

James Madison
JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL
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September 29, 2007

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
via email to: wrtl.ads@fec.gov

Re: Comments Responding to Notice of Proposed Rulemaking 2007-16 (Electioneering Communications)

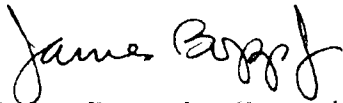
Dear Mr. Katwan & Commission:

The James Madison Center for Free Speech's *Comments* regarding the referenced rulemaking are attached.

James Bopp, Jr. wishes to present testimony in person at the hearing scheduled in this rulemaking on October 17, 2007.

Sincerely,

James Madison Center for Free Speech



James Bopp, Jr., General Counsel
Richard E. Coleson, Counsel

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

FEDERAL ELECTION COMMISSION

Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications)

*By James Bopp, Jr. & Richard E. Coleson*¹

In its *Petition for Rulemaking*,² the James Madison Center for Free Speech asked the Commission for a rulemaking to do two things in light of *WRTL II*: (1) recognize constitutional protection for issue advocacy from the electioneering communication restrictions and (2) repeal the Commission's alternate express advocacy definition at 11 C.F.R. § 100.22(b). The Madison Center now comments on the Commission's *Notice*.

Part I sets out *WRTL II*'s overarching requirement that any rule must be workable and protective of robust issue advocacy, or else the electioneering communication restriction must be struck down facially. Part II sets out the United States Supreme Court's threshold unambiguously-campaign-related requirement, which unifies its decisions and governs all campaign law, including this rulemaking. Part III discusses necessary changes to the electioneering communication rules. Part IV demonstrates the necessity of repealing the alternate express advocacy definition.

I. Overarching Principle: Workability

The overarching principle governing this rulemaking is that any resulting rules must conform to *WRTL II*'s mandate that the application of its “no reasonable interpretation” test, 127 S. Ct. at 2667,³ must be workable and highly protective of issue advocacy. *WRTL II* set out standards for deciding as-applied challenges to the electioneering communication restrictions that are necessary to make as-applied challenges an adequate remedy to protect First Amendment activity. These same standards must govern this rulemaking because a rule to implement *WRTL II* is inherently an as-applied application of *WRTL*'s no-reasonable-interpretation test.

¹The authors were counsel for Wisconsin Right to Life, Inc. in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”).

²The *Petition* is available on the Commission's website, [www.fec.gov](http://www.fec.gov/pdf/nprm/electioneering_comm/2007/petition_center_for_free_speech.pdf), at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/petition_center_for_free_speech.pdf.

³The cited opinion is by Chief Justice Roberts, joined by Justice Alito. As the controlling *WRTL II* opinion, it states the holding of the Court and will herein simply be referred to as *WRTL II*. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (citation omitted)).

WRTL expressly asked the Supreme Court to overrule its facial upholding of the electioneering communication restrictions in *McConnell v. FEC*, 540 U.S. 93 (2003), unless the Court provided the relief of both (a) stating a generally-applicable test to reduce the need for litigation and (b) making as-applied challenges an adequate remedy for protecting the First Amendment liberties of groups seeking to broadcast genuine issue ads by limiting the burdens of litigation. Brief for Appellee at i, 62, 65-70.

WRTL described to the Supreme Court how the as-applied remedy had been wholly inadequate in vindicating its First Amendment rights due to the heavy burdens of expensive, burdensome, and intrusive discovery and litigation, with relief coming only long after the effective opportunity to run WRTL's ads had passed. *Id.* WRTL described the numerous depositions to which it was subjected and the fact that WRTL "was required to produce a substantial volume of documents about its inner workings, plans, and finances—all information that an ideological group would otherwise keep private." *Id.* at 10 n.19. And WRTL summarized the future inadequacy of the as-applied remedy—unless the Supreme Court's holding made it adequate by limiting how future litigation should be conducted—as follows:

So any citizen group having the temerity to want to run future ads must (1) plan well in advance to allow ample litigation time (problematic because the need for grassroots lobbying frequently arises on short notice), (2) retain a lawyer, (3) endure the invasion of its privacy by a discovery investigation at the hands of the FEC and Intervenor (which often will include their political opponents), and (4) pay the legal expenses and costs to endure the scorched-earth litigation practices of the federally-funded FEC and the statutorily-permitted Intervenor in order to get prior permission from a court to run a constitutionally-protected communication at the core of our system of self-governance by the people. [*Id.* at 66.]

WRTL II took explicit notice of the "chill" resulting from "costly, fact-dependent litigation," 127 S. Ct. at 2665-66 (*quoting* Brief for Appellee [FEC] at 39, *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and set out the example of the burden of litigation imposed on WRTL in attempting to vindicate its First Amendment liberties:

Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finance. Such litigation constitutes a severe burden on political speech. [*Id.* at 2666 n.5.]

In response to these identified problems, *WRTL II* (a) stated a test to create a safe harbor for "genuine issue ads," *id.* at 2667, and (b) prescribed how implementation of the test must be conducted in an attempt to assure that the remedy is effective in protecting vital First Amendment liberties. *Id.* at 2666-67.

As to the test, the Supreme Court said that “an ad is the 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.” *Id.* at 2667. Note that the test’s presumption is against restriction. This is because “[t]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it,” *id.* at 2659, and “[w]e give the benefit of the doubt to speech, not censorship.” *Id.* at 2674. Thus, “issue advocacy,” *id.* at 2659, 2667, 2671-73, is specially protected.

As to implementation of the test, *WRTL II* said that because “the proper standard . . . must be objective, focusing on the substance of the communication.” 127 S. Ct. at 2666. There must be “minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation.”⁴ There must not be “open-ended . . . factors” that result in “complex argument in a trial court and a virtually inevitable appeal.” *Id.* (citation omitted). The litigation “must give the benefit of any doubt to protecting rather than stifling speech.” *Id.* at 2667 (citation omitted). *See also id.* at 2669 n.7 (restating the no-reasonable-interpretation test and limitations on the conduct of future litigation). Because the stated goal for as-applied challenges is “to resolve disputes quickly without chilling speech through the threat of burdensome litigation,” *id.* at 2666, whatever threatens burdensome litigation must be eliminated. Evidence for the chill that *WRTL II* sought to eliminate is readily apparent from the fact that *WRTL* had numerous amici curiae in the Supreme Court (from all across the ideological spectrum), *see id.* at 2674 (listing some of amici curiae), but none of these amici was willing to sustain the burden of bringing an as-applied challenge.

