

August 22, 2006

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Agenda Document 06-53 (“Grassroots lobbying” exemption)

Dear Mr. Norton:

At its meeting on August 29, 2006, the Commission is to consider Agenda Document 06-53, which proposes the adoption and immediate implementation of a regulatory exception for so-called “grassroots lobbying” ads to the definition of the statutory term “electioneering communication,” 2 U.S.C. § 434(f)(3).

We are submitting these summary comments from Democracy 21 and the Campaign Legal Center with regard to this Agenda Document. We wish to make three points:

First, approval of the Agenda Document would violate the APA by having the Commission adopt and implement this regulatory exception without the opportunity for notice and public comment on the specific proposal. For the reasons discussed below, the Commission cannot lawfully implement the proposed regulation on an “emergency” basis, as proposed in the Agenda Document.

Second, adoption of the Agenda Document would have the serious effect of contradicting and undermining the Commission’s own litigating position in two pending court cases in which the plaintiff corporations are suing the Commission to seek the same substantive result, a “grassroots lobbying” exception to the definition of “electioneering communication.” *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260 (D.D.C.) (three-judge court); *Christian Civic League of Maine, Inc. v. FEC*, No. 06-614 (D.D.C.) (three-judge court). In those cases, the Commission is vigorously contesting the constitutional necessity for such an exemption, and thus is asserting arguments in court that are directly contrary to the positions set forth in the Agenda Document.

Finally, while we reserve our substantive objections to this proposed rule, which we oppose on the merits, it is important to address one fundamental legal flaw in the proposal. The proposed rule on its face violates Title II of BCRA by allowing broadcast ads that would PASO federal candidates. 2 U.S.C. § 434(f)(3)(B)(iv). The rule’s purported restriction on PASO ads is illusory because it is grounded on a distinction between “candidates” and “officeholders” that is not contemplated by the statute, and is meaningless in practice.

For all of these reasons, the Commission should reject the rule proposed in the Agenda Document.

1. Adoption of this rule without following normal APA notice-and-comment procedures would violate the APA.

Simply put, this matter is not an emergency, and therefore cannot proceed under the emergency rulemaking procedures of the APA. Any purported exigency of time that exists now, due to the approaching 60-day pre-election window for the 2006 general election, 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa), is a creation of the Commission's own handling of this matter since February.

According to the Agenda Document, this matter was initiated more than six months ago, by the filing of a petition for rulemaking on February 16, 2006. The Commission waited a full month until opening a 30-day comment period on whether to initiate a rulemaking. 71 Fed. Reg. 13557 (Mar. 16, 2006). After the close of the comment period, the matter remained dormant on the Commission's docket *for more than four months*. At any point since February, the Commission could have undertaken a rulemaking, even on an expedited basis, and followed normal notice-and-comment procedures in compliance with the APA. The Commission cannot now use its own failure to act on this matter to bootstrap a claim that it can circumvent normal APA procedures due to a sudden emergency of timing.¹

Because this matter is not an emergency, it does not fall within the APA exception that allows an agency to dispense with public notice-and-comment requirements if such procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

The D.C. Circuit has repeatedly made clear that this exception "is to be narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) quoting *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992). "The exception is not an 'escape clause;' its use 'should be limited to emergency situations.'" *Id.* quoting *American Fed'n of Gov't Employees v. Block*, 655 F.2d 153, 1156 (D.C. Cir. 1981). In *Utility Solid Waste*, the Court rejected the agency's reliance on this exception because there was no indication that compliance with normal APA procedures "posed any threat to the environment or human health or that some sort of emergency had arisen." *Id.* at

¹ Indeed, even prior to the filing of the petition in February, 2006, the Commission could have acted on this matter through normal APA procedures at any time since BCRA was enacted in 2002. In fact, the Commission did consider whether to promulgate a similar "grassroots lobbying" exemption in 2002, and rejected all of the alternatives it proposed, and that were proposed by others, because it found that all such alternatives would violate the statute. "Electioneering Communications: Final Rules and Explanation and Justification," 67 Fed.Reg. 65190, 65201-02 (Oct. 23, 2002) ("[A]ll of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement [to not allow PASO ads].")

