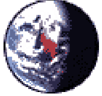

"Craig Holman"
<cholman@citizen.org>

10/01/2007 02:54 PM

To <wrtl.ads@fec.gov>

cc

bcc

Subject Comments on the electioneering communications rulemaking

TO: Ron B. Katwan, Assistant General Counsel

Notice 2007-16.

Please accept the attached comment regarding the FEC's electioneering communications rulemaking, submitted by Common Cause, Public Citizen and U.S. PIRG.

Attachment.

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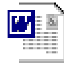

Electioneering communications testimony final5.doc

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

October 1, 2007

Chairman Robert Lenhard
Vice Chairman David Mason
Commissioner Hans von Spakovsky
Commissioner Ellen Weintraub
Commissioner Steven Walther
Assistant General Counsel Ron Katwan

RE: Electioneering Communications Rulemaking – Notice 2007-16

Dear Chairman and Commissioners:

Common Cause, Public Citizen and U.S. PIRG exhort the Federal Election Commission to limit its rulemaking to the issues that were actually considered by the U.S. Supreme Court in its recent decision, *FEC v. Wisconsin Right to Life* ("*WRTL*")[1] as the FEC revises its rules on electioneering communications. The Court provided specific, narrow guidelines that define the scope of the constitutional protection afforded to some types electioneering communications, "genuine issue ads." These guidelines should be closely adhered to by the Commission. We urge it to reject any proposals that would extend the scope of this rulemaking beyond the Court's ruling.

The Court's holding – which the Commission must implement – was contained and discrete. The FEC should consider the following as it revisits the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA):

- The prohibition on use of corporate or union treasury funds for electioneering communications in BCRA Section 203 (2 U.S.C. § 441b(B2)(2)) remains constitutionally valid on its face and continues to be in effect, except with respect to "genuine issue ads" as defined by the Court.

- The definition of "electioneering communications" under BCRA Section 201 (2 U.S.C. § 434(f)(3)) and current FEC regulations was not at issue in *WRTL*. The definition remains intact and should not be revised.

[1] 127 S. Ct. 2652 (2007).

- The reporting and disclosure requirements imposed by BCRA Section 201 (2 U.S.C. § 434(f)) on all electioneering communications, including "genuine issue ads" that meet *WRTL*'s criteria for exemption from the treasury fund prohibition, were not subject to constitutional challenge in *WRTL*, nor were they even considered by the *WRTL* Court. They should remain in effect.

- "Genuine issue ads" that the Court has determined may be financed with corporate and union treasury funds ("soft money") must not refer to a candidate's character, qualifications or fitness for office. In addition, the following factors should weigh against a finding that an electioneering communication is a "genuine issue ad" under *WRTL*:

  (1) The "clearly identified candidate" is not an incumbent officeholder;

  (2) The communication does not discuss a particular current legislative or executive branch matter; or

  (3) The communication refers to an election, the candidate's candidacy, or a political party.

These principles for identifying a genuine issue ad are reasonably derived the Court's analysis in both the *McConnell* and *WRTL* decisions, and were considered by the Commission in an earlier Interim Final Rulemaking proceeding. Their incorporation into the rules governing electioneering communications would properly shape a reasonable and constitutionally informed interpretation of BCRA and the recent Court decisions.

A. Electioneering Communications Provision of BCRA Remains in Effect

In *WRTL*, the decision guiding this rulemaking, the Court left intact its holding in *McConnell v. FEC*[2] that BCRA Section 203's prohibition on use of corporate and union treasury funds to finance electioneering communications is facially constitutional. Indeed, Chief Justice Roberts' controlling opinion explicitly stated that "in deciding this as applied challenge, we have no occasion to revisit *McConnell*'s conclusion that the statute is not overly broad."[3] The Court also was not asked to consider the validity of BCRA Section 201's disclosure requirements for electioneering communications. Instead, the Court specifically weighed an "as applied" challenge to the application of the corporate funding prohibition to three broadcast advertisements that met the criteria of "electioneering communications." Wisconsin Right to Life argued that the ads were genuine issue ads, and thus constitutionally exempt from the ban on corporate and union funding of broadcast advertisements that refer to federal candidates on the eve of an election.

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[2] 540 U.S. 93 (2003).

[3] *WRTL* at fn. 8.