If *WRTL* and similar advocacy groups are forced to deal with a set of rules as a result of this rulemaking that do not fully and adequately embrace broad protection for robust issue advocacy, the as-applied remedy will have proven inadequate. If the rules are vague or overly restrictive, so that advocacy groups risk enforcement actions and litigation based on the sort of novel and complex arguments asserted and rejected in *WRTL II* (e.g., reliance on context instead of the substance of the communication), the remedy will be insufficient. Then it will be necessary to reconsider the facial upholding of the electioneering communication restrictions in *McConnell*. 540 U.S. 93. While three Justices would have overturned *McConnell* in *WRTL II*, 127 S. Ct. at 2674 (opinion of Scalia, J., joined by Kennedy & Thomas, JJ.), the Chief Justice and Justice Alito sought to provide a workable test and standards for implementation in an effort to provide an adequate remedy to protect the First Amendment rights of issue advocacy groups. But implicit in the Chief Justice’s opinion and explicit in Justice Alito’s concurring opinion is the position that if the as-applied remedy remains inadequate to protect the First Amendment rights of groups seeking to broadcast genuine issue ads trapped by the electioneering communication restrictions,

⁴*WRTL II* said that courts may take judicial notice of “basic background information . . . to put an ad in context—such as whether an ad [is about a current legislative issue]—but the need to consider such background should not be an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.” *Id.* at 2669.

then *McConnell*'s facial upholding of the restrictions will need to be reconsidered. As Justice Alito put it, "If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* . . . that § 203 is facially constitutional." *Id.* at 2674 (citations omitted).

So the Commission should view its overarching task in this rulemaking as twofold: (1) positively, embracing and implementing the Constitution's strong protection for robust issue advocacy and (2) negatively, preventing the facial invalidation of the electioneering communication restrictions (if the Commission considers preserving the electioneering communications restrictions a worthy goal).

II. Threshold Requirement: "Unambiguously Campaign Related"

The Constitution mandates that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This "guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) (citation omitted). If "Congress shall make no law," how can government regulate First Amendment activities related to election campaigns? *Buckley* provided the answer: "The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." *Id.* at 13 (footnote omitted) (emphasis added). *Buckley* noted that "Article I, § 4, of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives." *Id.* at 13 n.16 (also citing decisional authorities extending this power to elections for President and Vice President and to primary elections).

This authority to regulate elections is self-limiting. If the government tries to regulate speech that is not closely and clearly related to election campaigns, it goes beyond its authority. The key to the *Buckley* analysis (as stated in its discussion of a disclosure requirement) is the clearly articulated constitutional question of whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *Id.* at 80 (emphasis added). The Court requires that government restrict its election-related laws to reach only First Amendment activities that are "*unambiguously related* to the campaign of a particular federal candidate," *id.* at 80 (emphasis added), in short, "unambiguously campaign related." *Id.* at 81.

Buckley applied its threshold unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC disclosure of contributions and independent expenditures, *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act [regulating elections], for they are connected with a candidate or his campaign.")

To implement this unambiguously-campaign-related requirement for PAC status, the Court created the major purpose test for "political committees": "To fulfill the purposes of the

Act [regulating elections] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79. “Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*.” *Id.* at 79 (emphasis added). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 253, 262 (1986) (“*MCFL*”) (major purpose test reiterated and determined by express-advocacy “independent spending”).

To implement the unambiguously-campaign-related requirement as to expenditures, the Court created the express advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 44, 80. *See also MCFL*, 479 U.S. at 249 (“independent expenditure” requires express advocacy construction). This express advocacy test assures that expenditures are “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424, U.S. at 80.

While *McConnell v. FEC*, 540 U.S. 93, 190 (2003), declared “the express advocacy restriction . . . an endpoint of statutory interpretation, not a first principle of constitutional law,” the express advocacy test was created to implement the unambiguously-campaign-related requirement, which *is* “a first principle of constitutional law.” *McConnell* expressly recognized this. It did so by quoting *Buckley*’s explanation that the express advocacy construction was done “[t]o insure that the reach’ of the disclosure requirement was ‘not impermissibly broad.’” *Id.* at 191 (quoting *Buckley*, 424 U.S. at 80). *McConnell* also implicitly endorsed the unambiguously-campaign-related requirement when it stated that “[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.” *Id.* at 192. Conversely, where a restriction on First Amendment liberties *is* vague or overbroad (for reaching beyond things unambiguously campaign related) it must toe the express advocacy line,⁵ or its “functional equivalent.” *Id.* at 206. In fact, *McConnell*’s facial upholding of the prohibition on electioneering communications only “to the extent that [they] . . . are the functional equivalent of express advocacy,” *id.*, is a reaffirmation of the unambiguously-campaign-related requirement.

McConnell also expressly recognized the existence of “issue advocacy,” which it described as “discussion of political policy generally or advocacy of the passage or defeat of legislation,” *id.* at 205 (quoting *Buckley*, 424 U.S. at 48), and of “genuine issue ads” that likely lay beyond the ability of Congress to regulate. *Id.* at 206 n.88. “Genuine issue ad” was a term of art in the *McConnell* litigation and the **PBA ad** was recognized by *McConnell* defense expert Kenneth M. Goldstein as a “genuine issue ad,” *see McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. (2003) (Henderson, J.), 748 (Kollar-Kotelly, J.), 905 (Leon, J.):

⁵Several courts have recognized this post-*McConnell*. *See infra*.

America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121. [*Id.* at 312 (Henderson, J.) (“[sic]” included in Henderson opinion).]

This ad states the candidates' position on an issue, described in very negative terms, but it is not unambiguously campaign related.

The **Barker ad** was recognized by *McConnell* defense expert David Magleby as a “genuine issue ad” and was cited and quoted in Judge Leon's *McConnell* opinion as a “representative example” of a “genuine issue ad,” *id.* at 795, 914-15 (Leon, J.):

Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed *last* year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative _____ at xxx-xxx-xxxx and tell him to vote *no* on Fast Track. Tell him we're still paying attention. And Fast Track is *still* a bad idea.

It, too, is not unambiguously campaign related.

In *WRTL II*, the Supreme Court applied the unambiguously-campaign-related requirement to eliminate overbreadth in the regulation of electioneering communications when it stated its test for functional equivalence: “[A]n ad is the 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.” 127 S. Ct. at 2667. And it reiterated the requirement when it said that the corporate-form corruption interest does not “extend[] beyond campaign speech.” *Id.* at 2672. So *WRTL II*'s no-reasonable-interpretation test is the application of the unambiguously-campaign-

related requirement to electioneering communications, just as the express advocacy test was the Court's application of the unambiguously-campaign-related requirement to independent expenditures. In light of *WRTL II*, there is no longer a functional equivalence (to express advocacy) test because that test has been superseded by the no-reasonable-interpretation test.

WRTL II also reaffirmed that the purpose of the unambiguously-campaign-related requirement—and its no-reasonable-interpretation test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections. *See supra*. Positively, it protects what the Court calls “genuine issue ads,” *WRTL II*, 127 S. Ct. at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or “issue advocacy.” *Id.* at 2667.⁶ *WRTL II* explained that “[i]ssue advocacy conveys information and educates,” *id.* at 2667, and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect issue advocacy from being chilled, and any doubt must be resolved in favor of free speech:

[W]e have acknowledged at least since *Buckley* . . . that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” 424 U.S., at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor. [*Id.* at 2669.]