755; see also *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (rule applies only in an “exigent circumstance” where “delay could result in serious harm”).²

Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004) is an example of the rare case where the D.C. Circuit has approved an agency’s use of the exception, and illustrates by contrast how inappropriate it would be for the Commission to invoke it here. In *Jifry*, the FAA and the Transportation Security Administration (TSA) published emergency regulations for suspending or revoking a pilot’s license when the pilot is found to pose a security threat. *Id.* at 1177. The Court agreed that the agencies had “legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001” and that normal APA rulemaking “could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman’s certificate.” *Id.* at 1179. Invoking the APA exception therefore “was necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.” *Id.*

There is nothing remotely comparable here. There is no threat to public health or safety before the Commission, nor even a threatened deprivation of rights. The relevant portion of the underlying statute at issue has been *upheld* by the Supreme Court as constitutional in all regards. *McConnell v. FEC*, 540 U.S. 93, 189-212 (2003) (upholding §§ 201-204 of BCRA). Although the Commission has statutory authority to promulgate “appropriate” regulatory exceptions to the statute, 2 U.S.C. § 434(f)(3)(B)(iv), no court has said that the exemption proposed in the Agenda Document is necessary to protect anyone’s constitutional rights – and indeed the Commission itself is actively advocating the contrary position in two pending cases.

In the absence of showing this is an “emergency situation,” *Utility Solid Waste, supra* at 754, the Commission cannot legally proceed with this rule as proposed in the Agenda Document.

2. The Agenda Document contradicts and undermines the Commission’s own litigating position.

The central thrust of the Agenda Document is that the Constitution requires the Commission to promulgate an exception for “grassroots lobbying” broadcast ads. The Agenda

² These “emergency” standards describe the “impracticable” prong of the test. The “unnecessary” prong applies only “to the issuance of a minor rule in which the public is not particularly interested,” *Utility Solid Waste, supra* at 755 quoting ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 31 (1947), such as where “the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and the public.” *Id.* quoting *South Carolina v. Block*, 558 F.Supp. 1004, 1016 (D.S.C. 1983). That clearly is not the case here.

The “public interest” prong also does not apply here. That exception is properly invoked only where the “‘interest of the public would be defeated by any requirement of advance notice,’ as when announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.” *Id.* quoting A.G. MANUAL at 31, or when announcement of the rule “could be expected to precipitate activity by the affected parties that would harm the public welfare.” *Chamber of Commerce, supra* citing *Mobil Oil Corp. v. Dep’t of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983). Again, that is not the case here.

Document states that the Commission has an “obligation” to “further the First Amendment right of petition,” citing in support of that right, *inter alia*, the Massachusetts Body of Liberties (1641), the Declaration of Independence (1776) and de Tocqueville’s *Democracy in America* (1835), along with several Supreme Court cases discussing the right to petition. Agenda Doc. at 24-28. The Agenda Document states:

While it is true the electioneering communication provisions do not prevent associations from forming, the provision does impede their lobbying the prince, *i.e.*, the federal government, on issues that are important to the work they do and on legislation that can impact the effectiveness of their efforts to improve American society, democracy, government, culture, and industry.

Id. at 28. The Agenda Document refers to the “electioneering communications” provisions of BCRA as being “an ironic and profound violation of fundamental core principles....” *Id.* at 27.

This assertion – that the existing Title II rules unconstitutionally impair a First Amendment right to engage in “grassroots lobbying” – was explicitly rejected in the *McConnell* case. 540 U.S. at 206 (“[I]n the future, corporations and unions may finance genuine issue ads during [the Title II windows] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.”) The same issue is now being raised again in both the *CCL Maine* and *WRTL* cases pending before separate three-judge district court panels in Washington, DC. In those cases, both plaintiff corporations are arguing that Title II is unconstitutional as applied to “grassroots lobbying” ads, including to specific ads that plaintiffs wished to broadcast with corporate funds.

The Commission is vigorously contesting this claim, and is arguing that Title II of BCRA is fully constitutional without any exception for “grassroots lobbying” ads. Referring to the *McConnell* decision, the Commission states:

The Court did note that at least some prior advertisements falling within BCRA §201(a)’s definition of “electioneering communication” were not actually intended to influence federal elections. *Far from suggesting that BCRA’s financing restrictions were unconstitutional as applied to such advertisements, however, the Court held that the statute’s minimal impact on issue advertising was constitutionally acceptable* because corporations and unions could comply with the law and “finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for an ad from a segregated fund.” *McConnell*, 540 U.S. at 206.³

Further, the Commission argues that *McConnell* itself necessarily addressed the question of whether the First Amendment requires an exception for “grassroots lobbying” ads:

³ Defendant Federal Election Commission’s Opposition to Plaintiff’s Motion for a Preliminary Injunction (April 17, 2006) in *CCL Maine v. FEC*, *supra* at 18-19 (emphasis added) (hereinafter *FEC Opp. to Prelim. Inj.*).