The Court agreed, ruling that the WRTL advertisements could "reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," and that the First Amendment does not permit application of Section 203's funding restriction to such genuine issue ads.[4] The Court did not limit the statutory definition of "electioneering communications," nor did it comment directly or indirectly on the constitutionality of the disclosure requirements for electioneering communications. The holding of the *WRTL* decision is only that some electioneering communications may be genuine issue ads and thus constitutionally exempt from the soft money source prohibition.

Common Cause, Public Citizen and U.S. PIRG urge the Commission to retain the current definition of electioneering communications, including maintaining the disclosure requirements for such communications. The FEC should do no more than carve out a regulatory exemption from the prohibition on corporate and treasury funding, as mandated by the Court, for electioneering communications that "genuine issue ads," as defined by the Court. As below, Common Cause, Public Citizen and U.S. PIRG also encourage the Commission to provide a road map for the regulated community by clarifying the types of ads that will generally be exempt (as the Commission proposes) as well as the types of ads that will generally be considered express advocacy.

B. The FEC should Define "Genuine Issue Ads" As a Partially Exempt Sub-Category of Electioneering Communications

The *WRTL* Court did not dismiss the funding-source prohibition for electioneering communications in general and did not overturn the *McConnell* decision. The controlling opinion held that the funding-source prohibition does not apply to an electioneering communication if the content of the ad is the "functional equivalent of express advocacy." 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."[5] Using its "functional equivalence" standard, the WRTL Court found that the three electioneering communications sponsored by Wisconsin Right to Life were exempt from the funding source prohibition because they were "genuine issue ads."[6] The

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[4] *WRTL* at 2670.

[5] *WRTL* at 2660.

[6] The three ads sponsored by Wisconsin Right to Life that were the subject of the case were "Wedding," "Loan" and "Waiting." All three radio ads used nearly identical content, were scheduled to air within the 30-day period before the Wisconsin primary, focused on Sens. Russ Feingold (a candidate in that election) and Herb Kohl (not a candidate), and would have to be financed largely by corporate treasury funds. The transcript of Wedding reads as follows:

> *"PASTOR: And who gives this woman to be married to this man?*
>
> *BRIDE.S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .*
>
> *VOICE-OVER: Sometimes it's just not fair to delay an important decision.. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple .yes or no vote. So*

controlling opinion's explained why the Wisconsin Right to Life ads qualified for an exemption from the source prohibition using the following criteria:

> The ads' contents were consistent with that of a genuine issue ad in that they:
>
> 1) Focused on a legislative issue, took a position on the issue; exhorted the public to adopt that position and urged the public to contact public officials with respect to the matter. (As the Court later noted, some contextual information may be appropriate to consider in evaluating this factor.); and
>
> 2) Lacked indicia of express advocacy because they did not mention an election, candidacy, political party, or challenger, and did not take a position on a candidate's character, qualifications or fitness for office.[7] The Court also emphasized that the ads did not expressly condemn a candidate's issue position.[8]

The *WRTL* Court held that these factors determined whether the electioneering communications at issue had "no reasonable interpretation other than an appeal to vote for or against a specified candidate" and therefore are not subject to BCRA's funding source prohibition. The Commission should incorporate these criteria in its regulations on electioneering communications.

C. In Defining "Genuine Issue Ads," the FEC Should Outline General Principles for the Regulated Community that Include Both Safe Harbors and Capture Nets

Alternative I, proposed by the Federal Election Commission in its Notice of Proposed Rulemaking, offers largely reasonable guidelines for implementation of *WRTL* and is consistent with the criteria spelled out by the Court. It also resembles, in part, rule changes first considered by the Commission in 2006.[9]

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qualified candidates don't get a chance to serve. .It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee."

[7] *WRTL* at 2667.

[8] *WRTL* at fn. 16.

[9] Commissioner Hans von Spakovsky, Proposed Interim Final Rule (Aug. 3, 2006). Though many of the changes proposed by von Spakovsky in 2006 resemble the *WRTL* guidelines, there are some important differences. The most critical difference is that the *WRTL* Court does not suggest redefining the term "electioneering communications." Redefining the term could result in unjustifiably ending the reporting requirement for many electioneering communications, including those that qualify as genuine issue ads under the *WRTL* guidelines.

