No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* THE WYOMING LIBERTY GROUP AND THE GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they involve the fundamental, and threatened, right of citizens to freely participate and share their point of view in the electoral and political process.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan research and educational organization dedicated to the study of

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Scharf-Norton Center for Constitutional Litigation is the preservation of constitutional liberties, including the right of political speech and association connected to elections.

SUMMARY OF ARGUMENT

1. Since this Court's pronouncement in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), substantial confusion has arisen over the "appeal to vote" test. In *Wisconsin Right to Life*, Chief Justice Roberts explained that an advertisement could not be regulated under the Federal Election Campaign Act as the functional equivalent of express advocacy unless it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Still, the Court conducted an extensive application of that test, leading some to believe that the Court's lengthy application represented the test itself. Clarification must be given to the appeal to vote test, ensuring that speech-protective rules carry the day.

2. The Federal Election Commission has mocked the First Amendment and this Court's earlier instruction in *Wisconsin Right*

to Life. By focusing on this Court's application of the appeal to vote test, the Commission established its own two-prong, 11-factor test to regulate speech. It cannot be trusted with such open-ended discretion again.

3. What the Federal Election Commission created in theory is even worse in practice. The Commission charged with interpretation of federal election law itself cannot decide how to apply the law. This leaves citizens wholly at the mercy of an excitable Commission and places speech rights in jeopardy.

ARGUMENT

Before this Court is yet another blow to the American experiment of self-governance rooted in a citizenry free to voluntarily speak and associate. A now-regular source of irritation to that liberty, the Federal Election Commission (the "FEC" or "Commission"), is before this Court defending the failed concoction of campaign finance reform efforts in the Republic. Since 1974, the Commission has haphazardly expanded categories of speech it deemed prohibited, regulated, or just not too sure about, leaving citizens at its prosecutorial mercy. During each election cycle, those who might speak must learn to hop through the FEC's elaborate rules. And since 1976, this Court has stricken key provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq*., and the Bipartisan Campaign Reform

Act ("BCRA"), 2 U.S.C. § 431b(b)(2) and (c)), recognizing the Commission's penchant for defending its own authority instead of speakers' natural rights to speak. Once again, this Court finds itself in familiar territory.

Just last term, some observers of election law described the Court's opinion in *FEC v. Wisconsin Right to Life*, *Inc.*, 127 S. Ct. 2652 (2007), as a return to clarity and longstanding First Amendment principles that favored speech. In *Wisconsin Right to Life*, the Court announced its fidelity to the speech-protective rules described in *Buckley v. Valeo*, 424 U.S. 1 (1976), and set out several foundational approaches for ensuring that political speech remain protected. As a guiding tenet, any distinction between regulable and non-regulable speech would need to "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 14 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The standards for determining regulable speech would need to be objective, *Wisconsin Right to Life*, 127 S. Ct. at 2666, focus on the communication itself and not the intent and effect of the speaker, *id.*, and should eschew the "open-ended rough-and-tumble of factors." *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). These principles favor more speech, not less, limit the Commission's authority, and give the benefit of the doubt to speakers, not speech

regulators. Still, simple truths are sometimes difficult to digest.

Having received the clear instruction of this Court, the Commission commenced rulemaking to instruct citizens about what the FEC termed "permissible" speech. Explanation and Justification for Electioneering Communications ("Explanation and Justification"); Final Rule; 72 Fed. Reg. 72899 (F.E.C. Dec. 26, 2007). In doing so, the Commission developed its own rules of interpretation that are contradictory to the Chief Justice's repeated admonitions to favor speech over censorship and offer speakers clear guidance, not prolix regulation, about the line between regulated and non-regulated speech. The FEC set out to instruct citizens within what boundaries they might safely speak by creating a safe harbor in the regulations. *See* 11 C.F.R. § 114.15(b). Still, deciding that some other speech might still be tolerable, the Commission reasoned that it would "consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate in order to determine whether, *on balance*, the communication is susceptible of no other reasonable interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate." Explanation and Justification at 72905 (emphasis added) (hereinafter the "Heads You Speak, Tails You Don't Approach"). The Commission's approach flies in the face of this Court's "no reasonable interpretation

other than as an appeal to vote for or against a specific candidate" test. *Wisconsin Right to Life*, 127 S. Ct. at 2667.

This is not the first time the Congress or the Commission has played the proverbial role of Dr. Frankenstein with the body of speech rights enjoyed by citizens. Since *Buckley* in 1976, the FEC has been on the losing end of several significant challenges. In *Buckley*, the Court struck down, among other sections, the expenditure limits applicable to candidates and their committees and the $1,000 limit on independent expenditures. 424 U.S. at 51. Later, the Commission lost in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), with the Court deciding that banning corporate expenditures by some nonprofit corporations would serve as a disincentive to speak and would infringe on First Amendment activities. More recently, the Commission gave the benefit of the doubt to censorship over speech and lost in *Wisconsin Right to Life*. Later, this Court struck provisions of the "Millionaires' Amendment" of the BCRA as well. *Davis v. FEC*, 128 S. Ct. 2759 (2008). The FEC has been no stranger to continued losses over unconstitutional infringements at the federal appellate level, either. *See, e.g.*, *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996), *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997). Of course, nationwide, speech regulators have lost time and time again when states sought to regulate beyond the scope of the First Amendment. *See,*

e.g., Randall v. Sorrell, 126 S. Ct. 35 (2005)*; Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Chamber of Commerce v. Moore,* 288 F.3d 187 (5th Cir. 2002); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *see also Connecticut v. Proto*, 526 A.2d 1297 (Conn. 1987); *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000); *Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721 (Wisc. 1999). No matter how inventive the speech regulators become, the Constitution rebuffs their efforts.

The *Buckley* Court recognized a truth consistent with the First Amendment. While government possesses authority over the regulation of elections, such exercise must be carried out in a manner protective of speech. U.S. Const. Art. I, § 4; U.S. Const. amend. I. The Court established a simple point of demarcation between regulable election-related activity and constitutionally protected political speech. Consistent with *Buckley*, government may regulate action that is "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. Why? Unambiguously campaign connected communications share a connection to government's interest in preventing corruption.