Indeed, the record in McConnell was replete with advertisements that purported merely to lobby about an issue rather than advocate a particular electoral result. See, e.g., McConnell v. FEC, 251 F.Supp.2d 176, 574-79 (D.D.C. 2003) (Kollar-Kotelly, J.). *The Court was thus directly confronted with the contention that BCRA § 203 is unconstitutional because of its potential to burden lobbying or other issue advertisements that may not be intended to influence federal elections.* Nevertheless, the Court squarely held the provision constitutional, even though it might encompass some “genuine issue ads,” McConnell, 540 U.S. at 206. In reaching that conclusion, the Court recognized that BCRA § 203 imposes only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal election....⁴

Indeed, the Solicitor General of the United States, on behalf of the Commission, has emphasized that the statute is intended to cover ads that include “grassroots lobbying.” The Solicitor General notes that the Supreme Court in McConnell “treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA’s ‘electioneering communication’ provisions were intended to address.”⁵

The Commission specifically contests the premise of the Agenda Document that the First Amendment “right to petition” has special force on this question:

Lobbying has no higher First Amendment status than electoral advocacy. McConnell emphasized that it was upholding the electioneering communication provisions, not because “[a]dvocacy of the election or defeat of candidates ... is ... less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation,” but because of the compelling interest in fighting corruption and preserving the integrity of the electoral process. 540 U.S. at 205 (quoting Buckley, 424 U.S. at 48). Moreover, the ability of individuals or corporations to petition elected government officials – either in person, by mail, phone, facsimile, or email – is not directly implicated by BCRA § 203, which limits only how certain broadcast communications can be received by 50,000 or more persons are financed.

⁴ Defendant Federal Election Commission’s Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment (July 14, 2006) in WRTL v. FEC, *supra* at 14 (emphasis added) (hereinafter FEC Sum. Judg. Mem.).

⁵ Motion to Dismiss or Affirm for the Federal Election Commission (Aug. 2006) at 19 (emphasis in original), filed in Christian Civic League of Maine v. FEC, No. 05-1447.

FEC Opp. to Prelim. Inj. (*CCL Maine*) at 20-21.⁶ The Agenda Document contends that the Supreme Court, in a post-*McConnell* decision, “confirmed the possibility that BCRA’s electioneering communication provisions may be unconstitutional as applied to certain types of communications,” Agenda Doc. at 8, citing *Wisconsin Right to Life v. FEC*, 126 S.Ct. 1016, 1018 (2006). But that is not the interpretation of the case made by the Commission:

Even though the Supreme Court in *WRTL* explained that its prior decision in *McConnell* had not purported to foreclose all as-applied challenges to the electioneering communication provision, the Supreme Court’s decision in *WRTL* did nothing to erode the rationale of *McConnell* in upholding that provision on its face. When the Court remanded the case “for the District Court to consider the merits of *WRTL*’s as-applied challenge in the first instance,” 126 S. Ct. at 1018, *it did not suggest that it had already decided that any particular as-applied challenge will succeed, that a grassroots lobbying exception is necessary, or that the task of this Court is to define “grass roots lobbying.”*

FEC Sum. Judg. Mem. (*WRTL*) at 15 n.4 (emphasis added).⁷

The Commission is also sponsoring expert testimony in the *WRTL* case that directly refutes another central premise of the Agenda Document: that a “grassroots lobbying” exception can be drawn in a sufficiently narrow fashion to avoid opening a loophole in the law that would allow corporations and unions to fund broadcast ads that have an impact on the election. Douglas L. Bailey, one of the Commission’s own experts,⁸ recently submitted a written declaration in *WRTL* testifying that *any* ad that mentions a candidate’s name in the immediate pre-election period will have an impact on the election:

11. *A purported issue ad that airs in the time immediately preceding an election that implores a voter to “contact” or “tell” a candidate about one’s opposition to a certain policy will unavoidably affect that candidate’s election. During the election time period, the implicit message to the voter is that one way to change the policy would be to remove that candidate from office on election day. Conversely, an issue ad which airs during the pre-election period and implores a voter to contact or tell a candidate about one’s support for a particular*

⁶ Further, the Commission states that it is “simply wrong” to say that the “right to petition,” as opposed to the right to free speech, was not raised or considered in *McConnell*. FEC Sum. Judg. Mem. (*WRTL*) at 16 n.5.

