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November 19, 2007

By Electronic Mail

Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Agenda Doc. No. 07-76, Draft Final Rule on Electioneering Communications

Dear Commissioners:

On Friday, the Commission's Office of General Counsel published Agenda Doc. No. 07-76, alternative draft final rules to interpret and implement the Supreme Court's decision earlier this year in *FEC v. Wisconsin Right to Life (WRTL)*¹ The draft final rules are scheduled for consideration and possible adoption at the Commission's meeting tomorrow, November 20, 2007.

Both alternative draft rules could be interpreted as going much further than required by the Court's decision in *WRTL* and substantially weakening the "electioneering communication" restrictions established by Congress when it enacted the Bipartisan Campaign Reform Act of 2002 (BCRA). For this reason, we urge the Commission to revert to the rule proposed in NPRM 2007-16,² subject to the minor modifications and refinements suggested in the comments the Campaign Legal Center *et al.* filed in this rulemaking October 1, 2007.³

In *WRTL*, the Supreme Court held that electioneering communications that are not express advocacy, or the "functional equivalent of express advocacy," may not constitutionally be subject to the prohibition on the use of corporate and union treasury funds to pay for electioneering communications, a restriction imposed by Title II of BCRA.⁴ The 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."⁵ The Court found that the ads at issue in *WRTL* were susceptible of a reasonable interpretation other than as an appeal to vote for or against a candidate for *all of the following reasons*:

¹ 127 S. Ct. 2652 (2007).

² 72 Fed. Reg. 50261 (August 31, 2007).

³ See Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters and U.S. PIRG, Comments on Notice 2007-16: Electioneering Communications (October 1, 2007), available at

http://www.fec.gov/pdf/nprm/electioneering_comm/2007/campaign_legal_center_democracy21_brennan_center_for_justice_commoncause_league%20of_women_voters_uspirg_eccomment7.pdf.

⁴ *WRTL*, 127 S. Ct. at 2670.

⁵ *Id.* at 2667.

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads 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.⁶

It was the fact that WRTL's ads possessed *all of these characteristics* that led the Court to conclude they were not the functional equivalent of "express advocacy" and, therefore, could not be subject to the corporate/union funding restrictions.

The FEC's initial proposed rule in NPRM 2007-16 largely mirrored the Court's opinion by establishing an umbrella "no reasonable interpretation" test and then establishing a *de facto* safe harbor for ads possessing all of the characteristics listed above. The Campaign Legal Center supported this approach and—importantly—urged the Commission to consider any "indicia of express advocacy" in an ad *to be strong evidence that the ad is the equivalent of "express advocacy"* and, consequently, still subject to the BCRA restrictions on corporation/union funding of "electioneering communications."⁷

Both alternative draft rules in Agenda Doc. No. 07-76 could be interpreted as establishing an exemption much broader than that which was proposed in NPRM 2007-16—and much broader than that which the Court found necessary to protect WRTL's constitutional rights. Both alternative drafts would carve out an exception for an ad that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate"—and then establish that an ad *de facto* does have a reasonable interpretation other than as an appeal to vote for or against a candidate (*i.e.*, the ad is exempt) if it "[f]ocuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue."

In other words, one might argue that ad qualifies for the Commission's new proposed exemption even if it mentions an election, candidacy, political party or challenger and takes a position on a candidate's character, qualifications, or fitness for office—so long as the ad "*focuses* on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue."

It would be a mistake if Commission were to promulgate a rule based on the approach taken in Agenda Doc. No. 07-76 and interpret the rule so as to exempt from the "electioneering communication" restrictions any ad that "focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue"—even where the ad contains all of the "indicial of express advocacy" not possessed by the ads exempt by the *WRTL* Court. Both alternative drafts are susceptible to such an interpretation.

⁶ *Id.*

⁷ Contrary to Mr. Bopp's characterization of our position in his letter to the Commission dated today, November 19, the Campaign Legal Center *does* believe that the *WRTL* Court's "indicia of express advocacy" should be part of the Commission's "no reasonable interpretation" test. As noted in the body of this letter and in our comments filed October 1, the presence of "indicia of express advocacy" in an ad should be considered strong evidence that the ad is the functional equivalent of express advocacy (*i.e.*, that the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate).

In addition to voicing our dismay over the exemption standard incorporated into both alternative draft final rules, we also reiterate our opposition to the adoption of a rule exemption here that would exempt any ads from the BCRA “electioneering communication” reporting and disclosure requirements, for the reasons detailed in the written comments we filed October 1, 2007.

The Campaign Legal Center urges the Commission to reject both alternative draft final rules contained in Agenda Doc. No. 07-76 and, instead, to promulgate a rule similar to that which was proposed in NPRM 2007-16, subject to the minor modifications and refinements suggested in our written comments filed October 1, 2007. We further urge the Commission to continue to apply BCRA’s “electioneering communication” disclosure requirements to all ads meeting the statutory definition of that term.

We believe it would be a mistake of historic proportions for the Commission to go beyond the text of the controlling opinion in *WRTL*. The electioneering communications provision was a central part of BCRA, and was debated in detail by Congress in the course of passage of the legislation. It has been the subject of two United States Supreme Court decisions. At this point, the Commission’s job is only to implement *WRTL* as written, and to do so as simply as possible so that affected persons have the maximum of guidance in this election cycle.

Respectfully,

/s/ J. Gerald Hebert

J. Gerald Hebert

Paul S. Ryan

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Cc: General Counsel Thomasenia P. Duncan
Commission Secretary