Since *Buckley*, this Court has recognized but two narrow categories of speech that are unambiguously related to the campaign of a particular candidate. First, communications that in "express terms

advocate the election or defeat or a clearly identified candidate" for public office may be regulated consistent with this approach. *Id.* at 44. Second, this Court has permitted a limited class of speech, the "functional equivalent of express advocacy," to be regulated as well. *Wisconsin Right to Life*, 127 S. Ct. at 2667. Both classes are highly circumscribed to be certain that other speech not be swept in its regulatory ambit or that regulators be given too broad of authority to attack unwelcome speech. *Houston v. Hill*, 482 U.S. 451 (1987).

To be regulated as the "functional equivalent of express advocacy," two requirements must be met. Under the FECA, a communication may constitute an electioneering communication which is a "broadcast, cable, or satellite communication" and refers to a "clearly identified candidate" within sixty days of a general election or thirty days of a primary election. *See* 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29. Next, the communication must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life*, 127 S. Ct. at 2667. This Court took great pain in *Wisconsin Right to Life* to explain the constitutional significance of this test by referencing the fact that it must ignore contextual references, "eschew 'the open-ended rough-and-tumble of factors,'" which invite burdensome discovery and lengthy litigation, and give the "benefit of the doubt to speech, not censorship." *Id.* at 2666.

Following *Wisconsin Right to Life*, the Commission drafted regulations that seized upon the application of Chief Justice Roberts' test instead of its bright-line principles. While the Court instructed the FEC that only speech which had no other reasonable interpretation as an appeal to vote for or against a specific candidate could be regulated as the functional equivalent of express advocacy, the Commission elected to design a test that would look to whether speech "on balance" was an appeal to vote for or against a specific candidate. Shifting the analytical focus from "no other reasonable interpretation" to "on balance" carefully shifted authority back to the Commission, ensuring more speech regulation. On balance, the FEC may conduct extensive weighing of contextual factors. On balance, the Commission may make linguistic comparisons. On balance, the FEC may pay little heed to the strict dictates of the First Amendment.

Like Homer's Sisyphus – a man whose existence consisted of bitter pains due to his toil as he pushed a boulder up a hill in perpetuity – the Commission continues to resist the rather straightforward instruction of the First Amendment, and this Court's patience, by advancing unworkable and unconstitutional regulations. Enough is enough. The real victims of this practice are the citizens of this Republic whose speech is stifled and shutdown as a result of the Commission's failure to heed basic constitutional requirements. When the Commission charged with enforcement of federal election law establishes vague

and labyrinthine tests, cloaking itself in power, First Amendment rights continue to stand in peril, as citizens remain hesitant to speak. It now stands as this Court's obligation to render justice to the Commission's repudiation of the First Amendment and this Court's earlier instruction. Afford citizens bright-line standards that are easily applied and that are not dependent on a hope that the FEC might just get it right this time. As is demonstrated below, it will not.

I. The Appeal to Vote Standard Must be Narrowed or Eliminated

Inventing speech standards is difficult business. Because of the confusion created by the Commission in interpreting the appeal to vote test, this Court should revisit its earlier instruction. In *Wisconsin Right to Life*, Chief Justice Roberts explained that the appeal to vote test was both simple and speech-protective. *Id.* at 2666-2669. He reasoned that under the appeal to vote test:

1. There can be no free-ranging intent-and-effect inquiry.
2. There generally should be no discovery or inquiry into contextual factors.
3. Discussion of issues cannot be banned merely because the issues might be relevant to an election.
4. In a debatable case, the tie is resolved in favor of protecting speech.

Id. at 2669 n.7.

After noting these constitutional considerations, speech may be deemed the functional equivalent of express advocacy, and thus subject to regulation, only if "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. As with other judicial considerations, the *Wisconsin Right to Life* Court then considered a variety of factors in determining whether the speech at issue there was the functional equivalent of express advocacy. The Court included inquiries such as mentioning an election or exhorting the public to adopt a policy position as an application of the appeal to vote test. *Id.* Today, there rests great confusion over the test described by Chief Justice Roberts. While many considered this a test protective of speech, the Commission viewed it as more of a two-prong, 11-factor, Heads You Speak, Tails You Don't test.

A. *Buckley*, the First Amendment, and the Import of Speech Protective Principles

The most essential purpose of the First Amendment is to protect individuals' rights to freely discuss, debate, and criticize their elected representatives. During elections, when individuals are most interested in political speech, the First Amendment has its "fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Where the First Amendment was once thought to vigorously guard the sanctity of political speech, erosion of that protection has steadily occurred since this Court's

pronouncement of exceptions since *Buckley*, 424 U.S. 1.

In *Buckley*, rather than treat contributions to political candidates as a directly protected form of speech and association, the Court deemed them tainted and receptive of less protection because the "expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. The Court even found that direct speech that was coordinated received less protection out of a concern rooted in corruption and a perceived control of candidates. Of course, *Buckley* sought to preserve independent speech because of its higher value and lower threat of corruption. *Id.* at 45. Still, it permitted limited regulation of a class of communications known as independent expenditures, which constituted express advocacy of the election or defeat of a clearly identified candidate. The Court, and lower courts throughout the nation, held fast to the *Buckley* framework, as offering the only workable rule that would protect free speech while permitting limited regulation. That rested on respect of a simple rule: "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. While *Buckley* involved a strained reading of the First Amendment and permitted government intrusion into the most sacred area of protected speech, it did so by drawing narrow and

bright-line boundaries. Citizens could, at a minimum, understand the boundaries and be able to produce a great deal of speech without running afoul of the law.

The analytical framework established in *Buckley* proved effective. It offered a narrow class of easily-identifiable, regulable speech, while preserving the full freedom of the First Amendment for other categories of speech. The test was objective in nature and examined the actual words of the communication as its point of focus. *Id.* at 44 n.52 ("communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject' "). Speakers understood the test, which meant they would not need to hedge and trim, but could speak freely and robustly without fearing a test focused on the intent of the speaker or the effect of the message on its audience. As explained by the *Buckley* Court:

> [W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever

> inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Of course, the express advocacy construction protects issue advocacy – that is, the free discussion of citizens – and the distinction was necessary because candidates, "especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. In short, issue advocacy that includes a discussion about candidates and issues of the day is a core function of citizens' participation in representative democracy. And it should continue to receive the highest constitutional protection.