⁷ The same point is made by the U.S. Solicitor General, in a memorandum filed on behalf of the FEC in the *CCL Maine* case: “Although the Court in *WRTL* held that *McConnell* did not foreclose as-applied constitutional challenges to BCRA’s electioneering communications, the Court did not identify the circumstances, *if any*, under which such as-applied challenges might succeed.” Opposition of the Federal Election Commission to Appellant’s Motion to Expedite and Consolidate Briefing (May 2006) at 6 (emphasis added) filed in *Christian Civic League of Maine v. FEC*, No. 05-1447.

⁸ Mr. Bailey is a well-known former political consultant and also served as an expert in the *McConnell* case. His findings were cited by the Supreme Court in that case. See 540 U.S. at 193 n.77.

policy, implicitly suggests that one way to continue that policy is to vote for the reference [sic] candidate.

12. Context and timing will ordinarily determine whether an ad is a true issue ad or an electioneering ad in disguise. While an ad that refers to a candidate may have an effect as an issue ad a year away from an election, that same ad will impact the viewer as an electioneering ad when it is aired right before an election. *In the midst of swirling campaign activity, the primary impact of an ad that mentions a candidate's name will be as an electioneering ad.* In short, the audience is simply unlikely to distinguish between the issue in the ad as opposed to the more prevalent election activity when the so-called issue ad mentions a specific candidate's name.

Declaration of Douglas L. Bailey, filed by the FEC in *WRTL v. FEC* (June 2, 2006) at 11 (emphasis added). Mr. Bailey concludes, "As any experienced campaign consultant knows, ads that mention a candidate by name in the time period immediately preceding an election are likely intended to influence, and unavoidably will influence, that election." *Id.* at 6.

The other expert witness sponsored by the Commission in the *WRTL* case reaches similar, if not stronger, conclusions. Dr. Charles H. Franklin, a political scientist, testifies that:

...if restrictions are to be put on the sources of funding for campaign related advertising, any exception for "genuine issue ads" or "grassroots lobbying" will undermine the purpose of the regulations and will allow de facto electioneering ads back into the restricted period.

He explains this conclusion as follows:

...the effects of political advertising during the late stages of a campaign have inherent electoral consequences. The BCRA restriction on ads within 30 days of a primary or 60 days of a general election is supported by the empirical evidence. Any political advertising during that period will have electoral consequences. It is not possible to specify an exempt category on the basis of content that can be said to have no electioneering consequences.

If any rule were developed that allowed an exemption for ads based on content, but which still allowed discussion of political issues, incumbent positions or roll call votes while in office, or which emphasized the responsibility of the incumbent for particular policies, these ads would still have electoral effects....Moreover, it is the inherent nature of political advertising to make the most of any opportunity. Any exemption will inevitably be tested to the limit. Rational interest groups will take any exception as an opportunity to design ads that are electorally effective and yet which remain within the letter of the law. We saw exactly this phenomena with Buckley's "magic words" test. The current restrictions written into BCRA provide a simple bright line by specifying a date beyond which all ads mentioning a candidate are considered electioneering.

Exceptions based on the content of the ad inevitably invite the evisceration of a meaningful restriction.

Expert Report of Professor Charles H. Franklin, filed by the FEC in *WRTL v. FEC* (June 2, 2006) at 40, 41 (emphasis added).

Thus, both of the Commission’s own expert witnesses, in uncontested testimony, conclude that any exception for “grassroots lobbying” ads would inevitably authorize corporate and union funds to be spent for campaign-related broadcast ads and would, therefore, in Dr. Franklin’s words, “invite the evisceration” of the bright-line test of Title II as upheld in *McConnell*.

This discussion should make clear that the Agenda Document is fundamentally at odds with the Commission’s own position in both *WRTL* and *CCL Maine*. It should also make clear that the Commission’s adoption of the Agenda Document would profoundly compromise the Commission’s litigating position in both cases and would, as a practical matter, contradict and concede the key points which the Commission has to date asserted in defense of the statute.

