

October 1, 2007

By Electronic Mail (wrtl.ads@fec.gov)

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2007-16: Electioneering Communications

Dear Mr. Katwan:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters and U.S. PIRG in response to the Notice of Proposed Rulemaking (NPRM) on “Electioneering Communications.” See NPRM 2007-16, 72 Fed. Reg. 50261 (August 31, 2007). The Commission requests comments on proposed revisions to its rules governing electioneering communications, in order to implement the Supreme Court’s decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (“*WRTL I*”).

WRTL II held that electioneering communications that are not express advocacy, or the “functional equivalent of express advocacy,” *id.* at 2667, 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 the Bipartisan Campaign Reform Act of 2002 (BCRA), and codified at 2 U.S.C. §§ 441b(b)(2), 441b(c). Further, the plurality opinion 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.” *WRTL II*, 127 S. Ct. at 2667.

The Commission is seeking public comment on two alternative proposed approaches to implementing the *WRTL II* decision – the first would incorporate the new exemption into the rules prohibiting the use of corporate and union treasury funds to pay for electioneering communications; the second would incorporate the new exemption into the rule defining “electioneering communication” itself. The principal difference between the two approaches is that the second would have the effect of exempting *WRTL II*-type ads not only from the corporate/union source restrictions at 2 U.S.C. § 441b(b)(2), but also from the electioneering communication disclosure requirements at 2 U.S.C. § 434(f). 72 Fed. Reg. at 50262.

For the reasons set forth below, we urge the Commission to promulgate a rule based on the “Alternative 1” approach, limiting the new exemption to the corporate/union funding

restrictions, and retaining the existing disclosure requirements for all ads that meet the statutory definition of “electioneering communication.”

In addition to the “safe harbor” proposed by the Commission as part of “Alternative 1,” the Commission should make clear in the rule that it will consider “indicia of express advocacy” in an ad, 127 S. Ct. at 2667, such as an attack on a candidate’s character, qualifications or fitness for office, as a “red flag” and as strong evidence that the ad is subject to the Title II funding restrictions. Further, the Commission should make clear that it will consider “condemning” a candidate’s record on an issue – so-called “Jane Doe”-type ads, as discussed both in *WRTL II*, 127 S. Ct. at 2667 n.6, and in *McConnell v. FEC*, 540 U.S. 93, 127 (2003) – also as strong evidence that the ad is subject to the Title II funding restrictions.

The Campaign Legal Center and Democracy 21 each request the opportunity to testify at the public hearing on this rulemaking scheduled for October 17, 2007.

I. The Commission Should Adopt “Alternative 1” And Reject The “Alternative 2” Proposal To Extend The *WRTL II* Exemption To BCRA’s Reporting Requirements.

The NPRM correctly acknowledges that the “plaintiff in *WRTL II* challenged only BCRA’s corporate and labor organization funding restrictions and did not contest either the definition of ‘electioneering communication’ in section 434(f)(3), or the reporting requirement in section 434(f)(1).” 72 Fed. Reg. at 50262 (*citing WRTL II*, 127 S. Ct. at 2658-59; and Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in *Wisconsin Right to Life, Inc. v. FEC* (D.D.C. No. 04-1260)).

In the original complaint filed by Wisconsin Right to Life that led to the Supreme Court decision, the plaintiff could not have been clearer that it was not challenging the reporting and disclaimer provisions of the law: “WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.” Complaint, *supra* at ¶ 36.

This is a point repeatedly stressed by WRTL in its brief to the Supreme Court. In the introductory section of the brief, it stated: “WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA.” Brief for Appellee, *FEC v. Wisconsin Right to Life*, No. 06-969 (March 2006) at 10 (emphasis in original); *see also id.* at n.18 (“Full disclosure of WRTL’s identity and activities would have been forthcoming.”) and *id.* at 29 n.39 (“WRTL did not challenge the electioneering communication *disclosure* requirements.”) (emphasis in original). Indeed, WRTL stressed to the Court that its challenge to the statute, if successful, would leave a fully “transparent” system:

Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimer and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for

grassroots lobbying on a particular government issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, ... , the people, with full disclosure as to the messenger, can make the ultimate judgment.

Id. at 49.

The NPRM also correctly notes that the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), “specifically upheld the electioneering communications reporting provisions as constitutional because they ‘d[o] not prevent anyone from speaking[.]’” 72 Fed. Reg. 50262 (quoting *McConnell*, 540 U.S. at 201 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) (internal quotations omitted).¹ The *McConnell* Court upheld these disclosure provisions by a vote of 8-1, with only Justice Thomas dissenting.

Yet, despite the fact that the plaintiff in *WRTL II* did not challenge the constitutionality of the disclosure requirements applicable to electioneering communications, and despite the fact that the *WRTL II* Court did not address the constitutionality of these disclosure requirements, and despite the fact that the *McConnell* Court by a large majority specifically upheld the constitutionality of the Title II disclosure requirements – the Commission has proposed, as “Alternative 2,” to amend the definition of “electioneering communication” at 11 C.F.R. § 100.29(c) so as to exempt many if not most electioneering communications from the disclosure requirements.

For the reasons set forth below, the Commission does not have any basis for adopting “Alternative 2.”

A. Supreme Court’s *WRTL II* holding that the “electioneering communication” funding restrictions are unconstitutional as applied to certain advertisements does not extend to the reporting requirements for “electioneering communications.”

The Commission asks: “Does *WRTL II* either permit or necessitate an exemption from the definition of ‘electioneering communication,’ or give the Commission authority to create such an exemption?” 72 Fed. Reg. at 50263.