The limited *Buckley* rationale for government regulation of political speech expanded over time to include preventing the circumvention of other campaign finance restrictions. Indeed, this Court's reliance on corruption as a basis for regulation has been pushed beyond its logical extent to define corruption "not only as quid pro quo agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *FEC v. Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). Post-*Buckley*, appearances matter, even more so than protected liberties.

B. The Confusion over *McConnell* and the *Wisconsin Right to Life* Clarification

By the advent of *McConnell v. FEC*, this Court expanded the concept of regulable political speech to include communications that were the "functional equivalent" of express advocacy, and thus subject to regulation. 540 U.S. 93, 206 (2003). What was once deemed high-value, independent speech with little or no concerns about corruption or its appearance now received less protection by the Court. Still, the Court left open the possibility that future, as-applied challenges might narrow, and better define, the class of communications known as the functional equivalent of express advocacy.

There is considerable tension in the accepted standards developed for distinguishing regulable from non-regulable political speech in this Court's jurisprudence. The cause of tension is easy to identify. Favor speech, through narrow rules and objective guidelines, and ensuing regulations will be underinclusive. Favor regulation, through broad rules and flexible standards, and the ensuing regulations will be overinclusive. Fortunately, there is a solution found in this Court's jurisprudence. Chief Justice Roberts expressed a truth central to the First Amendment – err on the side of speech. Government officials should never be trusted with enforcement of open-ended, ill-defined, speech codes. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963). Otherwise, along comes

two-prong, 11-factor, Heads You Speak, Tails You Don't tests.

Regulatory lines, if to be drawn at all, must be drawn to err on the side of the speaker. This is the truth of *Wisconsin Right to Life*, *Buckley*, and the general body of this Court's First Amendment case law. Government officials cannot be expected to place individual liberty above the exercise of government authority. *Buckley's* express advocacy test and *Wisconsin Right to Life's* appeal to vote test, narrowly construed, realize this principle. Other courts approaching difficult-to-decide speech issues have recognized the need for speech-protective, bright-line approaches as well. In Illinois, for example, courts apply the innocent construction test in analyzing libel claims. *John v. Tribune Co*., 24 Ill.2d 437, 442 (1962). In those situations, an "article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *Id*. Stated differently, a "statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions." *Solaia Technology, LLC v. Specialty Pub. Co.*, 221 Ill.2d 558, 580 (2006). Like the appeal to vote test, once one reasonable, nondefamatory construction of the speech is found, the analysis ends and speech remains protected.

The simplest reading of Chief Justice Roberts' appeal to vote test is that once one reasonable interpretation of an advertisement is found other than an appeal to vote for or against a specific candidate, speech is not the functional equivalent of express advocacy. The unspoken concern about this test is that it limits government authority and does not perfectly "capture" the entire class of regulable speech.

II. The Federal Election Commission's Heads You Speak Tails You Don't Approach

Deciding to go it alone, the FEC fashioned its own test for determining whether speech was subject to regulation as electioneering communications post-*Wisconsin Right to Life*. It involves a "multi-step analysis for determining whether [electioneering communications] that do not qualify for the safe harbor nevertheless qualify for the general exemption." *Explanation and Justification*, 72 Fed. Reg. at 72902. In other words, a communication must fit into a "safe harbor" to receive protection, otherwise, speakers are subject to the prolix, and ill-defined, set of Commission determinations in deciding whether they may communicate. Stated more concretely, speech is deemed impermissible outside the harbor unless the Commission decides a speaker might fit within an exemption. Life vests are heartily encouraged.

A. The Safe Harbor

Most citizens hoping to comply with the FEC regulations will attempt to hedge and trim their speech into a protected safe harbor. Speech is safe, and permissible, if it does not mention "any election, candidacy, political party, opposing candidate, or voting by the general public," and does not take a position on the candidate's "character, qualifications, or fitness for office." *Id.* at 72903; *see also* 11 C.F.R. § 114.15(b)(1)-(3). It is not just that speech may not discuss certain issues; it must also reference specific government-approved topics if it is to be deemed safe and categorically protected. Such speech is required to focus "on a legislative, executive, or judicial matter or issue" or propose a "commercial transaction." *Id.*

To be helpful, the Commission penned several examples of speech likely falling outside of the safe harbors during its rulemaking. Some articles of potentially repressed speech include: "pictures of a ballot or voting booth," "Bob Jones is running for the Senate," "Bob Smith supports our troops; Bill Jones cut veteran's benefits by 20%," and even implied references to incumbents, like, "It's time to take out the trash, select real change with Bob Smith," or "This November, we can do better." *Explanation and Justification*, 72 Fed. Reg. at 72903. Steering clear, far clear, of these subjects ensures government permission, while selecting the content of your own speech ensures increased scrutiny and the likelihood of an enforcement action.

Not only must speech focus on a "legislative, executive, or judicial matter or issue," it must also "urge the candidates themselves to take a position, or urge the public to take a position and contact the candidates." *Id.* Speakers wishing only to educate the public or increase awareness about an issue and whose speech is captured by the electioneering communications regulations are compelled to craft their message according to the "best practices" of the Commission. A safe harbor just ignores the truth that speakers, not government bureaucrats, are best equipped, and constitutionally protected, to make those sorts of determinations. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995)). After all, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (internal quotations and citations omitted).

The problem with employing a safe harbor is that it signals citizens that some speech is clearly authorized, leaving speakers to take their chances with the rest. Every solemn promise of the Commission notwithstanding, most citizens will forgo the opportunity to meet the Enforcement Division of the FEC. Being uncertain just how the Commission might balance and weigh speech outside the harbor, playing safe, or not speaking at all, ensures protection against an excitable Commission. Combining the vagueness and overbreadth of the FEC's regulations at issue here

raises special First Amendment concerns due to their chilling effect. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

B. Speech Outside the Harbor: Not so Safe

Like international waters, few speakers will dare leave the harbor of safety created by the Commission. This is understandable. Citizens have no way to balance the multitude of factors like the ill-defined "indicia of express advocacy" or how the Commission might interpret what their speech really means. Indeed, even the FEC itself cannot accomplish this mighty task.[2] To avoid investigation and enforcement actions, citizens will turn away from expressing themselves in a manner most conducive to their mission and seek the cold comfort of government-sanctioned speech. For the few speakers who leave the harbor, citizens will find that the balancing, weighing, and intricate considerations conducted by the FEC bear little resemblance to the test developed in *Wisconsin Right to Life* – one carefully constructed with constitutional safeties in mind.