3. The rule proposed in the Agenda Document does not comply with the statute.

We urge the Commission to reject the Agenda Document for the reasons discussed above. In addition, we oppose the substance of the proposed rule, but we reserve our specific comments on the merits. We do, however, want to point out one crucial element of the proposed rule that is a particularly fatal flaw in the draft.⁹

⁹ We also want to point out that the Agenda Document badly mis-cites the legislative and administrative history of this matter. The Agenda Document, for instance, quotes Senator Snowe as saying that “let’s look at the genuine issue ad, which is the difference, if we are talking about a genuine issue ad, which [Title II] would not apply to.” Agenda Doc. at 7. In the next sentence, however – not quoted in the Agenda Document – Senator Snowe reads the specific ad she is referring to, and it is one that *does not mention the name of a candidate and thus is not an “electioneering communication” within the meaning of Title II.* 147 Cong. Rec. S2458 (March 19, 2001). That is what Senator Snowe meant by a “genuine issue ad” – an ad that does not mention a candidate – and is the sense in which she says that the statute “would not apply to it.” Senator Snowe then adds, “You could even say ‘call your Senator, call your representative,’ or you could even provide your Representative’s phone number in the ad. *If you are not identifying the candidate, you will not come under the disclosure provisions in this 60-day period.*” *Id.* (emphasis added). To make the point even more forcefully, she then adds, “That is the true distinction of the type of ad we are attempting to force disclosure on, *the ones in which they identify a candidate by name 60 days before an election.*” *Id.* (emphasis added). So too, the Agenda Document quotes Senator Wellstone as saying that his amendment was not aimed at “legitimate policy ads.” Agenda Doc. at 7-8. The reference to Senator Wellstone is especially ironic because his amendment to Snowe-Jeffords (now codified at 2 U.S.C. §441b(c)(6)) added the provision which *expanded* the coverage of Title II to section 501(c)(4) groups that typically engage in grassroots lobbying. (They had previously been partially exempted from the ban on spending corporate funds. *See* 2 U.S.C. § 441b(c)(2)). In adding c-4 lobbying groups back into the statute, nothing indicates that Senator Wellstone meant to exempt ads that refer to candidates within the Title II time frames, even if those ads also discuss “policy” issues. He did say, “Any group, any organization, any individual can finance any kind of ad they want,” 147 Cong. Rec. S2846, and then noted, “If a corporation or union wishes to run electioneering communications, they must

The proposed exemption defines a “grassroots lobbying communication” as a communication that, *inter alia*, “references a clearly identified candidate for Federal office, but refers to that candidate only in his or her capacity as an incumbent public officeholder...” Agenda Doc. at 45. The Agenda Document applies what it calls a “multiple hat theory” to this rule, *id.* at 32, stating that there is “no doubt that an individual may be referenced solely in his capacity as an incumbent public officeholder, and that reference is easily distinguished from a reference to the individual as a candidate for Federal office.” *Id.* at 32-3.

use a PAC with contributions regulated by federal law to do so. The point is, they have to do it with hard money.” *Id.* at S2847.

The Agenda Document also incorrectly discusses the Commission’s 2002 rulemaking on this issue. It cites and quotes the 2002 E&J in describing a “grassroots lobbying” exemption proposed by “some commenters” in the 2002 rulemaking, but then *erroneously* attributes this proposal to the BCRA sponsors and several reform organizations, including Democracy 21 and the Campaign Legal Center. Agenda Doc. at 11 n.6; *see also id.* at 18, 23. In the very next sentence following the description of the proposal quoted by the Agenda Document, the 2002 E&J states, “Other commenters went further than this proposal and also required that the candidate not be named or appear in the communications; the candidate could only be identified as ‘Your Congressman’ or a similar reference that does not include the candidate’s name.” 67 Fed. Reg. at 65201. That is the proposal made by the BCRA sponsors and reform groups. *See, e.g.*, Comment letter of BCRA Sponsors (Aug. 23, 2002) at 10; Comment letter of Democracy 21 (Aug. 23, 2002) at 12. This restriction was a central feature of the reform proposal; as the Sponsor comments noted, “Permitting the use of ‘Your Congressman’ and similar expressions that clearly identify the person or persons to be contacted, but continuing to prohibit the use of a candidate’s name makes it less likely that the exemption will be used to accomplish an electoral objective.” Comments of BCRA Sponsors at 11. Thus, the Agenda Document in several places relies on the fact that the BCRA sponsors (and reform groups) proposed a “grassroots lobbying” exemption in 2002, but fails to note the significant difference between that proposal and the one made by the Agenda Document.