Lest there be any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that “the benefit of any doubt [goes] to protecting rather than stifling speech,” *id.* at 2667 (*citing New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)), that “in a debatable case, the tie is resolved in favor of protecting speech,” *id.* at 2669 n.7, and that “the benefit of the doubt [goes to] speech, not censorship.” *Id.* at 2674. In other words, free speech about public issues, especially political ones, is so essential to our system of government that it is better to allow some theoretically-regulable speech to go unrestricted than to chill public debate. This approach is akin to our criminal jurisprudence, which says that it is better to let a guilty person go free than to convict an innocent person, except that chilling free speech affects not only the lone speaker, but also her hearers and our very system of government. *WRTL II* reaffirmed what the Court held in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002): “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become

⁶*See also id.* at 2672-73 (listing prior concurrences by Justices Brennan and Stevens distinguishing issue advocacy from campaign advocacy).

unprotected merely because it resembles the latter. The Constitution requires the reverse.” *Id.* at 2670 (*quoting Ashcroft*, 535 U.S. 234 at 255). To do otherwise would “turn[] the First Amendment upside down.”” *Id.*

Two post-*WRTL II* cases further develop the scope of protection for issue advocacy in the context of electioneering communications—showing applications of the *WRTL II* no-reasonable-interpretation test and the underlying unambiguously-campaign-related requirement. In both of these cases, the FEC and the intervenors (BCRA prime sponsors Sen. McCain et al.) agreed to a stipulated judgment conceding that the ads at issue were protected issue advocacy under *WRTL II*'s test. One of these cases is *WRTL III*, which held the electioneering communication prohibition unconstitutional as applied to *WRTL*'s 2006 Child Custody Protection Act (“CCPA”) advertisement. *Wisconsin Right to Life v. FEC*, No. 04-1260, slip op. at 1 (D.D.C. July 23, 2007) (“*WRTL III*”).⁷ The CCPA ad stated the positions of Senators Feingold and Kohl (the candidate), based on their prior votes, and characterized their positions. The other case involved a “Crossroads” advertisement that the Christian Civic League of Maine (“CCLM”) sought to run.⁸ This ad

⁷*WRTL* sought a preliminary injunction during the 2006 prohibition period, as part of its ongoing *WRTL* litigation, to permit it to run this **CCPA ad** (preliminary injunction was denied and a decision on the ad was held in abeyance until after *WRTL II*):

Listen up, parents. Wisconsin requires parental consent before your minor daughter can have an abortion. But, she can be taken to Illinois for an abortion that is kept secret from you. Imagine, your daughter can be taken across state lines for a major surgical procedure without your knowledge or consent. The U.S. Senate recently passed a bill to protect parents from secret abortions. Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not. Your help is urgently needed because some Senators are holding up further action on the bill. Please call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions. That's 202-224-3121.

⁸CCLM sought judicial protection to run this **Crossroads ad** (preliminary injunction was denied and the case dismissed for mootness, which decision the Supreme Court reversed):

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early

(continued...)

stated the candidates' position on the issue and characterized that position. The district court held the electioneering prohibition unconstitutional as applied to the Crossroads ad." *Christian Civic League of Maine v. FEC*, No. 06-614, slip op. at 1-2 (D.D.C. Aug. 21, 2007) ("*CCLM*"). Consequently, there is now no question that ads stating a candidate's position and characterizing that position may be fully protected issue advocacy and excluded from the electioneering communication definition. The rule and commentary should make this clear.

The ads set out in this discussion (Part II) and WRTL's 2004 anti-filibuster ads should be set out in the commentary for the new rules because these ads reveal the vigor with which issue advocacy may advocate for an issue without being in violation of *WRTL II*'s no-reasonable-interpretation test. They are not unambiguously campaign related, even if they are run in the thick of a campaign and invoke issues that have become campaign issues. They are approved safe harbors and should be officially recognized as safe harbors in addition to any other rules that the Commission may attempt to derive from them.

The threshold unambiguously-campaign-related requirement is the unifying constitutional principle and analysis of the governing precedents—*Buckley*, *MCFL*, *McConnell*, *WRTL II*, *WRTL III*, and *CCLM*. The no-reasonable-interpretation test is the approved application of the threshold requirement to electioneering communications. The express advocacy test is the approved application of the threshold requirement to independent expenditures. The threshold requirement and these two tests for applying it mandate what the Commission must do to protect genuine issue ads and define express advocacy in this rulemaking.

III. Electioneering Communications: Protect Issue Advocacy

Alternative 2 Required. The unambiguously-campaign-related requirement mandates that the Commission exempt what the Court calls "'genuine issue ads,'" *WRTL II*, 127 S. Ct. at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), or "issue advocacy," *id.* at 2667, from all electioneering communication restrictions because issue advocacy is not unambiguously campaign related. So the Commission must choose Alternative 2 in its *Notice*, i.e., it must revise the electioneering communication *definition* to exclude genuine issue ads by incorporating *WRTL II*'s no-reasonable-interpretation test.

This is clear from the way that *WRTL II* was decided. The Court could have ruled for WRTL based on (1) the nature of WRTL, (2) the nature of the funds used, or (3) the nature of the ads. The Court chose to decide on the basis of the nature of the ads, although all three options

⁸(...continued)

June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

were argued.⁹ A decision based on the nature of WRTL or of its funds would necessarily have addressed the applicability of the corporate-form interest, i.e., whether there could be a *prohibition*.¹⁰ A decision based on the nature of the ads, which *WRTL II* chose, addresses the proper scope of the electioneering communication *definition*, i.e., are these ads the functional equivalent of express advocacy, which is unambiguously campaign related? WRTL argued that its ads were not the functional equivalent of express advocacy. The Court agreed. Even when *WRTL II* addressed the corporate-form interest, it did so based on the nature of WRTL's ads, not the nature of WRTL: "We hold that the interest recognized in *Austin* [*v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990),] as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech *has no application to issue advocacy* of the sort engaged in by WRTL. *WRTL II*, 127 S. Ct. at 2673.

In sum, *WRTL II*'s no-reasonable-interpretation test addresses the electioneering communication *definition* because the government may not regulate issue advocacy, which is not unambiguously campaign related. Since *WRTL II* was expressly decided on the basis of what properly fits in the electioneering communication *definition*, and not on what justifies a *prohibition*, the Commission is required by *WRTL II* to modify the electioneering communication definition by faithfully incorporating *WRTL II*'s no-reasonable-interpretation test.

Specific Language of Rule and E&J. As to specific language to be employed for protecting issue advocacy in the electioneering communication context, the correct route to take is to simply follow *WRTL II*'s no-rational-interpretation test implementing the unambiguously-campaign-related requirement as to electioneering communications. The first sentence of proposed § 100.29(c)(6), in Alternative 2, does this in a satisfactory manner with regard to the test itself.

In the explanation and justification ("E&J") commentary on the rule, the Commission should explain that this test would encompass the grassroots lobbying ads in *WRTL II* (the three 2004 anti-filibuster ads) and the other decided cases, *see supra*, which include the CCPA ad,

⁹The nature of WRTL was argued in the *Brief of Family Research Council, Free Market Foundation, and Home School Legal Defense Association as Amici Curiae in Support of Appellee, WRTL II*, 540 U.S. 93, prepared by the Stanford Constitutional Law Center, which argued that all nonprofits should be exempted from the electioneering communication prohibition because the government had no corporate-form interest as applied to nonprofits. The nature of the funds that WRTL proposed to use for its ads, if necessary to obtain judicial relief, was raised in Count II of WRTL's complaint, which offered to use funds from a separate bank account containing only funds raised for the purpose from individuals, which option would have eliminated the corporate-form interest.