When speech finds itself outside the harbor, the Commission asks "whether the communication includes any indicia of express advocacy and whether

[2] On October 23, 2008, the Commission could not determine whether an advertisement presented before it constituted a prohibited electioneering communication. *See generally* Section III, *infra.*

the communication has an interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate in order to determine whether, *on balance*, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate." 11 C.F.R. § 114.15(c) (emphasis added). Asking whether speech, on balance, might be regulable does not comport with this Court's appeal to vote test.

The Commission's approach to determining whether speech constitutes an electioneering communication is flawed in at least three ways. First, the FEC asks the wrong question to decide whether speech should be regulated. The Commission states that it will determine whether speech has an interpretation other than as an appeal to vote for or against a candidate ("A"), by asking whether there is indicia of express advocacy ("B") and whether the speech has an interpretation other than as an appeal to vote for or against a candidate ("A"). In short, if A + B = A, then regulate. This strange sort of constitutional logic, to the extent it makes sense, collapses internally and finds no support in this Court's First Amendment jurisprudence.

Second, the Commission did not rely on the First Amendment principles discussed in *Wisconsin Right to Life* to create its test. Instead, it seized upon the Chief Justice's application of the appeal to vote test as a measure to differentiate regulated from non-regulated speech.

In reading *Wisconsin Right to Life*, one may come away with several operational tests for determining the validity of restrictions affecting speech. A first approach examines the broad principles described by the Chief Justice and which guide the outcome reached in that challenge. As the Chief Justice understood, the First Amendment enjoys a preferred place because it supports our "indispensable democratic freedoms." *Collins*, 323 U.S. at 530. That preference "gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." *Id.*

These guiding principles led the Chief Justice to formulate the appeal to vote test and explained a "court should find 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." *Wisconsin Right to Life,* 127 S. Ct. at 2667. In the very same area of the opinion, the Chief Justice explained the importance that this test is objective, focuses on the communication itself and not intent-and-effect, involves "minimal if any discovery," and must eschew the "open-ended rough-and-tumble of factors." *Id.* at 2666. This approach gives the benefit of any doubt to "protecting rather than stifling speech." *Id.*

Another reading of *Wisconsin Right to Life* is found by placing emphasis on the particular analysis used by the Court and adopting this as the formal

rule. After discussing the First Amendment principles in effect, Chief Justice Roberts applied the test to demonstrate why the speech in question was not regulable:

> 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.

Id. at 2667.

The temptation to rely on the *application* of the appeal to vote test is understandable. It offers regulatory-minded officials a lengthy set of criteria to apply, while permitting a great deal of speech to be captured in the regulatory ambit. Yet, the list was proffered as an example of why regulation was not warranted in a particular example before this Court. To be consistent with overarching First Amendment truths, this two-prong, 11-factor list cannot be what the Court had in mind as a guiding principle when it explained that we could no longer rely on an "open-ended rough-and-tumble" of factors to decide free speech rights. Doing so empowers bureaucrats, not citizens, in making decisions about speech.

Third, in fashioning a two-prong, 11-factor test out of the *Wisconsin Right to Life* holding, the FEC created a balancing test that favors regulation and prohibition as the operating norm. No speakers know in advance, for example, whether speech might trigger regulation because it discusses the character, qualifications, or fitness of a candidate. Few citizens possess the prescience to predict whether inferences, implications, or even photographs might trigger the Commission's regulations. After all, if one seriously believes that the Chief Justice's *application* of the appeal to vote test is the test itself, all sorts of speech would be captured by that approach. In issuing its Notice of Proposed Rulemaking, the Commission took these considerations seriously. It included what can only be considered risible examples as possible triggers for prohibited speech:

- Dressing a candidate up as "Rocky" the prizefighter.
- "Support gun rights this November 5."
- "Vote for liberty when picking your Senator!"
- "Remember the House Bank scandal? This November, let's do better."
- Candidates appearing in mock settings of government offices, which amount to an implied reference to candidacy.
- "The War party in Washington," elephants, or donkeys.

- "It's time to take out the trash, select real change with Bob Barry."
- Allegations about the candidate's patriotism, or lack thereof.
- The candidate's "history or absence of public, military, or community service."
- The "medical, psychological or mental fitness of the candidate."
- Even peer's "recollection of candidate's reputation (e.g. "hardworking," "scandalous," "faithful public servant," "philanderer," tenacious").

Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (F.E.C. August 31, 2007).

All in all, the Commission included more than forty some examples of possible speech that might transform communication into a prohibited electioneering communication. With a two-prong, 11-factor test, citizens would have to take care to make advertisements that convey their message in the blandest manner. Including references to the "liberals in Washington," accidently referencing a challenger by implication, or being so bold as to discuss the Rotary activities of a candidate may just summon the attention of an excitable Commission. No one knows the significance of each element. All that is known is that at some point, free speech becomes banned speech. The safe course is to not speak at all or to speak as the Commission has instructed you.

Where is the tipping point between banned and free speech under the Commission's approach? Will mentioning the Rotary activities of a candidate while discussing a legislative issue trigger fines? Might dressing up the hometown hero in Rocky the prize-fighter's garb be enough, by itself, to turn protected speech into banned speech? Could the discussion of a public scandal connected with the candidate change the otherwise permissible communication into the impermissible? Outside of the harbor, speakers must guess at how six commissioners will scry the meaning of their communication. The First Amendment has never been so dependent upon a crystal ball.

Citizens possess a right not only to speak, but also to decide the most effective manner in which to speak. *See, e.g., Pacific Gas & Electric Co. v. Public Util. Comm'n of California,* 475 U.S. 1, 11 (1986) (plurality opinion); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988); *McIntyre*, 514 U.S. at 341-342. By failing to comport with the First Amendment and this Court's earlier instruction in *Wisconsin Right to Life*, citizens are forced to hedge and trim their speech into a circumscribed harbor established by the state. But citizens need not trim and adjust their speech to make it palpable to government bureaucrats. This approach removes respect for the inherent dignity and authority of the individual to decide what form of speech to produce and what content is best to include the communication. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770

(1976) ("There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"). Above all else, it is plain to see that individuals, not six commissioners, should be deciding these matters if freedom of speech should retain any import in this Republic.