The Commission's Alternative I makes no change to the definition of "electioneering communications." It does exempt a subset of electioneering communications from the ban on corporate and union treasury funding. Alternative I also does not alter the reporting and disclosure requirements of BCRA Section 201, including for electioneering communications that fall within the exemption.

The Commission should retain the reporting and disclosure requirements for electioneering communications that are express advocacy for a number of compelling reasons. First, the plaintiffs in both *WRTL* and the other major as-applied challenge to BCRA Section 203's funding prohibition (*Christian Civic League of Maine v. FEC*[10] never contested BCRA's reporting and disclosure requirements for electioneering communications. Indeed, they repeatedly told the courts that they were ready and willing to comply with the disclosure rules if permitted to fund the ads they wished to run.

Second, neither the controlling opinion nor concurring opinions in *WRTL* mentioned the reporting and disclosure requirements of BCRA Section 201. They certainly did not call into question the legality of the provisions.[11] The FEC would therefore be entering uncharted waters.

Third, the controlling opinion's constitutional analysis was premised on its view that BCRA Section 203 is "a prohibition … directed at speech itself."[12] It therefore provides no basis to doubt the constitutionality of the disclosure requirements, which are much less burdensome than prohibitions and are supported by different interests — interests whose legitimacy the Court repeatedly recognized from *Buckley v. Valeo* through *McConnell*. Absent either a serious as-applied challenge to the constitutionality of the reporting and disclosure requirements for electioneering communications, or a genuine basis for such a challenge in the *WRTL* decision, the Commission should not take it upon itself to weaken BCRA by exempting a large class of electioneering communications from the requirements of Section 201.

Indeed, if the Commission were to go further than required by *WRTL* by exempting "genuine issue ads" from the funding prohibition as well as its definition of electioneering communications, it would be exceeding its authority under 2 U.S.C. § 434(f)(3)(B)(iv) because many of the electioneering communications so excluded, while falling within the scope of the *WRTL* as-applied challenge to the funding prohibition, would also "promote, support, attack, or oppose" a candidate. While *WRTL* holds that the funding prohibition may not be applied to "genuine issue ads," nothing in the Court's opinion directly or by inference empowers the Commission to exempt these ads from other provisions of BCRA in the face of a clear statutory direction to include them.

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10 *Christian Civic League of Maine v. FEC*, 127 S.Ct. 336 (2006).

11 Moreover, while there was no shortage of criticism by the dissenters on the Court, there was no suggestion that the controlling opinion jeopardized the reporting and disclosure requirements.

12 *WRTL* at 2664.

Alternative I's basic definition of the type of electioneering communications that are now exempt from the funding-source prohibition is also sound. Specifically, proposed section 114.15(a), which provides that the prohibition does not apply to an ad "if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate," faithfully implements the *WRTL* controlling opinion's definition of "genuine issue ads."

1. Safe Harbor Should Be Carefully Defined and Include One Addition to the Commission's Proposal

The Commission proposes two safe harbors. The safe harbors are identical under both regulatory alternatives offered by the Commission, and focus on the content of the communication rather than its intent and effect. The first safe harbor covers "grassroots lobbying communications." The second covers "commercial and business communications."

The latter safe harbor for commercial and business communications has already been implemented by the Commission over the last two election cycles, and offers little controversy. These types of communications should be appropriately interpreted as having a non-electoral business or commercial purpose and continue to be exempt from BCRA's source prohibition.

The safe harbor covering grassroots lobbying communications is new but reasonable, as long as it remains limited to the criteria explicitly relied upon by the controlling opinion in *WRTL*, as discussed above, and is modified in one minor respect. As proposed by the Commission, a reasonable safe harbor for grassroots lobbying communications should be limited to four considerations that identify "content [that] is consistent with that of a genuine issue ad" and exclude ads bearing "indicia of express advocacy."[13] All four factors should be met for an ad to fit within the safe harbor.

Specifically, the Commission's proposed safe harbor would be limited to ads that:

- Exclusively discuss a pending legislative or executive matter or issue;
- Urge an officeholder to take a particular position or action with respect to the matter or issue, or urge the public to adopt a particular position and to contact the officeholder with respect to the matter or issue;
- Do not mention any election, candidacy, political party, opposing candidate, or voting by the general public; and
- Do not take a position on any candidate's or officeholder's character, qualifications or fitness for office.