The answer to all those questions is no. As noted above, the Court’s decision in *WRTL II* did not even consider, let alone invalidate, BCRA’s definition of “electioneering communication” and related reporting requirements. And the Commission does not have

¹ Also quoting *Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) (“The [*McConnell*] Court was not * * * explicit about the appropriate standard of scrutiny with respect to disclosure requirements. However, in addressing extensive reporting requirements applicable to * * * ‘electioneering communications’ * * *, the Court did not apply ‘strict scrutiny’ or require a ‘compelling state interest.’ Rather, the Court upheld the disclosure requirements as supported merely by ‘important state interests.’”) (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (upholding FECA’s reporting requirements).

authority to exempt from the disclosure requirements any electioneering communications that promote, support, attack or oppose a candidate. *See* 2 U.S.C. § 434(f)(3)(B)(iv).

The Court in *WRTL II* reviewed the constitutionality of the Title II funding restrictions – not its disclosure requirement. Fundamentally different constitutional tests apply to the two provisions. Whereas a reporting requirement is constitutional so long as there is a “‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed,” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), a restriction on political spending is constitutional only if it meets the more rigorous strict scrutiny requirement of being “narrowly tailored to further a compelling interest,” *WRTL II*, 127 S. Ct. at 2671 (*quoting McConnell*, 540 U.S. at 205; *Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 44-45).

Examining the source prohibition, and that provision alone, the Court in *WRTL II* applied this more rigorous standard. The *WRTL II* Court had no reason to, and indeed did not, consider whether the ads at issue in the case could constitutionally be subject to the disclosure requirements of Title II, under the less rigorous standard of review applicable to such reporting requirements.

Thus, this rulemaking is being conducted pursuant to a Supreme Court decision that did not examine or address the constitutionality of the Title II disclosure requirements, and did not make any ruling on those requirements. And if the Court had been presented the question, the standard it would have applied to assessing the Title II disclosure requirements clearly would have been markedly different than the standard it applied to reviewing the Title II funding restrictions.

The Commission should not speculate as to what the outcome might be of some possible future as-applied challenge that might (or might not) be someday brought against the disclosure requirements of Title II. Certainly there are no grounds, now, for the Commission to conclude that those disclosure requirements are unconstitutional. *WRTL II* provides no basis for the Commission to decide, by rule, that the statutory disclosure requirements of BCRA cannot apply to all electioneering communications.

This conclusion has even stronger force given that the Supreme Court in *McConnell*, with eight Justices agreeing, expressly upheld the Title II disclosure requirements, 540 U.S. at 194-200, a decision undisturbed (and unanalyzed) by *WRTL II*.

McConnell's analysis of disclosure has its roots directly in *Buckley*. There, the Court made clear that both the government interests supporting disclosure laws, as well as the burdens imposed on those required to comply with disclosure requirements, differ substantially from interests and burdens at issue in provisions that impose limits on contributions and expenditures.

The *Buckley* Court began by noting that “[u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities.” *Id.* at 64. The Court said that there must be a “‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be

disclosed.” *Id.* This test is necessary, the Court reasoned, “because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights,” but it also found “that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the ‘free functioning of our national institutions’ is involved.” *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court continued:

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return. . . .

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests.

Id. at 66-68 (footnotes omitted) (emphasis added).

With respect to the burdens imposed by disclosure requirements, the *Buckley* Court noted that “disclosure requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.” *Id.* at 68 (footnotes omitted). On balance, the Court concluded that the “sufficiently important” government interests served by disclosure requirements justify the burdens imposed by them, and it rejected the claims that FECA’s disclosure requirements were unconstitutional as applied to political committees and individuals. *Id.* at 60.

By reference to this analysis, the Court in *McConnell* rejected a challenge to the Title II disclosure requirements. 540 U.S. at 195. The Court:

[A]gree[d] with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA’s disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive

electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304’s disclosure requirements to the entire range of “electioneering communications.”

540 U.S. at 196 (footnote omitted) (emphasis added). The Court continued:

Plaintiffs’ disdain for BCRA’s disclosure provisions is nothing short of surprising. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: ‘The Coalition-Americans Working for Real Change’ (funded by business organizations opposed to organized labor), ‘Citizens for Better Medicare’ (funded by the pharmaceutical industry), ‘Republicans for Clean Air’ (funded by brothers Charles and Sam Wyly). . . . Given these tactics, Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public. McConnell Br. at 44. Plaintiffs’ argument for striking down BCRA’s disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” 251 F.Supp.2d at 237.

540 U.S. at 196-97 (*quoting McConnell*, 251 F.Supp.2d at 237(emphasis added)).

Just as the *Buckley* Court had upheld earlier FECA disclosure requirements against constitutional challenge, the *McConnell* Court held that BCRA’s disclosure requirements “are constitutional, in part, because they ‘d[o] not prevent anyone from speaking.’” *Id.* at 201 (internal citation omitted).²

In his opinion concurring in this portion of the judgment, Justice Kennedy, joined by Justice Scalia and Chief Justice Rehnquist, stated that he “agree[s] with the Court’s judgment upholding the disclosure provisions contained in § 201 of Title II, with one exception.” *Id.* at 321.³ Justice Kennedy stated that the section 201 disclosure requirement “does substantially relate” to the governmental interest in providing the electorate with information, which “assures its constitutionality.” *Id.* (*citing id.* at 196).

In short, the Supreme Court has held that reporting requirements serve governmental interests broader than those served by restrictions on expenditures, and that disclosure

² The Court in *McConnell* noted that persons subject to the disclosure requirement might avail themselves of an as-applied challenge if they could demonstrate that disclosure would subject them to a “reasonable probability” of “threats, harassment, and reprisals.” *Id.* at 198-99 (*quoting Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982)). It found no such demonstration was made in *McConnell*, *id.* at 199, nor was any such argument advanced in *WRTL II*.