¹⁰Only corporations (and unions for parity) are *prohibited* from making electioneering communications, based on the corporate-form interest. *See McConnell*, 540 U.S. at 205.

Crossroads ad, PBA ad, and Barker ad, as well as the genuine issue ads recognized by Judge Leon in *McConnell*, 251 F. Supp. 2d at 914-18. These should be set out as approved templates. They are court-approved safe harbors that capture multiple nuances that are difficult to reproduce in a safe-harbor rule. The Commission should constantly measure its rulemaking against these benchmarks because they establish what is already court approved, not what might be protected. There is no legitimate reason to create a test narrower than what has actually been done in these court-approved templates, broadly construed to favor free speech instead of censorship, as *WRTL II* mandates.

There is nothing wrong with also creating rules to define safe harbors for grassroots lobbying and business communications, as the Commission proposes, provided that two things occur. First, the rules must not attempt a narrow, stingy scope of protection for free expression, despite *WRTL II*'s broadly protective test for safeguarding issue advocacy. Second, the Commission, the regulated community, and the general public must all clearly understand that the rules are not the limits of this expansive protection, but rather safe havens far from the border of permissibility, and that within these safe havens there may be robust issue advocacy without any thought to a possible need to hedge and trim one's speech.

The E&J should expressly state that *WRTL II* created a test for protecting "genuine issue ads," *see, e.g.*, 127 S. Ct. at 2669 (*WRTL*'s ads were "genuine issue ads"), not just a test for grassroots lobbying. Grassroots lobbying is a subset of the much larger class of genuine issue ads. So *WRTL*'s no-reasonable-interpretation test, *id.* at 2667, is designed not only to protect grassroots lobbying but also other kinds of genuine issue ads, such as ads lobbying candidates to take a position on an issue (whether or not it is currently before the legislative or executive branch, as would typically be the case with grassroots lobbying) and communications that provide relevant information to voters about the position of a candidate on an issue. For example, an ad setting forth a current candidate's vote (or other indication of position) on any issue—ranging from abortion rights, to animal rights, to environmental concerns and other public issues—would be a genuine issue ad, even if it fit the electioneering communication definition, so long as "the ad is susceptible of [some] reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* The commentary should make clear that the two safe harbors (for grassroots lobbying and commercial and business advertisements) in the rule do not exhaust the scope of issue advocacy protected by *WRTL II*'s no-reasonable-interpretation test that implements the unambiguously-campaign-related requirement. The E&J should note that all communications that meet the electioneering communication definition but are not encompassed by *WRTL II*'s narrow no-reasonable-interpretation test are genuine issue ads that may not be restricted—regardless of their characteristics, their context, or whether they fit one of these safe harbors.

As to the proposed language for § 100.29(c)(6) (to be created by Alternative 2), the second sentence should be changed. It currently reads (emphasis added): "A communication *shall satisfy* this section . . ." This language is confusing because it sounds mandatory and limiting. Preferable wording is: "Among communications that satisfy this section are those that meet the

requirements of either subparagraph (i) or (ii) of this section” It is important to eliminate confusing language and indicate other possibilities in the rule itself, not just the E&J, because the rule as most commonly used in booklet form (or online) will be separated from the commentary, and the rule as it stands alone should be clear and should give a clear indication that there are other possibilities that might invite a look at the E&J commentary. And although campaign finance law has become a highly (and overly) specialized field—far from the First Amendment’s majestic mandate that “Congress shall make no law” restricting the People’s speech liberty—there should always be the effort to guide non-specialists to what is required.

Subparagraph (i)(A) identifies “Any communication that . . . [e]xclusively discusses a pending legislative or executive branch matter or issue” The term “exclusively” is too narrow, too wooden.¹¹ The Commission should follow the language employed in *WRTL II* in applying the no-reasonable-interpretation test: “The ads *focus on* a legislative issue.” 127 S. Ct. at 2667 (emphasis added). In contrast, “exclusively discusses” requires that the whole of a communication be about the grassroots lobbying issue. But there is no constitutional justification for suggesting that an organization couldn’t say, e.g., “Call Sen. X about Bill 1234, and don’t forget to come to the Fall Ox Roast.”

The term “pending” is too narrow, unless a definition is provided that broadens the common understanding of the term. Better language is provided by *WRTL II*, which quoted the

¹¹The Commission’s alternative definition of “expressly advocating”—despite its other flaws (*see infra*)—referred to the “[t]he *electoral portion* of the communication,” 11 C.F.R. § 100.22(b)(1) (emphasis added), recognizing that the Commission had no authority to regulate the whole of a communication where a part of it might be subject to regulation.

The “exclusively” language was employed in only one of four options proposed in the Commission’s earlier rulemaking proposing a grassroots lobbying exception to the electioneering communication prohibition. *See* 67 Fed. Reg. 51131, 51145 (Aug. 7, 2002). This and other rule proposals are collected in the Appendix to James Bopp, Jr. & Richard E. Coleson, *Distinguishing “Genuine” from “Sham” in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353, 408 (2007) (hereinafter “*Distinguishing*”). Another option used “[r]efers to . . . legislation . . . or any policy proposal,” and another option simply said “[u]rges support or opposition to any legislation . . . or any policy proposal.” *Id.*

That prior rulemaking was performed under the statutory authority granted to the Commission by Congress to make exceptions for communications that do not “PASO” a candidate. *See Notice* at 3. The present rulemaking is pursuant to the authority of *WRTL II* (as well as *WRTL III*, and *CCLM*) and is not constrained by that PASO standard. In fact, so long as a communication is susceptible of [some] reasonable interpretation other than as an *appeal to vote* for or against a specific candidate,” *WRTL II*, 127 S. Ct. at 2667 (emphasis added), it is free to otherwise “support” or “oppose” a candidate in lesser ways (e.g., by praising or criticizing) without being restricted—and all doubts are resolved in favor of robust issue advocacy. Hence, narrow, wooden interpretations of *WRTL II* that would restrict issue advocacy must be rejected.

lower court in speaking of “a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future.” 127 S. Ct. at 2669.¹² The Commission should follow *WRTL II* here, too.

The *Notice* proposes “examples of urging the general public to act” that all include contact information. *Notice* at 21. While the Commission and Intervenors in *WRTL II* argued that the absence of direct contact information for Senators Feingold and Kohl in *WRTL*’s 2004 anti-filibuster ads (the ads referred hearers to a website that contained contact information) proved that the ads were not genuine issue advocacy, *WRTL II* rejected that argument (in fact, it totally ignored it). Moreover, the ads that Judge Leon found to be “genuine issue ads” in the *McConnell* district court did not all contain contact information. *See McConnell*, 251 F. Supp. 2d 176, 914-18 (Leon, J.). Contact information is not required for an electioneering communication that is protected as a genuine issue ad under *WRTL II*, which expressly reaffirmed “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” 127 S. Ct. at 2671 n.9 (citation omitted). *See also* Bopp & Coleson, *Distinguishing*, 29 Camp. L. Rev. at 396-97. That fact should be made absolutely clear in the commentary accompanying the new rule. And if a communication does include contact information, the speaker has the autonomy to choose whatever contact information it desires (so long as a cited website doesn’t contain express advocacy in its name). The suggested notion that “the address of a campaign headquarters” should be excluded from possible contact information, *Notice* at 22, has no merit because communications to a candidate can actually be achieved at that address and because *WRTL II* said that “[a]ny express advocacy on [*WRTL*’s] website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable.” 127 S. Ct. at 2669. So even if a campaign headquarters might make a pitch for support if a caller communicates a position on a grassroots lobbying issue, that possibility does not affect the protected nature of the communication. It is up to the speaker to decide what is most effective in getting the attention of the official who is the target of grassroots lobbying—and that just might be flooding her campaign headquarters with calls about a hot issue in Congress that the candidate needs to attend to by getting off the campaign trail and back to DC for a vital vote.