[13] *WRTL* at 2655.

We suggest that the Commission should add one additional criterion to the safe harbor—namely, a requirement that an ad not condemn or praise a candidate's position on the issue or matter that is the subject of the ad.

The reason for this suggestion is that the controlling opinion in *WRTL*, in distinguishing the ads that it found to be protected from the hypothetical "Jane Doe" ad that the Court had held in *McConnell* could be subjected to the requirements of BCRA Section 203, stressed that that the hypothetical ad condemned Jane Doe's position on an issue, while the ads in WRTL did not do so, and indeed did not even tell listeners that the candidate's position was different from that advocated by the ads.[14] Thus, the *WRTL* opinion stopped short of holding that the hypothetical "Jane Doe" ads would be entitled to the protection against application of Section 203. Without the additional criterion we suggest, however, a "Jane Doe" type ad would at least arguably be entitled to the protection of the safe harbor.

Although we agree with the Commission's proposal that a safe harbor be created that embodies the critical features of the specific type of issue advertising that the Court held protected in *WRTL*, we do not believe it is appropriate for the safe harbor to sweep further than *WRTL* and encompass forms of advertising that the Court did not hold outside the constitutional reach of Section 203, let alone types of ads that the Court suggested are in fact subject to regulation. Accordingly, the safe harbor should be qualified further, as was the opinion in *WRTL*, so as not to include "Jane Doe"-type ads that condemn (or, conversely, praise) a candidate's stance on the issue under discussion.

This is not to suggest that all ads that criticize (or say they agree with) a candidate's position on an issue will necessarily fall outside of the protection of the Commission's general "reasonable interpretation" standard. Whether particular examples of such ads are or are not protected will depend on the specifics of their content. Our point is only that in light of the *WRTL* controlling opinion's explicit refusal to extend its holding to "Jane Doe"-type ads, the Commission should take care not to create a safe harbor that would automatically protect all such ads.

Beyond the modification we propose, we believe there is neither any constitutional basis nor policy benefit to embellishing this safe harbor further. The four prongs, supplemented by our additional proposed criterion, are fairly self-explanatory and should provide anyone wishing to engage in "genuine issue advertising" or "grass-roots lobbying" a clear means of ensuring that their ads are protected. As emphasized by the controlling opinion in *WRTL*: there is an "imperative for clarity in this area" that a clear definition of the safe harbor helps to provide.[15]

The scope of the proposed safe harbor is appropriate because *WRTL* makes clear that ads that satisfy the proposed criteria would not be considered the equivalent of express advocacy. The safe harbor as proposed does not, and indeed need not,

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[14] *WRTL* at fn. 6.

[15] *WRTL* at fn. 7.

encompass all ads that may be protected under the more generic "reasonable interpretation" test. Indeed, the Commission should not attempt to expand the safe harbor by modifying or widening the scope of any of the factors. Because the effect of the safe harbor is to establish that ads meeting its criteria are *always* protected, it should not be extended beyond the circumstances the *WRTL* clearly establishes qualify for constitutional protection.

The questions posed by the Commission about whether (and how) to expand the safe harbor beyond the circumstances that *WRTL* specifically establishes illustrate that there is, at the very least, some uncertainty about whether ads that fail to meet all of the criteria of the proposed safe harbor would always be properly classified as express advocacy or its functional equivalent. Unless it can be said with assurance that an ad with a particular characteristic would *always* be entitled to protection, those characteristics cannot be the basis for a safe harbor. There is in fact no room for mere speculation by the Commission on this matter, nor does WRTL require any more of the Commission than its proposal with the modification we suggest.

2. A "Capture Net" Is Similarly Needed to Define Ads that Would Be Subject to the Funding Prohibition

Virtually all electioneering communications (including express advocacy communications) – whether primarily focused on promoting the election or defeat of candidates, denigrating the character of officeholders, or advocating a public policy – will discuss issues as well. Indeed, in the 2000 *Buying Time* study, the coders found that over 92 percent of electioneering ads discussed public policies to varying degrees.[16]