In contrast with the Chief Justice's appeal to vote test, the Commission's Heads You Speak, Tails You Don't Approach is seriously flawed. Instead of giving priority to speech through a plain application of the "no reasonable interpretation" language found in *Wisconsin Right to Life*, the FEC balances considerations (with elements of import only it knows) to decide the line between regulation and freedom. Under the appeal to vote test, there is no balancing of reasonable interpretations of speech. Under the Commission's Heads You Speak, Tails You Don't Approach, it expressly balances a variety of elements, departing from the speech-protective principles designed by Chief Justice Roberts.

If the FEC's approach seems bad in theory, it is even worse in practice. Not surprisingly, the Commission vested with authority over federal election law has difficulties applying its two-prong, 11-factor test.

III. The Friendly Regulators: The Tie Goes to the Commission

The FEC has enjoyed several opportunities to clarify and improve its approach to speech-friendly policies regarding the regulation of electioneering communications. But in each instance, the Commission has shown a dedication to the inverse of Chief Justice Roberts' now infamous rule: The tie goes to the speaker. Under the Commission's vision, when matters come before it, the operative rule is that the tie goes to the Commission, favoring government authority over liberty and the exercise of arbitrary power over First Amendment rights. And though this Commission has been instructed for more than thirty years to be sensitive to freedom and wary of its own authority, that lesson has not taken root. This Commission can no longer be trusted with hopeful, open-ended tests devised by this Court to protect speech.

A. National Right to Life Committee Advisory Opinion

In the midst of the 2008 election season, the National Right to Life Committee, Inc. ("NRLC") submitted an advisory opinion request AOR 2008-15 with the Commission on September 26, 2008. The Commission's October 28, 2008 Open Meeting to discuss this matter is included as an appendix.[3] The

[3] The transcript of the October 23, 2008 Open Meeting is included along with Advisory Opinion Request 2008-20 that discusses the matter.

advisory opinion request included the script of two advertisements NRLC hoped to air. Both discussed Barack Obama's commitment to pro-life principles and characterized Obama as being wrong on his characterizations. The first advertisement ended by asking, "Will Obama now apologize for calling us liars when we are the ones telling the truth?" The second included the end line, "Barack Obama: a candidate whose words you can't believe in." *See* App. 13.

After just under a month spent in careful consideration about whether the ads constituted prohibited electioneering communications, the FEC could not reach a conclusion about its own application of the law. Though two draft advisory opinions had been issued, the Commission failed by two separate votes of three to three on October 23, 2008 to approve either approach. *See In the Matter of National Right to Life Committee, Inc.*, October 23, 2008 Certification (F.E.C. Oct. 23, 2008) (available at http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2808&START=1004842.pdf, http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2808&START=1005408.pdf).

And while it appeared there were five commissioners ready to approve the first of the two ads as "permissible" speech, the Commission was unable to reach a conclusion in that manner.

A brief glimpse into the operating principles of the FEC commissioners can be gleaned from the available transcript for the October 23, 2008 Open Meeting in which this advisory opinion request was

discussed. The meeting begins with a frank acknowledgement of just how very difficult the issue is to decide. One commissioner began to run through the two-prong, 11-factor Heads You Speak, Tails You Don't Approach and admitted that the ad focuses on a legislative issue related to abortion. The commissioner continued by noting that the ad takes a position on the issue, but did not "exhort the public to adopt that position or urge the public to contact public officials with respect to the matter." She concluded by expressing her doubt that the ad might not be a genuine issue ad since not all four factors were present. *See* App. 16. The second ad included a tag line of "Barack Obama, a candidate whose word you can't believe in." After explaining in some detail the nature of recent litigation faced by the Commission, the commissioner asked, "What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in." App. 19. Crucial to this commissioner's analytical approach was an examination of audience reaction and the effect of the speech.

Going further, the same commissioner explained that the ad attacked the character of Obama because it stated that a person's word cannot be believed in. App. 19-20. After a lengthy discussion of the importance of character in raising children, the commissioner reasoned that mentioning a person's dishonesty is a "very direct attack" on character. App. 20. Significantly, the commissioner then exclaims that the citizens requesting the advisory opinion "wouldn't

need a 20-day AO [advisory opinion] if it was just an issue ad, and he wasn't seeking to affect the election." App. 21.

At the end of this analysis, the Commission's Chairman explained how analyzing the speech in question devolves "into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other." App. 22. The Chairman also read the test in *Wisconsin Right to Life* correctly – "[m]erely because you mention that someone is a candidate doesn't convert the ad into something" else and just because citizens requested the answer before the election does not make the speech the functional equivalent of express advocacy. As reasoned by the Chairman, the *Wisconsin Right to Life* test is a bright-line test. If "you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis." App. 24.

A third commissioner later suggested that while *Wisconsin Right to Life* protects against protracted litigation, "there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly." App. 30. Apparently, under this third approach, speakers enjoy an ample remedy found in litigating their rights if they can do so in a speedy, non-protracted fashion.

Examining these widely different approaches embraced by different commissioners at the FEC should give this Court some pause about the clarity of

its instruction in *Wisconsin Right to Life*. One commissioner examined contextual factors of the ad – timing – in deciding whether the speech was prohibited or not. For her, filing an expedited advisory opinion request during the heat of the electoral season meant that the speaker had intended to affect the election. Of course, what *Buckley* announced and what this Court reiterated in *Wisconsin Right to Life* remains true. Speech cannot be regulated or prohibited based on "the speaker's intent to affect an election." 127 S. Ct. at 2665. All such attempts to scry into the intent of speakers wreaks constitutional havoc by affording "no security for free discussion." 424 U.S. at 43 (internal quotations omitted). Despite this clear instruction, scrying remains an important approach for some at the Commission to decide whether speech is prohibited.

Then again, the same commissioner also supported examining how a "normal person" would react to the speech as a cornerstone of analysis. Yet, *Buckley* and *Wisconsin Right to Life* remain clear that such tests put speakers "wholly at the mercy of the varied understanding of his hearers." *Id.* "It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result," causing to "chill a substantial amount of political speech." *Wisconsin Right to Life*, 127 S. Ct. at 2666. Under at least one commissioner's approach, speakers must decide in effect how a "normal person" would interpret the communication. Of course, that really means scrying

to determine how a "normal commissioner" would give meaning to the speech.