Subparagraph (i)(C) says that the communication “[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public.” Either in the rule or in the E&J commentary accompanying it, this should be clarified to assure that where one of these topics is the *subject* of issue advocacy then it may be mentioned. For example, a grassroots lobbying communication seeking to persuade an official to enact a federal law concerning

¹²The Constitution and *WRTL II*’s no-reasonable-interpretation test would also protect grassroots lobbying about an issue that the speaker *wants* to make the subject of legislative or executive branch scrutiny. Although including all such options in a safe haven example may make it unwieldy, such other possibilities should be mentioned in the commentary explaining and justifying the new rule.

elections, candidates, political parties, or voting, would plainly not be “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. The mention of a party is appropriate in issue advocacy of the grassroots lobbying variety where one party (exclusively or predominantly) is engaged in the very subject at issue, e.g., filibustering judicial nominees, as in *WRTL II*. In such a situation, the speaker is entitled to say, and hearers are entitled to know, that Sen. Feingold and his fellow Democrats are leading and sustaining the filibuster effort. The myopic perspective that everything is about elections must yield to the clearer view that candidates and party caucuses are passing laws and affecting public policy even near elections, and the people (the true sovereigns in our Republic) cannot be prohibited from robust participation in the self-government mandated by our Constitution. The limit on mentioning parties is especially problematic, and should either be eliminated from the safe harbor entirely or clearly distinguished, along the lines just described, in the E&J. Moreover, it should be expressly noted in the commentary that this restriction on mentioning any of these subjects is limited *only* to this grassroots-lobbying safe harbor and there is no such general restriction imposed on issue advocacy under *WRTL II*'s no-reasonable-interpretation test.

Subparagraph (i)(D) should be clarified in accompanying commentary, with examples from the ads set out in *WRTL II* and *supra*, to indicate that vigorous advocacy for an issue—including describing the official's position and characterizing it in favorable or unfavorable ways—is *not* the same as taking a position on the candidate's character, qualifications, or fitness for office. Saying that a candidate is wrong on an issue is not saying that he is wrong for office. In fact, one can vigorously oppose an official on a particular issue and still desire her reelection. And the commentary to the new rule should emphasize that where there is any doubt as to this part of the safe harbor, the doubt is resolved in favor of free speech, not censorship, as *WRTL II* requires. Unless the communication is “unambiguously campaign related,” *Buckley*, 424 U.S. at 81, it may not be restricted in any way. And it should be made clear that the question of whether a communication meets the unambiguously-campaign-related requirement is a question of law that can be determined in advance under a bright-line, speech-protective standard (the express advocacy test or the no-reasonable-interpretation test) on the basis of the plain words of the communication. It is not a question of fact dependent on external context or the possible interpretation of some “reasonable person” from the audience after the fact.

As to Subparagraph (ii), the “exclusively” requirement should be changed to *WRTL II*'s “focus” term (*see supra*), i.e., an ad could advertise a product and also invite people to a public charity event. The “ordinary course of business” requirement should be eliminated because it invites a contextual investigation, which is forbidden by *WRTL II*. *See* 127 S. Ct. at 2668-69. This would be like investigating WRTL to see if its broadcast of anti-filibuster ads was in its “ordinary course of business,” which essentially happened to WRTL, but is not permitted under *WRTL II*. And the commentary should emphasize that business ads not meeting this narrow safe harbor might yet pass *WRTL II*'s no-reasonable-interpretation test.

IV. Express Advocacy: Repeal 11 C.F.R. § 100.22(b)

The Commission should repeal 11 C.F.R. § 100.22(b), which is the Commission's controversial alternate definition of "expressly advocating." This is necessary for several reasons.

First, it is necessary because—to the extent ads falling within *WRTL II*'s no-reasonable-interpretation test are the functional equivalent of express advocacy—there **cannot be express-advocacy criteria that are forbidden in applying the no-reasonable-interpretation test**. *WRTL II* said that ads meeting its new test were the functional equivalents of express advocacy to which *McConnell* alluded. 127 S. Ct. at 2664, 2667. *WRTL II* also said that context and proximity to an election could not be used in determining whether an ad fell within the no-reasonable interpretation test, but that the test must look to the substance of the communication itself. *Id.* at 2666, 2668-69. *WRTL II* repudiated the context-and-proximity approach the Commission and Intervenors took in their effort to prove that *WRTL*'s ads were the functional equivalent of express advocacy, along with the burdensome discovery imposed on *WRTL* in an effort to establish contextual factors. Yet § 100.22(b) embraces context and proximity to an election as criteria for express advocacy (the supposed equivalent), to be determined by burdensome investigations in enforcement actions and by burdensome discovery in litigation. "Such litigation constitutes a severe burden on political speech." *WRTL II*, 127 S. Ct. at 2666 n.5. If such severe burdens are unconstitutional in applying the no-reasonable-interpretation test, then *WRTL II*'s declaration of equivalence mandates that these burdens are necessarily unconstitutional in applying the express advocacy test. If *WRTL II* eschews context-and-proximity criteria and mandates focus on the substance of the communication in applying its no-reasonable-interpretation test, then the declared equivalence mandates that the same criteria be employed for determining express advocacy. Therefore, § 100.22(b) cannot stand.

Second, repealing § 100.22(b) is necessary to **eliminate confusion** by ensuring that there is a bright line between what is considered an "electioneering communication" and an "independent expenditure." The alternative definition of "expressly advocating" at § 100.22(b) contains some features similar, but not identical, to *WRTL II*'s narrow application of "electioneering communication." To the extent that they are alike, there is an overlap between the definition of express advocacy (which governs "independent expenditures") and the definition of "electioneering communication," leaving the regulated community at a loss as to which controls. While the definition of "electioneering communication" excludes "independent expenditures," 2 U.S.C. § 434(f)(3)(B)(ii), there is now difficulty in telling them apart.

For example, in the Conciliation Agreement ("SV-CA") on **MURs 5511 and 5525 (Swift Boat Veterans and POWs for Truth)**, the FEC found that five television ads "expressly advocated the defeat of Senator John Kerry" because

[t]he television advertisements were broadcast shortly before the 2004 Presidential Election, explicitly challenge Senator Kerry's "capacity to lead," assert that he cannot be "trusted," and ask why citizens should be willing to "follow" him as a leader. The Commission concludes that, speaking to voters in this context, the

advertisements unambiguously refer to Senator Kerry as a Presidential candidate by discussing his character, fitness for office, and capacity to lead, and have no other reasonable meaning than to encourage actions to defeat him. *See* 11 C.F.R. § 100.22(b); *Explanation and Justification*, 60 Fed. Reg. at 35,295. [SV-CA ¶ 25.]