But merely mentioning a public policy in an electioneering communication should not, by itself, qualify the ad as a "genuine issue ad." In an important footnote,[17] the controlling opinion in *WRTL* made clear that the Court also is not prepared to make such a sweeping assertion. As explained above, the controlling opinion distinguished WRTL's ads from the hypothetical "Jane Doe" ad discussed in the *McConnell* decision on the ground that the "Doe" ad condemned candidate Doe's position on an issue. The condemnation of Doe's stance differentiates the Doe ad from the WRTL ads, which focused on an issue rather than a candidate, and urged the public to contact the lawmakers to advance the issue. Similarly, the controlling opinion held that the WRTL ads were not express advocacy because they "do not mention an election, candidacy, political party or challenger and they do not take a position on a candidate's character, qualifications or fitness for office."[18]

A communication that does not qualify for the safe harbor discussed above may still fall within the general exemption proposed by the Commission. But because merely mentioning an issue is insufficient grounds for an exemption under *WRTL*, it would be

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[16] Holman and McLoughlin, BUYING TIME 2000, at 32.

[17] *WRTL* at fn. 6.

[18] *WRTL* at fn. 6, 2667.

appropriate to provide additional guidance to would-be advertisers by identifying specific criteria that serve the opposite function of the safe harbor criteria. It is imperative to define a narrow "capture net" that defines when an electioneering communication is explicitly not exempt.

The FEC's 2006 interim final rulemaking on a grassroots lobbying exemption to the electioneering communications considered a series of credible principles for a capture net. Some of these principles were originally proposed in the petition for rulemaking by the Chamber of Commerce, OMB Watch, AFL-CIO, National Education Association and the Alliance for Justice.[19]

To ensure that the grassroots lobbying safe harbor does not allow unlimited corporate and union treasury spending on electioneering communications, an appropriate capture net should automatically classify as express advocacy those ads that can have "no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The Commission should provide by regulation that an ad does not qualify for protection under the "reasonable interpretation" standard if it refers to a candidate's character, qualifications or fitness for office.

The controlling opinion in *WRTL* expressly recognizes that discussions of a candidate's character, qualifications or fitness for office are "indicia of express advocacy."[20] As Commissioner von Spakovsky explained in his 2006 proposed interim rule, the reasons for equating such discussions with electoral advocacy are clear: "these considerations are primarily relevant to a candidate's *election to* public office …. The character, qualifications, and fitness for public office of an individual are inextricably linked to that person's electoral suitability."[21] By contrast, these personal characteristics have very little, if anything at all, to do with current or pending legislative or executive issues or matters. Discussing positive or negative personal traits of a candidate is wholly foreign to whatever public policy issue may be at hand. Indeed, it is often known as an *ad hominem* attack that shifts the discussion away from the merits of the message and onto the merits of the messenger.

An electioneering communication that focuses on whether a candidate is a "good guy," "inexperienced," or "lacks temperament," provides no constructive information about a public policy matter or the action government should take on an issue. Discussions of character, qualifications or fitness for office are nothing more than public communications regarding personal traits that reflect on the quality of the candidate to

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[19] Jan Baran, Robert Bauer, Laurence Gold, Margaret McCormick and John Pomeranz, "Petition for Rulemaking: Electioneering Communications and Grassroots Lobbying Exemption," received by the Federal Election Commission on February 16, 2006.

[20] *WRTL* at 2655.

[21] Commissioner Hans von Spakovsky, Memorandum: Proposed Interim Final Rule (August 3, 2006) at 34.

hold public office. An ad run within the applicable time periods that comments on a candidate's character, fitness or qualifications for office is not reasonably understood as anything other than advocacy for or against the candidate's election.

The Commission also should make it clear that other characteristics of electioneering communications that are inconsistent with those of genuine issue ads or that are indicia of express advocacy weigh against classifying the ad under the "reasonable interpretation" standard. The criteria below indicate that a communication is the functional equivalent of express advocacy.

(1) Electioneering communications that address "a clearly identified candidate" other than in his or her capacity as an incumbent public officeholder should ***generally*** *not qualify for exemption.*

The controlling opinion in *WRTL* acknowledges that genuine issue ads typically involve attempts to influence "public officials."[22] Similarly, the Commission's proposed grassroots lobbying safe harbor recognizes that "[c]ommunications discussing a Federal candidate who is not a federal, state or local officeholder would not come within the proposed safe harbor."[23] What both the *WRTL* opinion and the proposed safe harbor reflect is that lobbying is an effort to influence governmental officials on matters of public policy. Grassroots lobbying encourages the general public to contact public officials in an effort to influence matters of public policy. Such matters of public policy are within the authority and jurisdiction of the public officials, as opposed to non-incumbent candidates who have no authority or jurisdiction over such matters of policy – at least until the *next* congressional session (assuming the non-incumbent is later elected to office). As such, non-incumbents have no authority over legislative (or executive branch) issues that could make them the subject of issue-related lobbying.