³ That exception is the requirement in section 202 of BCRA for “advance disclosure” of executory contracts to purchase airtime for electioneering communications to be run in the future.

requirements are less burdensome than restrictions on expenditures. For these reasons, the Court has employed entirely different legal standards when considering the constitutionality of reporting requirements, as compared to a ban on the use of corporate or union treasury funds to pay for expenditures. The Court’s ruling in *WRTL II*, applying the more rigorous standard to the source prohibitions of Title II, neither addressed nor disturbed the Court’s 8-1 ruling in *McConnell* which applied a different standard to uphold the disclosure provisions of Title II.⁴

B. The constitutionality of a disclosure requirement does not depend on the spender’s use of “express advocacy” or its “functional equivalent.”

The fact that the Title II disclosure requirement (1) was upheld as constitutional in *McConnell*, (2) was not challenged in *WRTL II*, and (3) would, if challenged, be subject to an entirely different legal standard than was the source prohibition at issue in *WRTL II*, alone makes clear that the Commission has no legal or policy basis for extending the *WRTL II* exemption to the electioneering communication disclosure requirement.

Nevertheless, some might argue that disclosure may not constitutionally be required by spenders who do not use “express advocacy” or its “functional equivalent” and, instead, engage in what they characterize as “grassroots lobbying.” This is wrong, but in any event would be a judgment for the courts to make about a statute passed by Congress, not a judgment for the Commission to make on its own.

The constitutionality of a disclosure requirement does not depend on the spender’s use of “express advocacy” or its “functional equivalent.” Statutes requiring disclosure of lobbying expenditures, as well as expenditures for ballot measures, have been upheld by both the Supreme Court and lower federal courts.

The leading case on lobbyist disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered the Federal Regulation of Lobbying Act, which required every person “receiving any contributions or expending any money for the purpose of influencing the passage or defeat

⁴ For the reasons discussed above, *WRTL II* does not require the Commission to create an exemption to the definition of electioneering communication that would have impact beyond the section 441b(b) restrictions on the use of corporate and union treasury funds reviewed by the Court. Nor does the Commission have discretionary authority under subpart (iv) of 2 U.S.C. § 434(f)(3)(B) (or on any other statutory basis) to create such an exemption to the definition of electioneering communication. Under that provision, the Commission may not exempt any electioneering communication that “promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).” *Id.* (incorporating 2 U.S.C. § 431(20)(A)(iii)). Since this language from section 431(20) makes clear that the category of PASO ads is broader than “express advocacy” and its “functional equivalent,” narrowing the definition of electioneering communications simply to express advocacy and its “functional equivalent” would necessarily exclude non-express advocacy ads which PASO a candidate. While such a narrowing construction is required by the plurality’s decision for purposes of applying the section 441b(b)(2) restriction on the use of corporate and union treasury funds, it is not required for any other purpose, and would exceed the statutorily constrained scope of the Commission’s discretionary authority.

of any legislation by Congress” to report information about their clients and their contributions and expenditures. *Id.* at 614 & n.1. To avoid finding this broadly-drafted Act unconstitutionally vague, the Supreme Court narrowed its application to lobbyists’ “direct communication with members of Congress on pending or proposed federal legislation[,]” and to such efforts made “through an artificially stimulated letter campaign.”⁵ *Id.* at 620; *see also id.* at 620 n.10 (noting that the Act covered lobbyists’ “initiat[ion] of propaganda from all over the country, in the form of letters and telegrams,” to influence legislators). After balancing the Act’s burden on First Amendment rights against the government’s interests, the Court found that disclosure of “lobbying,” thus defined, did not violate the First Amendment. It reasoned that disclosure served the state interest of “self-protection,” and enabled legislators to evaluate lobbying pressures by providing “a modicum of information from those who, for hire, attempt to influence legislation, or who collect or spend funds for that purpose.” *Id.* at 625. The Court said:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad [lobbying] pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

Id.

Lower courts, following *Harriss*, have also upheld state lobbying disclosure statutes. In *Minnesota State Ethical Practices Board (MSEPB) v. Nat’l Rifle Association*, 761 F.2d 509 (8th Cir. 1985), the Eighth Circuit upheld a state statute requiring disclosure of grassroots lobbying, even when the activity at issue was only correspondence from a national organization to its own members. The NRA had sent three letters and one mailgram from its Washington headquarters to its members in Minnesota (approximately 54,000 persons), urging them to contact their state legislators in support of three pieces of pending legislation. *Id.* at 511. The Court found that Minnesota’s interest in the disclosure of these activities “outweigh[ed] any infringement of the [NRA’s] first amendment rights.” *Id.* at 512.⁶

⁵ For instance, one of the lobbyist-defendants had “arranged to have members of Congress contacted” about legislation that would raise the price of agricultural commodities and commodity futures “through an artificially stimulated letter campaign.” *Harriss*, 347 U.S. at 616-17.

⁶ The Eighth Circuit reiterated this holding in *Minnesota Citizens Concerned for Life v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005), stating, “Both the Supreme Court and this court have upheld lobbyist-disclosure statutes based on the government’s ‘compelling’ interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption.” *See also Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (finding the New York state lobby law, construed to require disclosure of efforts to “exhort the public to make such direct contact with legislators as outlined in *Harriss*,” did not violate the First Amendment). *Cf. Florida League of Prof’l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460-61 (11th Cir. 1996) (citing *Harriss* in upholding a Florida law which required

The electioneering communication disclosure provisions of Title II are far narrower than those upheld in *Harriss* and *MSEPB*. Whereas the Title II disclosure requirements apply only to certain broadcast communications aired in close proximity to elections, the disclosure requirements upheld in *Harriss* and *MSEPB* apply to both broadcast and non-broadcast communications, and apply regardless of when the communication was made.