The Commission, nearly another month later, was able to render a decision approving one draft advisory opinion that came too late. Because of Commission delay, between October 28 and November 24, 2008, NRLC Political Action Committee, a separate legal entity, was forced to spend some $69,000.00 to broadcast the first advertisement. Currently before the Commission is Advisory Opinion Request 2008-20, asking that NRLC be able to refund NRLCPAC for running its advertisement while it waited for the Commission to reach a decision – that is, make sense of its own regulations.

B. The *Wisconsin Right to Life* Question

Briefly examining the litigation position assumed by the FEC during *Wisconsin Right to Life* helps illustrate just how far the FEC will go to show why speech is prohibited. No intent is too small and no inferential clue will be left unturned in unmasking the true motives of speakers. It is this sort of Inspector Clouseau approach to speech regulation that must be abolished.

It should be remembered that freedom of "discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Just

because issues are important in an election does not mean they may be banned. Unfortunately, this is precisely the approach embraced both now and in the past by some elements of the Commission.

During the course of briefing in *Wisconsin Right to Life*, the Commission suggested that it could infer the intent of speakers through the use of an expert political consultant. Douglas L. Bailey, veteran political consultant, provided expert testimony on how to infer the true intent and "implicit message" of advertisements. The expert reasoned that the ads were subtle and focused on issues instead of "exhorting the electorate to vote against Senator Feingold." *Wisconsin Right to Life*, 127 S. Ct. at 2668. Where one might not readily discern the intent of a speaker, the Commission will rely on experts to scry ever so effectively.

The FEC also sought to demonstrate that the real purpose of a communication could be found from its timing. Since electioneering communication ads always run just before a primary or general election, the Commission deemed this evidence that the speech was designed to influence them. Fortunately, this Court understood that citizens certainly possess the freedom to run an issue ad when public interest is high, such as in the time around an election, instead of when it is low. Indeed, it would constitute a perverse understanding of the First Amendment that citizens must wait until public interest has waned so they may have permission to speak. Unfortunately, reliance on timing and contextual factors to interpret

speech as being prohibited has been a steadfast approach of the FEC.

These sorts of freewheeling determinations are the stuff regular Inspector Clouseau investigations and formal opinions of the Commission are made of. This practice puts speakers at risk and permits the Commission to exercise the "discretion of an enlightened despot," relying on expert intuition, timing, context, or other activities of the speaker to interpret what speech before it really means (both pre- and post-*Wisconsin Right to Life*). *Rapanos v. U.S.*, 547 U.S. 715, 719 (2006) (plurality opinion). And it is this sort of freewheeling discretion and disregard for free speech by the Commission that this Court must end.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be reversed and clarification given to the speech-protective appeal to vote test described in *Wisconsin Right to Life*.

Respectfully submitted,

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December 1, 2008

AOR 2008-20

Re: Advisory Opinion Request

Thomasenia P. Duncan
Office of General Counsel
Federal Election Commission
999 E Street NW (Filed Dec. 1, 2008)
Washington, DC 20463
By email & 1st Class Mail

Dear Ms. Duncan,

On behalf of the National Right to Life Committee, Inc. ("NRLC"), we respectfully request an Advisory Opinion ("AO") from the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. 437f of the Federal Election Campaign Act ("FECA"). NRLC seeks guidance as to whether it may reimburse its separate segregated fund, National Right to Life Political Action Committee ("NRLPAC"), for the costs of broadcasting a radio advertisement that was declared by the FEC, *see* AO 2008-15, not to be subject to the corporate prohibition at 2 U.S.C. § 441b ("Prohibition").

Facts

On September 26, 2008, NRLC submitted AOR 2008-15, in which NRLC "request[ed] an immediate response" (or within the 20 days provided in 11 C.F.R. § 112.4(b) for candidates) as to whether NRLC would be prohibited from broadcasting two radio advertisements (*Apology #1* and *Apology #2*). The reason for

the haste, of course, was the fact that public interest in this issue was at a peak prior to the November 4 election, so NRLC "want[ed] to begin to run its ads immediately." AOR 2008-15 at 4. NRLC added the following note regarding urgency:

> NRLC recognizes that 11 C.F.R. § 112.4(b) only provides for a shorter response period when the requester is a "candidate" and NRLC is not a candidate. But it is inexcusable that this special benefit afforded to politicians should not also be afforded to private citizens and citizen groups.

AOR 2008-15 at 4.

The Supreme Court has placed some reliance on the availability of advisory opinions to mitigate burdens on free speech and association and to mitigate vagueness concerns. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). And in *Citizens United v. FEC*, a case now on appeal in the United States Supreme Court (No. 08-105), the FEC argued against a preliminary injunction to protect ads that also met the statutory "electioneering communication" definition on the basis that advisory opinions were available and could be obtained on an expedited basis: "When necessary, the Commission expedites its response to an urgent request for an advisory opinion, providing an answer in well under sixty days." Defendant Federal Election Commission's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction at 10 n.8, *Citizens United v. FEC*,

No. 1:07-cv-2240-RCL (D.D.C. Jan. 8, 2008) (Doc. 33 on PACER).

The FEC set the AOR for its October 23, 2008 open meeting.

In preparation for the October 23 meeting, the General Counsel submitted a draft AO stating that *Apology #1* was not subject to the Prohibition, either as an independent expenditure or an impermissible electioneering communication. *See* Agenda Doc. 08-32. The General Counsel's draft AO identified *Apology #2* as containing express advocacy. Chairman McGahn submitted a draft AO stating that neither ad was subject to the Prohibition. *See* Agenda Doc. 08-32-A.

At the October 23 meeting, comments by the commissioners indicated that three commissioners would have found that NRLC could permissibly broadcast both ads, Transcript ("TS")[1] at 19-20, 22, two commissioners would have followed the General Counsel's Report by finding *Apology #1* permissible and *Apology #2* impermissible, TS at 6, 28, and one commissioner would have found both ads impermissible. TS at 26-27. *See also* TS at 30-31 (votes).