An example of these “express advocacy” ads that, according to the Commission, “attacked the character, qualifications, and fitness for office of Senator John Kerry,” SV-CA ¶ 15, is “**Any Questions?**”:

John Kerry has not been honest
And he lacks the capacity to lead.
When the chips are down, you could not count on John Kerry.

...

I served with John Kerry ... John Kerry cannot be trusted. [SV-CA ¶ 15.]

Clearly there are no express words of advocacy in “Any Questions?”. And while there is clearly opposition to Sen. Kerry, there is nothing that looks like a call to action to vote against him. To be sure, it says that he is dishonest and can’t be trusted, but since when can citizens be barred from freely asserting that a politician is dishonest? It says he can’t lead, but politicians are constantly being accused of poor leadership—and poor judgment, intelligence, and character. It is a given fact of public life for public officials in a nation where there are no anti-sedition laws. And if Sen. Kerry put his ability to lead and his military record at issue in any way in an effort to advance himself, aren’t those who served under or with him permitted to publicly say what they have apparently long—and vehemently—felt about him?

The “Swift Vets contend[ed] that its 2004 activities were intended to set the record straight with regard to the public discussion of John Kerry’s conduct in, and statements about, the Vietnam War, particularly Mr. Kerry’s statements about the conduct of those who fought in Vietnam, and the declaration that he was ‘reporting for duty’ in connection with his 2004 Presidential campaign.” SV-CA ¶ 13. SwiftVets also contend[ed] the reason that it ran its ads when it did “was because it had made its point on the issue of concern at the time it was the focus of public debate.” SV-CA ¶ 13. “Setting the record straight” as to assertions by a public official and candidate concerning his record of both private and public actions, at a time when the issue is a focus of national debate, is well within the core of the First Amendment’s highest protection.¹³

¹³The Commission and Intervenors made nearly identical arguments concerning the timing of WRTL’s ads. *See, e.g.*, Brief for Appellant Federal Election Commission at 45-47, some of their arguments were picked up by the *WRTL II* dissent, 127 S. Ct. at 2698 (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.), and the district court dissent. *See WRTL v. FEC*, 466 F. Supp. 2d 195, 217-18 (D.D.C. 2006) (Roberts, J., dissenting). But *WRTL II* either ignored the arguments or expressly rejected them. *See* 127 S. Ct. at 2668 (rejecting argument that
(continued...)

The candidate's remedy where such an apparently long-simmering dispute among soldiers bubbles into public view is to join public debate on the allegations against him. His legal remedy would be constrained by the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), because of "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (*quoting Sullivan*, 376 U.S. at 270).

Yet the Commission found that "Any Questions?" fit the alternative definition of "expressly advocating," at 11 C.F.R. § 100.22(b) because of proximity to an election, character references, and, according to the Commission, discussion of Sen. Kerry's "fitness for office." SV-CA ¶ 25. Of course, discussing "fitness for office" appears nowhere as a criterion in § 100.22(b). And it is difficult to see how, under our First Amendment jurisprudence, discussing the character of a U.S. Senator, even if he is a presidential candidate, can be restricted without reverting to the days of anti-sedition laws. The Commission's finding that there was express advocacy required it to find that there was absolutely no doubt, no ambiguity, about whether the ad called for a *vote* against Sen. Kerry—that no reasonable person could think otherwise. But whether the Commission was wrong or right about "Any Questions?," the finding itself has serious implications for whether, and to what extent, the alternative express advocacy definition and the electioneering communication definition under *WRTL II* overlap and have blurred lines.

Given the Commission's finding of "express advocacy" advocacy in this ad, would the Commission also find (a fortiori) that it is an electioneering communication (i.e., it meets the no-reasonable-interpretation test)? *WRTL II*'s no-reasonable-interpretation test precludes considering the sort of contextual factors—such as the limited temporal scope of Swift Vets' activity and the proximity of the ads to an election—on which the Commission relied for a finding of express advocacy. SV-CA ¶¶ 13, 25. And while the Commission found that the ad "ha[d] no other reasonable meaning that to encourage *actions* to defeat him," SV-CA ¶ 25 (emphasis added),¹⁴

¹³(...continued)

ads were run near an election, not run after the election, and during a Senate recess, and declaring that "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote").

¹⁴The Commission used this same "encourage actions to defeat" formulation in both paragraphs making a finding of express advocacy, SV-CA ¶¶ 25, 28, which formulation comes from § 100.22(b)(2), while the initial (and supposedly controlling) language of § 100.22(b) actually requires a finding that a communications "contain[s] advocacy of the election or defeat of . . . [the] candidate." The initial test tracks *Buckley*'s "express advocacy" test (minus the word "express," which *Buckley* held was necessary to protect the test from vagueness and overbreadth), and *Buckley* specifically defined expressly advocating election or defeat as encouraging a *vote* for against someone, not as encouraging *actions* to elect or defeat. *Buckley*,

(continued...)

the ad lacks the narrower “appeal *to vote* for or against a specific candidate” requirement of *WRTL II*’s test. 127 S. Ct. at 2667. So it is possible that the Commission *could not* find that the ads are electioneering communications. But perhaps the Commission *would* decide that the ad is an electioneering communication, based on the sort of analysis in this and other recent conciliation agreements. How can a group wanting to broadcast an ad know in advance? The definitions overlap, with similarities and differences that are ambiguous and yield uncertain predictions.

It is helpful here to step back for a moment to gain perspective. After *Buckley* and *MCFL*, the federal courts were very strict about protecting issue advocacy by strictly construing the express advocacy test, even declaring the Commission’s alternative express advocacy definition unconstitutional. *See infra*. No one would have thought that “Any Questions” contained express advocacy. Even the Commission’s controversial alternative express advocacy definition had not been applied so expansively. The most that could have been said about “Any Questions?” might have been an allegation that it was one those so-called “sham issue ads.” But what Congress passed, and the Supreme Court approved as the cure for such alleged “sham ads” was BCRA’s electioneering communication restrictions—not an expansion of the scope of express advocacy. The Commission is trying to regulate as express advocacy what Congress regulated as electioneering communications. Congress did not try to expand the scope of express advocacy, and the Commission is without statutory authority or constitutional latitude to do so. The fact that the Commission has convinced several organizations to enter into conciliation agreements stating that ads that historically would *not* have been considered express advocacy now *are* considered such says nothing about the propriety of these findings—only about the enormous chill imposed by such vague and overbroad regulations on these organizations, who have been subjected to the very sort of invasive investigations that *WRTL II* expressly rejected and who wanted desperately to stop the hemorrhage of legal fees, lost time, exposure of their internal documents and plans, and legal risk.