Similarly, the Supreme Court has expressed approval of state statutes requiring the disclosure of funds spent on so-called issue advocacy in the context of ballot measures. In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on expenditures to influence ballot measures, but did so in part because “[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” *Id.* at 792 n.32. Citing *Buckley* and *Harriss*, the Court took note of “the prophylactic effect of requiring that the source of communication be disclosed.” *Id.*

The Court again recognized this state “informational interest” in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City’s ordinance that limited contributions to committees formed to support or oppose ballot measures. Although the Court struck down the contribution limit, it based this holding in part on the availability of disclosure requirements imposed on ballot measure committees. *See* 454 U.S. at 298 (“[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.”); *see also Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 167 (2002) (invalidating ordinance requiring registration of door-to-door canvassers but noting that disclosure requirements “may well be justified in some situations – for example, by the special state interest in protecting the integrity of the ballot initiative process....”).⁷

These precedents led the Ninth Circuit to hold that, “[g]iven the Supreme Court’s repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws.” *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003). The Ninth Circuit noted that “[t]hrough the *Buckley* Court discussed the value of disclosure for candidate elections, the same considerations apply just as forcefully, if not more so, for voter-decided ballot measures.” *Id.* at 1105; *see also Rhode Island ACLU v. Begin*, 431 F. Supp. 2d. 227, 243 (D.R.I. 2006) (upholding state law disclosure requirement that “is closely drawn to further a sufficiently important state interest in providing

disclosure of expenditures both for direct lobbying and for indirect lobbying activities which did not involve contact with governmental officials).

⁷ *McIntyre v. Ohio Election Comm.*, 514 U.S. 334 (1995), is not to the contrary. There, the Court struck down a state law identification requirement for political advertising, as applied to a pamphlet produced and disseminated by an individual. That case did not concern reporting requirements, and indeed the Court specifically distinguished such requirements, noting that they are a “far cry” from the identification law at issue in *McIntyre*. 514 U.S. at 355.

voters with information regarding the sources of funds used to support or oppose ballot measures.”).⁸

Whether viewed in the context of lobby disclosure laws, or ballot measure disclosure requirements, federal case law confirms that the entire universe of advertisements captured by BCRA’s definition of “electioneering communication” – those ads considered the functional equivalent of express advocacy, those that may promote or attack a candidate even if not the equivalent of express advocacy, as well as those that might be characterized as “grassroots lobbying” or “issue” advocacy – may constitutionally be subject to disclosure requirements. The Supreme Court and lower federal courts have upheld broader statutes requiring such disclosure, finding them justified by sufficiently important state informational interests.

II. “Alternative 1” Correctly Implements The Supreme Court’s Decision In *WRTL II*, Provided It Is Modified To Make Clear That “Indicia Of Express Advocacy” And “Condemning” A Candidate’s Record On An Issue (“Jane Doe”-Type Ads) Will Constitute Strong “Red Flag” Evidence That The Ads Are Subject To The Funding Restrictions Of Title II.

The Commission’s “Alternative 1” proposal to incorporate a new exemption into Part 114 of the Commission’s regulations appropriately limits the scope of the *WRTL II* exemption to BCRA’s restrictions on corporate and labor organization funding of electioneering communications. Thus, under “Alternative 1,” corporations and labor organizations would be permitted to use general treasury funds for electioneering communications that qualify for the proposed exemption, but would be required to file electioneering communications disclosure reports if their spending for such communications exceeds \$10,000 in a calendar year. *See* 72 Fed. Reg. at 50262.

As discussed in greater detail below, it is important for the Commission to be clear in the rule that “indicia of express advocacy” in an ad – such as attacks on a candidate’s character, qualifications or fitness for office – will provide strong evidence that the ad is subject to the funding restrictions of Title II. Similarly, the Commission should make clear that “condemning” a candidate’s record on an issue – what the plurality opinion called “Jane Doe”-type ads – will also provide strong evidence that the ad is subject to the funding restrictions of Title II.

Subsection (a) of proposed new 11 C.F.R. § 114.15 provides that “[c]orporations and labor organizations may make an electioneering communication . . . if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” Subsection (b) establishes safe harbors for certain types of electioneering communication (*i.e.*, “grassroots lobbying” and “commercial and business

⁸ In *Getman*, the Ninth Circuit analogized spending on a ballot measure with lobbying, thus invoking the *Harriss* rationale for disclosure. It noted that voters act as legislators in the ballot measure context, and that interest groups and individuals attempting to influence voters thus act as lobbyists. “We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists’ services and how much.” 328 F.3d at 1106 (citing *Harriss*, 347 U.S. at 625).

advertisements”) that meet specific requirements. Subsection (c) makes clear that electioneering communications qualifying for this exemption are nevertheless subject to the Title II reporting requirements.

We support the language of the general exemption set forth in proposed subpart (a). This subsection implements the Supreme Court’s conclusion that an electioneering communication which is not the “functional equivalent” of express advocacy is exempt from the Title II source prohibition, and it mirrors the plurality opinion’s language in defining the “functional equivalent” test.

This umbrella exemption, in itself, would be sufficient to implement the *WRTL II* decision. The Commission correctly recognizes that in “determining whether a particular communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate, the Commission may consider ‘basic background information that may be necessary to put an ad in context.’” 72 Fed. Reg. at 50264 (*quoting WRTL II*, 127 S. Ct. at 2669). Under *WRTL II*, this information could include whether a communication “describes 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.” 72 Fed. Reg. 50264 (*quoting WRTL II*, 127 S. Ct. at 2669).

Although it is not required by the decision, we think it is reasonable for the Commission to provide additional guidance as to the contours of the umbrella exemption. Such guidance, however, must include both what is covered by the exemption, as well as what is not covered. The “safe harbor” in proposed subsection (b)(1) for “grassroots lobbying communications” is appropriate guidance on what ads are included in the exemption, in that it provides protection for ads that share all of the same essential characteristics as the ads held exempt in *WRTL II*, provided the Commission also makes clear that “Jane Doe”-type ads are not eligible for the “safe harbor.” *See* n.9, *infra*. But this is not the only appropriate guidance the Commission needs to provide; the rule must also include guidance as to what ads are not covered by the exemption as well.