Although there were apparently five commissioners (and at least the requisite four commissioners necessary for a decision) who indicated that they would have found *Apology #1* permissible, the FEC

[1] A transcript of the open meeting is appended.

did not immediately issue an AO permitting NRLC to pay for that ad. Because an AO was not immediately issued permitting NRLC to broadcast *Apology #1*, NRLC's registered political committee NRLPAC began broadcasting it instead, starting on October 28.[2]

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[2] The version of *Apology #1* broadcast by NRLPAC slightly differs from the script included in AOR 2008-15. Instead of including the actual clip of Barack Obama's statement, NRLPAC simply read the quote, and NRLPAC removed the reference to a specific journalist in the first paragraph. These changes do not alter the substance of *Apology #1* in any legally significant way for purposes of this AOR. The complete text of *Apology #1* as broadcast by NRLPAC is as follows:

> **Male:** The following is paid for by National Right to Life PAC at nrlpac.org. Not authorized by any candidate or candidate's committee, NRLPAC is responsible for the content of this advertising.
>
> **Female 1:** In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, *and* that he later misrepresented the bill's content.
>
> **Male:** When Obama was asked about National Right to Life's charges in a televised interview, he replied: (quote) " . . . I hate to say that people are lying, but here's a situation where folks are lying."
>
> **Female 1:** We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:
>
> **Female 2:** (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's

(Continued on following page)

On November 24, the FEC approved AO 2008-15, which found *Apology #1* permissible for NRLC to broadcast and reached no conclusion on *Apology #2*. Between October 28, when NRLPAC began broadcasting *Apology #1*, and November 24, when AO 2008-15 was finally issued, NRLPAC spent $69,271.56 broadcasting *Apology # 1*.

Discussion

The FEC's AO 2008-15 means that *Apology #1* was in fact permissible when NRLC requested the opinion on September 26 (when the AO was requested), on October 22 (when the General Counsel submitted her draft AO), and on October 23 (when sufficient commissioners to issue an AO indicated that they believed the ad to be permissible). But NRLC could not rely on the General Counsel's initial draft (which was not approved in any event) or on the positions indicated at the October 23 meeting (especially since there were indications of attempted negotiations as to NRLC's First Amendment rights),

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claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining *every* baby born alive after an abortion as deserving of protection?

Will Obama now apologize for calling us liars when we were the ones *telling the truth*?

TS 31-32, because only an official AO provides legal protection. *See* 2 U.S.C. § 437f(c).

So an issue-advocacy citizen group and its members were deprived of protection by the FEC for their right to engage in First Amendment-protected, core-political, amplified speech, *see Buckley v. Valeo*, 424 U.S. 1, 22 (1976), at the very time when the public's interest in NRLC's issue was at its peak. NRLC could not safely speak unless it was willing to venture forth without protection in the face of two regulations, 11 C.F.R. §§ 100.22(b) and 114.15, that are so vague that the FEC Commissioners, themselves, could not readily or unanimously agree as to the regulations' applicability.

Moreover, the Commission seemed unable, or unwilling, to apply the constitutional mandate that "in a debatable case, the tie is resolved in favor of protecting speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2669 n.7 (2007) ("*WRTL II*"). This mandate ought to be applied by the Commission so that where the Commissioners split evenly on whether a communication is prohibited, the communication is recognized as permissible. Similarly, because § 100.22(b) turns on whether "reasonable minds could . . . differ" and § 114.15 turns on whether a "communication is susceptible of no reasonable interpretation other than as an appeal to vote," and because Commissioners nominated by the President and confirmed by the Senate to a federal agency specializing in campaign-finance issues surely must be assumed to be reasonable, where commissioners

"differ" on whether there is an appeal to vote in a communication then that communication should not be deemed express advocacy or an impermissible electioneering communication.

These constitutional problems, coupled with the delay in processing AOs at times when public speech on public issues is most pressing, requires a new approach. While resolving all of these problems is beyond this AOR, the facts of this request offer a good place to begin.

NRLC believes that in a situation where a connected organization is able and chooses to fund communications through a separate segregated fund as a legal precaution while it awaits the outcome of a requested AO near an election, the connected organization should be able to reimburse its separate segregated fund for its disbursements to broadcast the ad if it is recognized in an AO as permissible. The ability of NRLPAC to speak was no substitute for NRLC itself speaking. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2671 n.9 (PAC alternative not adequate substitute). And since federal funds are much more difficult to raise than other funds, connected organizations and SSFs rightly prefer using scarce federal funds only for communications for which the requirement of using federal funds is constitutionally justified.

The FEC could approach this in at least two ways. First, it might interpret the exclusion for administrative expenses, 2 U.S.C. § 441b(b)(2)(C), from the prohibition on "contribution or expenditure"

and "any applicable electioneering communication," 2 U.S.C. § 441b(b)(2), to permit reimbursement for such activity where the activity was undertaken as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election. A legitimate "administration" function, 11 C.F.R. § 114.5(b), is the proper payment of obligations and the allocation of funding to comply with constitutional and legal requirements. This approach provides the advantage of fitting the new reimbursement potential into an existing body of law. For example, 11 C.F.R. § 114.15(b)(3) provides for the reimbursement of administrative expenses by a connected organization to its SSF within 30 days. And AO 1983-22 recognized that the FEC has authority to permit reimbursement beyond that time period where an entity had requested an AO within the 30-day period. This is, of course, analogous to the present situation with NRLC and NRLPAC and the present AOR.

Second, the FEC might simply recognize that 2 U.S.C. § 441b(a) prohibits corporate independent expenditures and "applicable electioneering communication[s]," not expenditures for permissible communications. So, where communications are paid for by an SSF as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election, there is no justification for forbidding the reimbursement. Specifically, in such a situation there is no corporate corruption concern that would justify the government from

forbidding the reimbursement, so that First Amendment liberties should prevail. So the FEC could simply issue the present AO recognizing in this circumstance the permissibility of the reimbursement. The Commission may then wish to engage in a rulemaking on the subject to explore further the constitutionally- and legally-permissible boundaries for allowing such reimbursements.

Question

Under these circumstances, may NRLC reimburse NRLPAC for the costs involved in broadcasting *Apology #1*?