The same blurring of the lines—with the same communication possibly governed by two overlapping tests—is apparent in other recent conciliation agreements. For example, in **MUR 5754 (MoveOn entities)**, the Commission decided that MOVF (a § 527 organization) had failed to register as a political committee (as the Commission also had decided with regard to the SwiftVets). The Conciliation Agreement (“MOVF-CA”) described 25 television advertisements that “opposed George W. Bush regarding his record on campaign issues and criticized his leadership,” MOVF-CA ¶ 11, “rais[ing] such issues as spending on the war in Iraq, prescription drugs, overtime pay, and job outsourcing—each with the tag line, ‘George Bush[.] He’s not on our side.’ or ‘Face it[.] George Bush is not on our side.’” MOVF-CA ¶ 12. “Another common

¹⁴(...continued)

424 U.S. at 44 n.52 (“express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject’”). Substituting “actions” introduces vagueness and broadens the activity encompassed, all without precedential authority.

theme . . . was that George Bush was misleading the American people on issues from the Iraq war to financial security and Medicare.” MOVF-CA ¶ 12. “In many of these ads, the word ‘Leader’ was superimposed on President Bush’s picture and then the letters ‘M-I-S’ appear to form the word ‘Misleader.’” In this case, the Commission did not actually state that the described ads were express advocacy (relying on the fact that contributions were solicited to produce such ads to satisfy the \$1,000 contribution/expenditure trigger for political committee status). But based on the Commission’s interpretation of the SwiftVets ad (with its reliance on “capacity to lead” as indicating a Presidential election context and criticism indicating an attack on his “character, fitness for office, and capacity to lead” yielding “express advocacy” under the alternate definition) there is little doubt that the Commission would consider it express advocacy. However, the Commission would also likely find that it fails *WRTL II*’s no-reasonable-interpretation test for the same reasons set out *supra* as to the SwiftVet ad. But how could an organization ever know for sure, in advance, what the Commission would find? (Moreover, *WRTL II* makes clear that these ads are clearly protected issue advocacy under a proper test.)

The proper remedy for this blurring of the lines, confusion, and chill is to eliminate the alternative “expressly advocating” definition because the *functional equivalent* of express advocacy is not a *kind* of express advocacy. The unambiguously-campaign-related requirement, as developed in *Buckley*, *MCFL*, *McConnell*, *WRTL II*, *WRTL III*, and *CCLM*, makes it clear that Congress and the Commission may regulate communications that meet (1) the true express advocacy test (under *Buckley*’s “express words of advocacy” formulation) or (2) the no-reasonable-interpretation test (i.e., a communication that meets both the electioneering communication definition and *WRTL II*’s narrowing construction). There is no constitutional or precedential authority for any ambiguous hybrid test between the two. Attempting to blur the bright lines of these two tests chills issue advocacy, which chilling is forbidden by the First Amendment.

Third, *WRTL II*’s analysis makes clear that the express advocacy test at 11 C.F.R. § 100.22(b) is **void for vagueness**.¹⁵ In responding to accusations of his colleagues that *WRTL II*’s no-reasonable-interpretation test is vague, Chief Justice Roberts set out a detailed defense of why it was not vague, including the vital fact that it is limited to communications that meet the statutory “electioneering communication” definition:

As should be evident, we agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the

¹⁵Other aspects of the vagueness problem with the alternate express advocacy definition are also addressed *supra* (“actions”) and *infra* (“suggestive” and “advocacy of the election or defeat”).

sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind *this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place.* [127 S. Ct. at 2669 n.7 (second emphasis added).]

The alternative express advocacy test applies year-round, includes non-broadcast communications, and does not require targeting, so its vagueness is not mitigated by being confined to communications otherwise meeting the brightline electioneering communication definition. And the other saving graces of *WRTL II*'s no-reasonable-interpretation test and the mandated procedures for as-applied challenges are wholly absent from the way in which the Commission has been applying its alternative express advocacy test. Just as it did to *WRTL* in *WRTL II*, the Commission has sought to establish express advocacy by engaging in wide-ranging discovery into intent and effect. It has broadly employed often marginal contextual factors. It has insisted that if an issue is a campaign issue it is essentially foreclosed as a communication topic for non-campaign speakers, absent FECA compliance. And as to an ad like “Any Questions?”, where there is at most a doubt or tie, the benefit of the doubt or tie did not go to Swift Vets. So under the criteria of *WRTL II*, the Commission’s alternative express advocacy definition must be eliminated because it is void for vagueness.

McConnell said that the express advocacy test employed in *Buckley*, 424 U.S. 1, “was the product of statutory interpretation rather than a constitutional command” so that “a statute that was neither vague nor overbroad would [not] be required to toe the same express advocacy line.” 540 U.S. at 192. But since *McConnell*, several courts have embraced the express advocacy construction as an indispensable tool in dealing with vague or overbroad provisions. For example, the Ninth Circuit in *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004), followed the Sixth Circuit in endorsing the express advocacy test as the appropriate tool where a provision is vague and overbroad:

Nevertheless, as stated recently by the Sixth Circuit, *McConnell* “left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.” *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

See also Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006); *San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, No. 06-0425 (N.D. Cal. Sep. 20, 2006) (Order Granting Plaintiff’s Motion for Summary Judgment and Denying Defendants’ Motion for Summary Judgment). Because § 100.22(b) eschews a bright line and goes beyond express advocacy, it continues to be unconstitutionally vague after *McConnell* and so is itself subject to

the express advocacy construction. Consequently, it must be eliminated in favor of the primary express advocacy definition.

Fourth, § 100.22(b) is constitutionally **overbroad** under the Court’s analysis in *Buckley*, *McConnell*, and *WRTL II*. While *McConnell* said that the express advocacy test itself was not a constitutionally-mandated line, there was just such a line identified in *Buckley*. As discussed in Part I, *supra*, *Buckley* applied the express advocacy construction to both expenditure and disclosure provisions in *Buckley* to assure that any restriction was “unambiguously campaign related.” *Id.* at 81. The key to the *Buckley* analysis here is the clearly articulated constitutional question of whether “the *relation* of the information sought to the purpose of the Act [i.e., to regulate federal elections] *may be too remote*,” and, therefore, “*impermissibly broad*.” *Id.* at 80 (emphasis added). The Court immediately provided the benchmark for measuring whether a regulation is overbroad for regulating activity too remote from regulating elections, namely, that the government may only regulate First Amendment activities that are “*unambiguously related* to the campaign of a particular federal candidate.” *Id.* at 80 (emphasis added). In *WRTL II*, the Court reasserted this unambiguously-campaign-related requirement in its test restricting the reach of the electioneering communication prohibition in order to protect genuine issue ads: “[A]n ad is the 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.” 127 S. Ct. at 2667 (Roberts, C.J. joined by Alito, J.). *See also id.* at 2672 (corporate-form corruption interest does not “extend[] beyond campaign speech”). *WRTL II* also strictly restricted appeals to context in making the “no reasonable interpretation” determination. *Id.* at 2667-69. And it declared that close proximity to an election cannot establish functional equivalence to express advocacy. *Id.* at 2668.