The plurality opinion described the ads at issue in *WRTL II* by pointing to a list of attributes:

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.

WRTL II, 127 S. Ct. at 2667.⁹ The controlling opinion said that because the *WRTL* ads had these characteristics – and pointed specifically to all of these characteristics – those ads were

⁹ The plurality opinion noted an additional characteristic of the *WRTL* ads: it said that the *WRTL* ads were distinguishable from “Jane Doe”-type ads – ads that “condemned” a candidate’s “record on a particular issue.” 127 S. Ct. at 2667 n.6. The plurality said the *WRTL* ads “do not do so.”

“plainly not the functional equivalent of express advocacy.” *Id.* In light of that analysis, other ads which similarly share all of these characteristics may fairly be assumed to fall within the umbrella exemption as well (and thus can fairly be included within a “safe harbor”).¹⁰

The Commission asks “whether a showing that the communication meets all four prongs (and all elements of each prong) should be required to come within the safe harbor.” 72 Fed. Reg. at 50265. We strongly believe that it should. The Commission should adhere closely to the fact pattern of *WRTL II* in crafting a *per se* “safe harbor” exemption, and for that reason should make clear that “Jane Doe”-type ads are not eligible for the safe harbor, since the plurality opinion drew a distinction between the *WRTL* ads and the so-called “Jane Doe”-type ads. *See* n.9, *supra*. Of course, the failure to fall within the safe harbor does not mean an ad could not still be exempt under the governing “functional equivalent” test that would be codified by proposed section 114.15(a). Even if one or more prongs of the safe harbor test are not met, an ad may still qualify for the umbrella exemption. (The NPRM itself notes this point: “[A] communication that does not qualify for either of the safe harbors may still come within the general exemption....” 72 Fed. Reg. at 50264).

The Commission notes several limitations of its proposed “grassroots lobbying” safe harbor (*e.g.*, communications discussing a candidate who is not an officeholder would not come within the proposed “grassroots lobbying” safe harbor), and asks whether the safe harbor should be “so limited” or, instead, should be expanded in a variety of ways. 72 Fed. Reg. at 50265. We agree with the limitations and urge the Commission to reject any expansion of the safe harbor as proposed in the NPRM.

Again, the safe harbor deals only with ads that are *per se* exempt, and the failure to expand the safe harbor does not constrict of the scope of the umbrella exemption. Ads that do not fall within the proposed safe harbor might nonetheless be within the scope of the umbrella exemption.

Just as the Commission proposes for the sake of clarity to provide a safe harbor as to the types of ads that are covered by the umbrella exemption, it should also provide guidance as to the characteristics of ads that will constitute strong evidence that such ads are not covered by the exemption and thus remain subject to the funding restrictions of Title II.

The Commission asks whether “there any factors that could support a conclusion that a communication is *per se* the functional equivalent of express advocacy[.]” 72 Fed. Reg. at 20265. The answer is that there are factors that should raise a “red flag” and be viewed as providing strong evidence that an ad is subject to the Title II funding restrictions – and those factors were identified by the plurality opinion itself, which deemed certain characteristics of an ad to be “indicia of express advocacy,” *WRTL II*, 127 S. Ct. at 2667. These factors also

Id. Thus, ads which “condemn” (or praise) a candidate’s record on a particular issue should be expressly excluded from the safe harbor.

¹⁰ Subsection (b)(2) would establish a safe harbor for certain commercial and business advertisements – advertisements of a sort not at issue in *WRTL II*. We do not object to this proposed safe harbor.

include the kind of “condemnation” of a candidate’s record that characterizes the “Jane Doe”-type ads discussed by the plurality opinion, and which that opinion distinguished from the WRTL ads at issue in the case. *Id.* at n.6.

It is in part precisely because the ads at issue in *WRTL II* did not contain these “indicia of express advocacy” that the plurality opinion deemed those ads to be entitled to a constitutional exemption. By the same reasoning, if an ad does contain “indicia of express advocacy,” the regulations should state that those indicia provide strong evidence in favor of treating the ad as the equivalent of express advocacy, and accordingly as subject to the Title II funding restrictions. There is a reason that the plurality opinion spelled out what constitutes “indicia of express advocacy.” The Commission should give effective meaning to the list of such indicia, just as it proposes to give meaning to the indicia of what is a “genuine issue ad.” *Id.* Thus, we strongly urge the Commission to make clear in the new rule that the fact that a communication:

- mentions an election, candidacy, political party, or challenger; or that it
- takes a position on a candidate’s character, qualifications or fitness for office;

will constitute strong evidence that the ad is the functional equivalent of express advocacy within the meaning of the *WRTL II* decision and therefore is ineligible for the general exemption that would be established by proposed subsection (a).¹¹

¹¹ The recent enforcement actions against various section 527 groups provide examples of ads that attack a candidate’s “character.” In the February, 2007 conciliation agreement with Progress for America Voter Fund, *see In re* Progress for America Voter Fund (MUR 5487) (Feb. 28, 2007) *available at* <http://eqs.sdrdc.com/eqsdocs/00005AA7.pdf>, the Commission cited an ad which praised the character of President Bush:

Why do we fight? Years of defense and intelligence cuts left us vulnerable. We fight now because America is under attack. Positions are clear. A president, who fights to defeat terrorists before they can attack again. Or the nation’s most liberal senator with a 30-year record of supporting defense and intelligence cuts. The war is against terror. And President Bush has the strength and courage to lead us to victory. Progress for America Voter Fund is responsible for the content of this ad.

The Commission found this ad to be express advocacy. Conciliation Agreement at ¶¶ 27-28.