For these reasons, if an electioneering communication discusses a candidate who is not yet in office, that will generally be an indication that the subject of the communication is the candidate rather than an issue. Such an ad is unlikely to be reasonably susceptible to interpretation as genuine issue advocacy. For this reason, the Commission should clearly state that discussion of candidates who are not officeholders will normally indicate that an ad is the functional equivalent of express advocacy.

(2) Electioneering communications that do not focus on a current or pending legislative or executive branch issue or matter should ***generally*** *not qualify for exemption.*

As the controlling opinion in *WRTL* recognizes,[24] a genuine issue ad is a communication to the public that focuses on a current or pending legislative or executive

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[22] *WRTL* at 2655.

[23] Federal Election Commission, Notice of Proposed Rulemaking 2007-16: Electioneering Communications, at 20.

[24] *WRTL* at 2666.

issue or matter, whether or not it is simply informative or promotes action on that public policy. Such an issue or matter may be legislation, a legislative proposal, confirmation of nominees, a filibuster or any other policy matter of public debate that engages Congress or the Executive Branch. The absence of discussion of a current or pending legislative or executive branch issue is a strong indication that an ad that mentions a candidate is not a genuine issue ad and that it cannot be classified as something other than electoral advocacy.

(3) Electioneering communications that refer to a federal election or political party, or to a candidate's status as a candidate, should ***generally*** *not qualify for exemption.*

Federal elections and political parties are relevant to a candidate's election to public office, but are generally not relevant if lobbying that individual as an officeholder to take a position on a pending matter of public policy. Reference to a federal election or political party brings an electioneering component into the communication that is wholly irrelevant to issue advocacy. Thus, as the controlling opinion in *WRTL* recognized, references to federal elections, political parties or to a person's candidacy are "indicia of express advocacy."[25]

The *WRTL* Court recognized that a genuine issue ad may reference a specific officeholder who is also a candidate for public office, but at no point did the Court recognize a credible need or even utilitarian benefit to referencing an election or party. Referring to a specific federal election, or a person's candidacy in such an election, focuses on the competition among candidates running for public office. It is, on its face, electioneering

In the same vein, political parties serve one major purpose: the election or defeat of candidates to public office. Partisan affiliation is the single most important voting cue among the electorate.[26] Communications that associate candidates and officeholders with a political party are designed to have a significant electoral impact. The mention of party affiliation is therefore a strong indicator that an ad is express advocacy or its functional equivalent.

D. Impact on the Definition of Express Advocacy

The *WRTL* decision addressed to an as-applied challenge to Section 203 of BCRA – *i.e.*, it determined whether there should be an exemption from the source prohibition on

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[25] *WRTL* at 2655.

[26] Political science research widely confirms that party identification generally ranks among the top voting cues in most elections, especially federal elections. Some research has documented that the importance of partisan affiliation has been declining in affecting vote choice, but nevertheless still remains the single most important factor in most elections. See, *e.g*., Russell Dalton, "Partisan Mobilization, Cognitive Mobilization and the Changing American Electorate," *Electoral Studies* (June 2007); Charles Bullock, Donna Hoffman and R. Keith Gaddie, "Regional Variations in the Realignment of American Politics, 1994-2004," *Social Science Quarterly* (Sept. 2006).

funding electioneering communications that are "genuine issue ads." It did not address the definition of "express advocacy" for purposes of FECA's provisions governing electoral "expenditures," which was not at issue. The decision similarly did not discuss how to define express advocacy in light of vagueness concerns that led the Court in *Buckley v. Valeo*[27] and *MCFL v. FEC*[28] to limit the reach of FECA's expenditure provisions.

