinion, I would say that that doesn't change the outcome, but I am certainly willing to give it some thought.

I will take the same position that my predecessors on the previous panel who

requested additional time to think about hypotheticals and changes that were not presented in the NPRM II, to perhaps get back to you, but my initial response is I wasn't taking proximity of the election into consideration when I was initially asked whether this is in or out, and so your shift of a hypothetical to further from the election I would say initially that, no, that that doesn't change my response. That's the safe response.

CHAIRMAN LENHARD: Mr. Bopp would applaud your lack of consideration of context. Ms. Robinson, you had sought recognition before.

MS. ROBINSON: Yes, but now I can't remember what it was about.

CHAIRMAN LENHARD: It happens to all of us. We will move on and if it comes back to you, just give a signal. Commissioner Walther.

MR. WALTHER: I would like to ask

for an opinion from either one of you about guidance that we might get on ads that do not convey a verbal message but by the image convey a very strong message.

When you at look at some these ads, all that we talk about here is what we read and what we say, but in some cases, and I always hearken back to this example, for those of us who are old enough, about the Goldwater ad back in 1964, where they had this little girl picking petals off a flower and in the background was this mushroom cloud done in a black and white movie that sent out a very dark scary picture and it really made it all clear without any words pretty much, what that was all about, given the context.

Maybe you could have a word or two and consider what Senator X is thinking about what you just saw.

And now I am asking if you have any suggestions on how we've got to articulate how take those factors into account when you

know that one picture is worth a thousand words and certainly this is all about television, that we're regulating what is broadcast.

MS. ROBINSON: In thinking about the daisy ad, and I think I remember the whole thing, I would have to say in looking at that, that it is not the functional equivalent of express advocacy.

MR. WALTHER: Without just picking that ad, how can we articulate powerful messages conveyed visually?

MS. ROBINSON: I suppose it would be the same way when you look at the text.

MR. WALTHER: When the words are fairly anemic, without the visuals.

MS. ROBINSON: Right. It would be the same thing if you looked at an ad with text and considering the four corners of that ad, does it convey to you a message that is something other than --

MR. WALTHER: The functional

equivalent of express advocacy?

MS. ROBINSON: Right.

MR. WALTHER: So it could be where we're really not talking about express advocacy, then visually.

MS. ROBINSON: Right.

MR. WALTHER: Essentially.

MS. ROBINSON: Right.

MR. RYAN: I haven't really given much thought to the subject. I will mention that Chief Justice Roberts's test itself uses the words "an appeal" and that's open to interpretation as to whether an appeal can be made visually or must only be made verbally or through print communication.

It's a very difficult question that I don't have an answer to, and particularly with respect to the daisy ad, the mushroom cloud ad.

CHAIRMAN LENHARD: Certainly one would approach it with a great deal of caution in the Fourth Circuit.

Are there other questions, comments, general counsel's office, staff, anyone? Ms. Duncan.

MS. DUNCAN: Yes, thank you. Ms. Robinson, in your written comments you suggested including specific factors in the regulation that the Commission may consider in determining if an ad qualifies for the general exemption and those factors seem to be fairly similar to the prongs of the grassroots lobbying safe harbor.

I'm just wondering as a matter of structure and form why should we list the safe harbor prongs also as additional factors? Is there another benefit to doing that?

MS. ROBINSON: I am not sure that you should list all of safe harbor prongs as additional factors. I would conclude that there are some prongs of the safe harbor that may be left out in developing a safe harbor.

As you pointed out we did not avoid

the hurly-burly of factors when we submitted our comments.

But when we looked at those factors it was an attempt to explain to the Commission how, well, I guess in judging and looking at the factors it's a way to explain how more, even based on factors, can be included within, as Mr. Ryan calls it, the WRTL umbrella, than just those in the safe harbor.

CHAIRMAN LENHARD: Are there any other questions or comments? From our panelists, any final words?

MR. RYAN: No, but thank you for your attention.

CHAIRMAN LENHARD: Thank you. This concludes today's portion of our hearing.

I want to express my thanks to our panelists for sticking with us today and devoting the time and energy necessary for all of this, we thank you.

We will now recess and reconvene

tomorrow at 10 o'clock. Thank you.

(Whereupon, at 4:30 p.m., the HEARING was adjourned.)

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