An ad cited by the Commission in its conciliation agreement with Swiftboat Veterans and POWs for Truth (“SwiftVets”), *see In re* Swiftboat Veterans and POWs for Truth Conciliation Agreement (MURs 5511 and 5525) (Dec. 13, 2006) *available at* <http://eqs.nictusa.com/eqsdocs/000058ED.pdf>, directly criticized the “character” of Senator John Kerry:

How can you expect our sons and daughters to follow you, when you condemned this [sic] fathers and grandfathers?

Why is this relevant?

Because character and honor matter. Especially in a time of war.

The Commission correctly notes that “if a communication discusses an officeholder’s past position on an issue in a way that implicates the officeholder’s character, qualifications, or fitness for office,” then the communication would not be eligible for exemption under the “grassroots lobbying” safe harbor. 72 Fed. Reg. at 50266. These same factors should also be treated as providing strong evidence that the communication is not eligible for the umbrella exemption as well, and is therefore subject to the Title II funding restrictions.

Similarly, the Commission needs to make clear in the regulation that the *WRTL II* decision provides no “safe harbor” exemption for a class of ads which the plurality opinion refers to as the “Jane Doe” example identified in *McConnell*. 127 S. Ct. at 2667 n.6. These ads, as described by the plurality, are ones that “condemn[]” a candidate’s “record on a particular issue.” *Id.* The plurality opinion explicitly distinguished the WRTL ads from this kind of “Jane Doe” ad, on the basis that the WRTL ads “do not” condemn Senator Feingold’s position on the filibuster issue; instead, they “take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position.” *Id.* Indeed, “one would not even know from the ads whether Senator Feingold supported or opposed the filibuster.” *Id.*

By making this explicit distinction between the WRTL ads and the “Jane Doe” ad, the plurality opinion leaves in place the ruling in *McConnell* regarding such “Jane Doe”-type ads. For this reason, language in an ad “condemning” a candidate’s record on an issue should be treated as strong evidence that the ad is not eligible for the umbrella exemption and is thus subject to the Title II funding restrictions.

Finally, with respect to the “grassroots lobbying” safe harbor, the Commission provides numerous examples of communications that would, and would not, qualify for the safe harbor exemption. We agree with the Commission’s conclusions regarding the applicability of the safe harbor to Examples 1, 2 and 3. Example 4 should be deemed not to come within the proposed safe harbor, because it attacks a candidate’s character, qualifications, and fitness for office. Example 5 should be deemed not to come within the proposed safe harbor because it mentions the candidacies of two individuals. Example 6 should be deemed not to come within the proposed safe harbor because it takes a position on a candidate’s character, qualifications and fitness for office. Example 7 should likewise be deemed not to come within the proposed safe harbor because it mentions the candidacy of an individual for federal office and takes a position on that candidate’s character, qualifications and fitness for office.

John Kerry cannot be trusted.

Conciliation Agreement at ¶ 15. The Commission concluded that this ad is express advocacy. *Id.* at ¶ 25. To the same effect, the Commission cited a mailer which claimed Kerry “lied to the American people,” “betrayed his fellow soldiers,” and “lost the respect of the mean he served with,” and which concluded by stating, “We’re not debating Vietnam, it’s about John Kerry’s character, he betrayed us in the past, how do we know he won’t do it again?” *Id.* at ¶ 16. The Commission also concluded this mailer contained express advocacy. *Id.* at ¶ 26.

III. Proposed Revisions To 11 C.F.R. § 104.20 Would Adequately Facilitate Reporting Of Payments For Electioneering Communication Permissible Under Proposed 11 C.F.R. § 114.15.

The Commission is proposing to revise its Title II disclosure regulations to facilitate disclosure by corporations and labor organizations permitted to make payments for electioneering communication under proposed 11 C.F.R. § 114.15. *See* 72 Fed. Reg. 50271.

The Commission proposes to amend its regulations to allow corporations and labor organizations, like other persons, to establish segregated accounts for the purpose of making payments for electioneering communications. The names of addresses of each donor of \$1,000 or more to such segregated accounts must be reported. Where electioneering communications are not funded out of a segregated account, current regulations require the name and address of every donor of \$1,000 or more to the person making the electioneering communication be reported. 11 C.F.R. § 104.20(c)(8). The Commission notes that it is “not proposing revisions to paragraph (c)(8), which provides for the reporting of ‘donors’ when electioneering communications are not made using a segregated bank account.” 72 Fed. Reg. 50271.

The Commission asks, however, how a corporation or labor organization would report an electioneering communication funded with general treasury funds, and not funded out of a segregated account established for that purpose. 72 Fed. Reg. at 50271.

It is clear that a corporation or labor organization should be required to report the name and address of each donor who donates \$1,000 or more to a segregated account that is established for the purpose of making electioneering communications. If a corporation or labor organization does not use a segregated account to pay for electioneering communications, it should be required to disclose the name and address of all of its donors of \$1,000 or more. In each case, furthermore, the total amount of the donation should be reported. These rules, for instance, would apply to an advocacy group organized as a corporation, and that accepts donations. In the situation where a corporation receives no donations or contributions, and pays for an electioneering communication out of general treasury funds consisting of income from business activities, it would simply report that the corporation itself was the source of the funds.

IV. The *WRTL II* Holding Reinforces The Constitutionality Of 11 C.F.R. § 100.22(b).

In addition to addressing the “electioneering communication” issues raised by the *WRTL II* decision, the NPRM asks whether *WRTL II* “also provide[s] guidance regarding the constitutional reach of other provisions in the Act?” 72 Fed. Reg. 50263. The Commission correctly notes that the *WRTL II* “Court’s equating of the ‘functional equivalent of express advocacy’ with communications that are ‘susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate’ bears considerable resemblance to components of the Commission’s definition of express advocacy” at 11 CFR § 100.22. *Id.*

We agree with this. Subsection (a) of 100.22 defines “expressly advocating” to include communications that “can have no other reasonable meaning than to urge the election or defeat” of a candidate, while subsection (b) defines the phrase to include communication that “could only be interpreted by a reasonable person as containing advocacy of the election or defeat” of a candidate. The NPRM asks whether “*WRTL II* require[s] the Commission to revise or repeal any portion of its definition of express advocacy at section 100.22[.]” 72 Fed. Reg. at 50263.