In any event, the Commission rejected *all* of the proposed exceptions for grassroots lobbying ads, concluding that any such exemption would permit ads that promote, support, attack or oppose (PASO) a candidate:

The Commission concludes that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate. Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement.

Electioneering Communications Final Rules and Explanation and Justification, 67 Fed. Reg. 65190, 65201–02 (Oct. 23, 2002) (emphasis added). The Commission noted that “none of these exemptions is consistent with the *limited authority* provided to the Commission by the statute to make exemptions for communications that do not promote, support, attack or oppose a Federal candidate.” *Id.* at 65200 (emphasis added).

The Agenda Document then discusses the statutory restriction on the Commission's clause (iv) rulemaking authority to create Title II exceptions, and notes that the Commission may not exempt a public communication that refers to a Federal candidate and that "promotes or supports *a candidate for that office*, or attacks or opposes *a candidate for that office*." *Id.* at 34 quoting 2 U.S.C. § 431(20)(A)(iii) (definition of "Federal election activity") (emphasis in original). The Agenda Document then states:

By its plain terms, this language refers to promoting, supporting, attacking or opposing an individual *in his or her capacity as a candidate for that office*. Where an individual is referenced solely in his capacity as an incumbent public officeholder, and not as a candidate, it logically follows that such a reference does not PASO that individual *as a candidate for Federal office*.

Id. (emphasis in original). In short, the Agenda Document interprets the statutory prohibition on promoting or attacking "a candidate" as a restriction instead on promoting or attacking "an individual as a candidate."

This is an absurd distinction to make in applying the PASO test in Title II.

Under the logic of this discussion, any ad that refers to an incumbent by title, *e.g.*, as "Senator Smith" or "Congressman Jones," might be construed as referring to the individual only "in his capacity as an incumbent public officeholder" and not "in his capacity as a candidate." If the PASO limitation in the proposed rule only applies with reference to "an individual *in his or her capacity as a candidate for that office*," *id.*, then the rule might be read to *exempt* virtually any ad that attacks (or supports) the individual "in his capacity as an incumbent public officeholder," because the ad is not referencing (or PASO'ing) a "candidate." Taken literally, it would permit corporate or union treasury funds to be used to finance the following ad to be broadcast this Fall in Connecticut, up to Election Day, referring to Senator (and candidate) Joseph Lieberman:

Senator Joe Lieberman voted for the Iraq War Resolution. This war has led to the unnecessary death of thousands of America's troops and wasted billions of your tax dollars. Call Senator Lieberman and tell him its time for the troops to come home.

The ad complies with all elements of the proposed exception. It refers to Senator Lieberman only in his "capacity as an incumbent public officeholder" (subsection i). The ad surely attacks Senator Lieberman, but not – it would appear from the discussion in the Agenda Document – "in his capacity as a candidate." Thus, the ad complies with the PASO prong of the rule because it does not (under the logic of the Agenda Document) PASO "any candidate" (subsection iv). The ad does not reference the officeholder's "character, qualifications or fitness for office" (subsection i); it does not refer to an election or a political party (subsection i), it has a "public policy issue under consideration by Congress" as its subject matter (subsection ii), it urges the officeholder to take a "particular position or action with respect to the public policy issue

referenced” (subsection iii), and it references the record of the officeholder only by “reciting that officeholder’s official actions, such as a vote” (subsection v). *Id.* at 45-6.¹⁰

The Agenda Document thus proposes a rule that would allow corporate or union funds to be used to pay for this ad. In so doing, it proposes that the Commission promulgate an exemption to Title II so broad as to make the statute virtually meaningless.

In summary, the Commission should reject the Agenda Document because it would violate the APA to adopt it as an interim final rule, would contradict and undermine the Commission’s own legal position currently being argued in court in two different cases, and would violate, on its face, the clear statutory language of BCRA.

Respectfully,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

Fred Wertheimer
Democracy 21

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center

Copy to: Each Commissioner
Commission Secretary

¹⁰ With regard to the last standard, the discussion in the Agenda Document requires only “an objective and neutral presentation” of the officeholder’s record. Agenda Document at 40. There is nothing in the proposed rule that prevents characterizing the issue, as the hypothetical ad does, as opposed to characterizing the officeholder’s vote or record.