By contrast, the FEC’s alternative definition of “expressly advocating” at § 100.22(b) does not meet the “unambiguously campaign related” test because it embraces “external events” as important in establishing express advocacy and singles out “proximity to the election” as significant, while not being helped in any way by being *limited* to close proximity to elections (i.e., the test applies year round). Where *WRTL II*’s rule requires that an ad constitute “an appeal to vote,” 127 S. Ct. at 2667, the FEC’s definition employs the more vague “advocacy of the election or defeat of one or more . . . candidates,” a phrase that *Buckley* held to be unconstitutionally vague and overbroad, imposing the express advocacy construction in an attempt to save it. 424 U.S. at 42. Section 100.22(b) allows a finding of express advocacy where an ad “could only be interpreted by a reasonable person as containing advocacy . . . because “[t]he electoral portion is . . . suggestive of only one meaning” The term “suggestive”¹⁶ is very vague, and the

¹⁶*WRTL II*’s no-reasonable-interpretation test employs the term “susceptible,” 127 S. Ct. at 2667 (“susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”), which clearly indicates that the communication at issue must only be capable of one meaning in order to be restricted. This formulation favors liberty of expression.

(continued...)

formulation permits a finding of express advocacy based on a post hoc reasonable person standard. *WRTL II*'s test permits such a finding "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 127 S. Ct. at 2667, which focuses on the legal question of the objective meaning of the actual text and permits a finding that the ad may be regulated only if no other interpretation is reasonably possible.¹⁷

The overbreadth of § 100.22(b) is readily illustrated by a return to the SwiftVet's "Any Questions?" ad. Under *WRTL II*'s no-reasonable-interpretation test, the ad could not properly be restricted in any way as an electioneering communication because one cannot fairly and objectively say that "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 127 S. Ct. at 2667, when only the text of the ad is considered without reference to contextual factors. Of course, as noted *supra*, it is not clear that the *Commission* would see that it is not a regulable electioneering communication under *WRTL II*, given its finding that the ad is express advocacy. But no court would find that it is a regulable electioneering communication, given all the restrictions on context in *WRTL II* and that decision's insistence that any ambiguity, doubt, or tie be resolved in favor of protecting issue advocacy and against censorship (and if some judge varied from this verity, an appeal would soon reverse the error). However, although this ad is *not* objectively what *WRTL II* called the functional equivalent of express advocacy, the Commission has found that it *is* express advocacy. And it has done so under a test that would apply year round, not just in defined time periods before elections, and not just as to targeted broadcast ads.

These divergent outcomes of the no-reasonable-interpretation test and § 100.22(b) as applied to "Any Questions?" cannot be reconciled after *WRTL II*. Before *WRTL II*, the functional equivalent of express advocacy was arguably—based on *McConnell*'s facial upholding—simply any communication that met the electioneering communication definition (unless it also met the express advocacy definition, in which case it was excluded from the electioneering communication definition). But after *WRTL II*, an electioneering communication had to (1) meet the statutory electioneering communication definition *and* (2) unambiguously appeal for a vote for or against a candidate, which is the essence of express advocacy. *WRTL II* established that the

¹⁶(...continued)

By contrast, "suggestive" takes the issue away from the clear meaning of the text to what a communication might suggest. It is too vague for use in restricting First Amendment activity, where bright lines are required to protect speakers and chill would-be censors and those who would file complaints to invoke the powers of censorship. It favors suppression of expression. "In drawing that line [between campaign advocacy and issue advocacy], the First Amendment requires us to err on the side of protecting speech rather than suppressing it." *WRTL II*, 127 S. Ct. at 2659.

¹⁷The FEC test includes the "suggestive of only one meaning" language, but "suggestive" moves from the actual meaning of the words at issue to what they might suggest.

Commission can go no further than *WRTL*'s no-reasonable-interpretation test in trying to restrict communications that have this essence of express advocacy. But § 100.22(b) *does* go further in trying to define this essence of express advocacy. Consequently, it finds that "Any Questions?" meets this essence of express advocacy, while the *WRTL II* test would say it does not meet this essence of express advocacy. The Commission's alternative definition of express advocacy is therefore overbroad. It does not reach only unambiguously-campaign-related communications. It must be repealed.

Fifth, the alternative express advocacy test is based on an **erroneous interpretation** of how the Ninth Circuit treated the express advocacy test in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Subsection (b) utilizes some of the analysis in *Furgatch*, assuming that the Ninth Circuit was not requiring explicit words of advocacy of election or defeat, as required by subsection (a) of § 100.22. This, however is erroneous, as the Ninth Circuit itself has recently explained. *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit words of advocacy").

Sixth, § 100.22(b) **has been declared unconstitutional** in two Circuits and the Southern District of New York, *Maine Right to Life v. FEC*, 98 F.3d 1 (1st 1996) (per curiam); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D. N.Y. 1998), and other circuits have rejected *Furgatch*-style definitions. See *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002); see also *North Carolina Right to Life v. Leake*, 482 F. Supp. 2d 686 (E.D.N.C. 2007); *Gov. Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (Cal. Ct. App. 2002); *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000). As a result, subsection (b) is already unenforceable in many areas of the county.

Seventh, *McConnell* and *WRTL II* affirm that ***Buckley* required a "magic words" express advocacy test**. 540 U.S. at 126; 127 S. Ct. at 2667 (Roberts, C.J., joined by Alito, J.), 2682 (Scalia, J., joined by Kennedy & Thomas, JJ.) (concurring in part and concurring in the judgment). *Buckley* held that the phrase "expenditure . . . relative to a clearly identified candidate" was vague and overbroad, even if it was construed to mean "'advocating the election or defeat' of a candidate." 424 U.S. at 42. Only by construing the latter phrase to extend "only to expenditures for communications that in *express* terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44 (emphasis added), could it be saved from vagueness and overbreadth. This means that the magic words, which *Buckley* called "express words of advocacy," 424 U.S. at 44 n.52 (with examples), are necessary for there to be either express advocacy or an "independent expenditure." See *MCFL*, 479 U.S. at 249 ("We therefore

hold that an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition of [2 U.S.C.] § 441b.’)¹⁸

The Commission’s first “expressly advocating” test, at § 100.22(a), is clearly a “magic words” test. But the alternate definition, at § 100.22(b), is not. The alternate definition uses precisely the language that the Supreme Court rejected in *Buckley*, i.e., *Buckley* said “advocating the election or defeat” was too vague and overbroad, while the Commission’s alternate definition requires a finding of “advocacy of the election or defeat.” Under *Buckley*, these phrases must both be construed with the express words of advocacy construction, which would make the alternate definition a magic words definition and duplicative of the Commission’s magic words definition at § 100.22(a). Because the Supreme Court required a “magic words” test for express advocacy, the Commission may not have an express advocacy test that is not a “magic words” test.

In sum, *WRTL II* and other federal court decisions make it clear that the government may only regulate First Amendment activity that is “unambiguously campaign related,” *Buckley*, 424 U.S. at 80, i.e., it must be “*unambiguously related* to the campaign of a particular federal candidate.” *Id.* at 81 (emphasis added). The Supreme Court has implemented this threshold requirement by imposing the “magic words” express advocacy construction. Section 100.22(b) does not follow this construction. It is therefore without statutory, precedential, or constitutional justification. It must be repealed.

¹⁸In addition to the phrases “relative to a clearly identified candidate” and “advocating the election or defeat of a candidate, the Supreme Court has also imposed a “magic words” express advocacy construction on “for the purpose of influencing the nomination or election of candidates,” *Buckley*, 424 U.S. at 77-80, and “in connection with any election.” *MCFL*, 479 U.S. at 249 (construing this language from 2 U.S.C. § 441b).