It does not. The Commission should not revise or repeal any portion of its subpart (b) regulation. To the contrary, the *WRTL II* opinion considerably strengthens the argument that the Commission’s subpart (b) standard is constitutional.

That standard has been invalidated in a handful of lower court decisions, primarily on the ground that it is unconstitutionally vague. See e.g., *Maine Right to Life Comm., Inc. v. Fed. Election Comm’n*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*) (adopting district court opinion); see also *Fed. Election Comm’n v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*per curiam*) (adopting district court opinion).

Yet, the subpart (b) standard and the *WRTL II* test are virtually indistinguishable: the former based on a “could only be interpreted by a reasonable person” standard, and the latter based on a “susceptible of no reasonable interpretation other than” test.

If the *WRTL II* test – crafted by the Chief Justice’s plurality opinion itself – is not unconstitutionally vague, then neither is the virtually identical subpart (b) test. Given the striking similarities between the two standards, the Court’s embrace of a “susceptible of no reasonable interpretation” standard for defining the “functional equivalent of express advocacy” serves as a *de facto* endorsement of the constitutionality of subpart (b)’s “could only be interpreted by a reasonable person” standard.

The plurality opinion in *WRTL II* described its test as being “objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” *WRTL II*, 127 S. Ct. at 2666. As if to stress this point, the plurality opinion specifically defends the test it sets forth against Justice Scalia’s attack on its vagueness. *Id.* at 2669 n.7. The footnote points out that the “no reasonable interpretation” standard satisfies the “imperative for clarity in this area.” The footnote also argues that the “magic words” formulation of express advocacy used in *Buckley* was not “the constitutional standard for clarity ... in the abstract, divorced from specific statutory language,” and that the *Buckley* “magic words” standard was a matter of statutory construction and “does not dictate a constitutional test.” *Id.*¹²

¹² We take note of the fact that the plurality opinion also says that its test “is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place.” *Id.* As a descriptive matter, this is of course true: a limiting construction that narrows the scope of those “electioneering communications” that are subject to the corporate and union funding ban is itself necessarily subject to the underlying time frame limitations on the statutory definition of “electioneering communications.” Thus, it is correct that the plurality’s test applies only in the 30/60 day Title II period. This truism, however, does not in any way address the concern about whether the plurality’s limiting construction is,

In recent months, the Commission has been applying the section 100.22 standards of express advocacy, including its subpart (b) test, in the context of its enforcement actions regarding the “political committee” status of organizations active in the 2004 elections, a test that in part turns on whether such organizations made “expenditures” for express advocacy. The *WRTL II* decision affirms that Commission has been on solid legal ground in its reliance on subpart (b).

These enforcement actions also provide illustrations of how the Commission has been applying subpart (b), and therefore they provide important guidance on how the Commission should apply the closely related *WRTL II* standard. For instance, in its December 2006 conciliation agreement with Swiftboat Veterans and POWs for Truth (“SwiftVets”), *see In re Swiftboat Veterans and POWs for Truth Conciliation Agreement* (MURs 5511 and 5525) (Dec. 13, 2006),¹³ the Commission cited the following ads as containing subpart (b) express advocacy:

Friends

Even before Jane Fonda went to Hanoi to meet with the enemy and mock America, John Kerry secretly met with enemy leaders in Paris.

...

Eventually, Jane Fonda apologized for her activities, but John Kerry refused to.

In a time of war, can America trust a man who betrayed his country?

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.

or is not, vague. After all, if – as the plurality opinion concludes – the “susceptible of no reasonable interpretation” test is not vague, that is as true outside the time frame as it is inside that period. Furthermore, the fact that the plurality opinion says that the test applies only in the Title II period does not create a negative implication that this test, or a similar test, cannot be used outside that period.

This snippet of the opinion, however, may be used by some, incorrectly, to argue that the subpart (b) standard cannot be applied outside the Title II timeframe. In our view, that would be a gross over-reading of the plurality’s passing statement which, after all, is no more than one sentence of dictum in a footnote and is presented only as the fifth of five reasons to rebut an argument made by another Justice. That hardly should be taken as a negative ruling on the constitutionality of the Commission’s longstanding subpart (b) regulation that was not even before the Court.

¹³

Available at <http://eqs.nictusa.com/eqsdocs/000058ED.pdf>.

Never Forget (a/k/a Other Hand)

John Kerry gave aide [sic] and comfort to the enemy by advocating their negotiating points to our government.

Why is it relevant? Because John Kerry is asking us to trust him.

I will never forget John Kerry's testimony. If we couldn't trust John Kerry Then, how could we possibly trust him now?

Id. at ¶ 15. The Commission concluded that these ads, and other similar ones,

[E]xplicitly 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).

Id. at ¶ 25. The Commission also cited two mailers sent by SwiftVets. One read:

Why is John Kerry's Betrayal Relevant Today? Because character and trust are essential to leadership, especially in time of war. A man who so grossly distorts his military record, who betrays his fellow soldiers, who endangers our soldiers and sailors held captive, who secretly conspires with the enemy, who so brazenly mocks the symbols of sacrifice of our servicemen...all for his own personal political goals...has neither the character nor the trust for such leadership. JOHN KERRY CANNOT BE TRUSTED. If we couldn't trust John Kerry then, how could we possibly trust him now?