Nonetheless, Wisconsin Right to Life counsel James Bopp has further petitioned the FEC to repeal its long-standing definition of "expressly advocating" in 11 C.F.R. §100.22(b). This request is without merit. The petition asks the FEC to weaken the law in new and unwarranted ways that the *WRTL* Court saw no need to address. The request is so far reaching that it threatens to undermine the disclosure regime for electioneering communications, a regime that remains firmly intact. It would also require the FEC to re-evaluate legal precedent and constitutional interpretations offered by federal courts in various jurisdictions.

Moreover, to the extent that *WRTL* might be seen as having any indirect bearing on the regulation, the decision clearly supports, rather than undermines, this regulation's inclusion of communications that can "only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)."[29] The controlling opinion in *WRTL* uses a virtually identical standard to identify those communications that may constitutionally be subjected to the funding prohibition of BCRA Section 203. *WRTL* thus establishes that restrictions on express advocacy are supported by the compelling interests underlying FECA and do not violate the First Amendment. Moreover, the controlling opinion in *WRTL* specifically rejects the argument that a "reasonable interpretation" standard (indistinguishable from § 100.22(b)'s definition of express advocacy) is too vague to distinguish protected from unprotected speech.[30]

Given that *WRTL* does not bear specifically on the Commission's definition of "express advocacy" under FECA but does support the constitutionality of a very similar standard, the decision provides no occasion for revisiting the express advocacy regulation. Indeed, the Commission adhered to the regulation in the face of decisions of two federal circuits holding that it is unconstitutional.[31] Thus, it would be particularly ironic if the Commission now chose to repeal it when the Supreme Court has explicitly endorsed the constitutionality of a closely related test for distinguishing protected and regulated speech.

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[27] *Buckley v. Valeo*, 424 U.S. 1(1976).

[28] *MCFL v. FEC*, 479 U.S. 238 (1986).

[29] 11 C.F.R. § 100.22(b).

[30] *WRTL* at fn. 7.

[31] *Virginia Society for Human Life, Inc. v. FEC,* 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Committee, Inc. v. FEC,* 98 F.3d 1 (1st Cir. 1996).

E. Conclusion: The FEC Should Follow the Limited Scope of WRTL Decision in Rulemaking

Conforming agency regulations to principles and guidance offered by the Court is not often easy, especially when the Court's ruling involves matters of considerable political controversy. Though this particular case mandates some very substantive revisions in the rules governing electioneering communications, Common Cause, Public Citizen and U.S. PIRG urge the Commission to conduct straightforward implementation of the issues presented by the case.

The *WRTL* Court offers clear determinations and guidance on the rules governing section 203 of BCRA. First and foremost, the Court neither invalidated nor altered the definition of electioneering communications under the law. Some electioneering communications may in fact be issue ads, and thus qualify for exemption from the source prohibition. Nevertheless, these ads are still within the statutory definition of electioneering communications and remain subject to the current disclosure requirements.

Second, the *WRTL* Court provides fairly explicit criteria for identifying the subset of genuine issue ads within electioneering communications. Most notably, genuine issue ads should focus on current or pending issues or matters before the government; advocate some action that could influence governmental policy on that issue; and steer clear of discussions of an election, candidacy or candidate's traits and qualifications. Indeed, discussion of a candidate's traits and qualifications can have no other reasonable interpretation other than as an appeal to vote for or against a federal candidate.

Alternative I in the Commission's Notice for Proposed Rulemaking comes closest to conforming with the guidance of the Court. Alternative I also attempts to reduce ambiguity in the rules for the regulated community by outlining reasonable safe harbors within which a person can be fairly assured of compliance with the law. The Commission's proposed safe harbors are appropriate, with one modification to the safe harbor for issue ads regarding the ad's position condemning or praising a candidate's position.

Also, to reduce ambiguity, Common Cause, Public Citizen and U.S. PIRG suggest that the Commission provide guidance regarding a "capture net." Such guidance is every bit as useful as the regulation's safe harbor to the regulated community, which must know the types of communications that will be viewed by the Commission as electioneering communications that clearly are express advocacy or its functional equivalent.

Specifically, an electioneering communication should not qualify for exemption if the ad references a candidate's character, qualifications or fitness for office. Moreover, an ad should generally not be exempt if it:

(1) Addresses "a clearly identified candidate" other than in his or her capacity as an incumbent public officeholder.

(2) Does not focus on a current or pending legislative or executive branch issue or matter.

(3) References a federal election or political party.

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Respectfully Submitted,

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