Id. at ¶ 16. Of this mailer (and another similar one), the Commission said:

Both mailers comment on Kerry's character, qualifications and accomplishments and the Commission concludes that, in context, they have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Senator Kerry, the recipient is told, lacks an essential requirement to lead in a time of war – he "cannot be trusted" and is "unfit for command." Thus the Commission concludes that the only manner in which the reader can act on the message that "Kerry cannot be trusted" is to vote against him in the upcoming election. *See* 11 C.F.R. § 100.22(b).

Id. at ¶26.

A November 2006 conciliation agreement with Sierra Club, Inc., *see In re Sierra Club Conciliation Agreement* (MUR 5634) (Nov. 15, 2006),¹⁴ provides further examples of subpart (b) express advocacy. There, the Commission cited a pamphlet published by the Sierra Club shortly before the 2004 election:

The “Conscience” pamphlet prominently exhorts the reader to “LET YOUR CONSCIENCE BE YOUR GUIDE ...,” accompanied by pictures of gushing water, picturesque skies, abundant forests, and people enjoying nature. The headline of the interior of the pamphlet exhorts the reader, “AND LET YOUR VOTE BE YOUR VOICE” (Emphasis in the original).

Underneath that exhortation, the pamphlet compares the environmental records of President Bush and Senator John Kerry and U.S. Senate candidates Mel Martinez and Betty Castor through checkmarks and written narratives. For example, in the category of “Toxic Waste Cleanup,” it describes Senator Kerry as a “leader on cleaning up toxic waste sites” and states he co-sponsored legislation that would unburden taxpayers and “hold polluting companies responsible for paying to clean up, abandoned toxic waste sites.” In contrast, the description of President Bush’s record on the same subject says “President Bush has refused to support the ‘polluter pays’ principle, which would require corporations to fund the cleanup of abandoned toxic waste sites, including the 51 in Florida. Instead, he has required ordinary taxpayers to shoulder the cleanup costs.” Similarly, under the subject of “Clean Air,” Senator Kerry is described “support[ing] an amendment that would block President Bush’s change to weaken the Clean Air Act,” and as co-sponsoring legislation “which would force old, polluting power plants to clean up.” In contrast, President Bush’s position on “Clean Air” is described as “weakening the law that requires power plants and other factories to install modern pollution controls when their plants are changed in ways that increase pollution.” In each of three categories, the pamphlet assigns a “checkmark symbol” in one or two boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all three categories (Toxic Waste Cleanup, Clean Air, and Clean Water), whereas President Bush receives only one checkmark in a single category (Clean Air), and in that category, there are two checkmarks for Senator Kerry.

Id. at ¶¶ 8-9. The Commission concluded this pamphlet constituted subpart (b) express advocacy:

The Commission concludes that the “Conscience” pamphlet ... was unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether the pamphlet encourages readers to vote for Senator Kerry and Betty Castor or encouraged some other kind of action. *See* 11 C.F.R. § 100.22(b). Accordingly, the Commission

¹⁴

Available at <http://eqs.nictusa.com/eqsdocs/00005815.pdf>.

concludes that the “Conscience” pamphlet expressly advocated the election of clearly identified candidates.

Id. at ¶ 11.

In light of the *WRTL II* Court’s *de facto* affirmation that 11 C.F.R. § 100.22(b) is not unconstitutionally vague, we believe the Commission should continue to apply this standard when determining whether a person has made communications “expressly advocating” a candidate’s election or defeat. The Commission should reject any suggestion that the subpart (b) standard should be repealed.

Given that the *WRTL II* test and the subpart (b) definition of “expressly advocating” are virtually identical, the source restrictions of Title II now prohibit only corporate and union spending for “electioneering communications” that would already be prohibited by the section 441b prohibition on corporate or union spending of treasury funds for “independent expenditures,” defined to include express advocacy under section 100.22 of the Commission’s regulations. In light of this, the Commission asks whether “these coextensive definitions leave any independent meaning to the electioneering communications reporting requirements.” 72 Fed. Reg. at 50263.

The answer is that they do, because, as discussed above, the *WRTL II* “functional equivalent” test does not apply to the Title II reporting requirements. All communications meeting the statutory definition of “electioneering communication” should remain subject to BCRA’s reporting requirements. Thus, BCRA’s Title II disclosure requirements continue to have extremely important independent meaning, and to apply to all electioneering communications, regardless of whether they constitute the functional equivalent of express advocacy.

The Commission further asks whether “this combination of definitions [would] . . . rob the electioneering communication prohibition in section 441b(b)(2) (and proposed new 11 CFR 114.15) of independent significance by construing the corporate expenditure prohibition as coextensive with the corporate electioneering communications prohibition[.]” 72 Fed. Reg. at 50263.

This is not the case because, as noted above, the subpart (b) standard has been invalidated by some lower federal courts and is thus currently inapplicable in certain jurisdictions. Because of the Commission’s inability to enforce subpart (b) in these jurisdictions, the corporation/labor organization electioneering communication restrictions established by 2 U.S.C. § 441(b)(2), even as narrowed by *WRTL II*, continue to have independent significance in those jurisdictions. Further, because the future of subpart (b), and the Commission’s application of it, are not permanently resolved, notwithstanding the *de facto* approval of it in *WRTL II*, the Commission should retain both standards.

For all of these reasons, we urge the Commission not to revise or repeal any portion of its definition of express advocacy at section 100.22.

V. Conclusion

We urge the Commission to promulgate a rule reflecting the “Alternative 1” approach, with the important modifications described above, limiting the new *WRTL II* exemption to the corporate/union funding restrictions imposed by Title II, and retaining the existing disclosure requirements for all ads that meet the statutory definition of “electioneering communication.” We also urge the Commission not to revise or repeal any portion of its definition of express advocacy at section 100.22.

We appreciate the opportunity to submit these comments.

Respectfully,

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