Sincerely,

BOPP, COLESON & BOSTROM

/s/ James Bopp, Jr.
James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen

AUDIOTAPE TRANSCRIPTION

from

FEC OPEN MEETING – OCTOBER 23, 2008

* * * *

Taken for:

Bopp, Coleson & Bostrom
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* * * *

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[2] APPEARANCES

SPEAKERS:

Donald F. McGahn, II, Chairman
Steven T. Walther, Vice Chairman
Cynthia L. Bauerly, Commissioner
Caroline C. Hunter, Commissioner
Matthew S. Peterson, Commissioner
Ellen L. Weintraub, Commissioner
Jonathan Levin, General Counsel
Robert Knop, General Counsel
David Adkins, General Counsel
Amy Rothstein, General Counsel

[3] PROCEEDINGS

CHAIRMAN MCGAHN: All right. Next up, Draft Advisory Opinion 2008-15 submitted by National Right to Life Committee, Inc.

Do we have any other late-submitted documents we need to –

UNIDENTIFIED MALE SPEAKER: Yes, Mr. Chairman. We'd move for the sustention of the attorney's – provision for the attorney's submission of documents to consider, Agenda Document Number 08-32 and Agenda Document 08-32A.

CHAIRMAN MCGAHN: Without objection, so ordered.

MR. ADKINS: Good morning, Mr. Chairman, Commissioners. The two draft advisory opinions before you, Agenda Document 08-32 and Agenda Document 08-32A, respond to an Advisory Opinion request submitted on behalf of the National Right to Life Committee, Incorporated. The NRLC is a nonstock, 501c4 nonprofit which has produced two radio advertisements. The NRLC intends to broadcast these advertisements immediately and continuously throughout the United States leading up to the November 2008 general election. The two advertisements involve a dispute between the NRLC [4] and Senator Barack Obama over a vote that Senator Obama cast as a member of the Illinois legislature and specifically whether Senator Obama mischaracterized that vote in subsequent statements. The only

difference between the two advertisements is that the second advertisement features a concluding sentence that reads, "Barack Obama, a candidate whose words you can't believe in." The committee asks whether the NRLC's use of general treasury funds to finance the broadcast of the advertisements would constitute prohibitive corporate expenditures or prohibitive electioneering communications.

The first draft, Agenda Document 08-32, concludes that the first advertisement does not contain express advocacy and would be a permissible corporate-funded electioneering communication. Therefore, the NRLC would be able to fund its broadcast with general treasury funds.

Regarding the second advertisement, the draft concludes that the ad does contain express advocacy, and therefore the NRLC's funding of its broadcast with treasury funds would constitute a prohibitive corporate expenditure.

By contrast, the second draft, which is [5] Agenda Document 08-32A, or revised Draft B, concludes that neither advertisement is an impermissible electioneering communication or contains express advocacy. Therefore, the NRLC would be able to use treasury funds to finance the broadcast of both advertisements.

However, we received two comments on the drafts, specifically the first draft, and one comment on the request. So I'm happy to address any questions you may have. Thanks.

CHAIRMAN MCGAHN: Thank you. First, I'd like to thank Mr. Adkins for his work on this. Whenever we get anywhere near the history of the agency on issues that involve interpreting Supreme Court cases is a very challenging area. And the herding of the cats here has taken up a lot of time, and I appreciate the effort and various drafts and – and helping all the commission with their thinking on this.

Two drafts and on the first ad, my sense is there's some agreement at least as to the conclusion. And then there's a difference on the – whether mentioning – whether putting that extra line in the ad changes the ad. Given that Draft B is from me, it's pretty clear where I [6] stand, but the thing about this is it's an AO request, and it's a rather targeted request, and it certainly is a request designed to put a tough issue in front of the commission. This is not an easy case. These were ads written in a way to probably raise a lot of issues. In a lot of ways this is a law school exam on the meaning of the Wisconsin Right to Life test. And – and, you know, it's tough as an agency to look at test cases because they always raise issues that may not otherwise be raised, but that's the beauty of the AO process. We still have to try to answer the questions as best we can. Any comments, thoughts, motions? Ms. Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I support the other draft. We didn't originally have two drafts, so they're not – one of them doesn't have a letter, and the other one is just

Draft B. I support the unlettered Agenda Document, 08-32. I think that it is most consistent with the Wisconsin Right to Life decision, with our regulation implementing the Wisconsin Right to Life decision, with our – with the arguments that this agency has made in court subsequent to that regulation, and the [7] Wisconsin Right to Life decision, and with the responses that we've gotten back from the court on – from lower courts on that regulation and on interpretations of it. I know a lot of people preferred the magic word test, and, you know, there were a lot of serious, respected people who for many years thought that was the end point of under the constitution of what could be regulated was magic words. But in the McConnell case the Supreme Court said that that test is functionally meaningless and expanded into the area of functional equivalent of express advocacy.

When we got to the Wisconsin Right to Life case, the court said, an ad is a 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. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. 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.

[8] And I'll just interrupt the quote at this point to point out that the ad in this case – I suppose it

focuses on a legislative issue. It's a past legislative issue. It's a vote that was taken in the state senate in, I think, 2000, but it is – it does generally pertain to the issue of abortion, which clearly is an ongoing public policy concern that, you know, people get very animated about, and it's very important to a lot of people. So I'm, you know, not trying to read this too narrowly. The ad takes a position on – certainly on the vote on that issue. Doesn't really exhort the public to adopt that position or urge the public to contact public officials with respect to the matter. So it's not clear out of the four factors that the court mentioned as being consistent with that of a genuine issue ad. At least two of them are clearly missing from this ad.

Second, going back to the quote, 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 the candidate's character, qualifications, or fitness for office.

[9] Now, those factors, those two factors, I think, are clearly evident. The indicia of express advocacy, in the ad – in the second ad which has the tag line – let me find it – "Barack Obama, a candidate whose word you can't believe in."

A candidate, mentions that he's a candidate and says that his word can't be believed in. In the – in a recent case that we litigated, "The Real Truth About Obama," – there were same counsel who has filed the

request today – we had a couple of other ads where the tag line was in one case, "Now you know the real truth about Obama's Position on abortion. Is this the change you can believe in?" The commission took the position that that was not express advocacy.

The second ad had the tag line, "Obama's Callousness," – and I'm going to put in a dot, dot, dot because the rest – there's a part in the middle that doesn't really go to the legal issue – Obama's callousness reveals a lack of character and compassion that should give everyone pause.

Should give everyone pause was enough for this commission to go into court and argue that that's express advocacy.

[10] Now, the really interesting thing to me about, "The Real Truth About Obama" case is that the decision we got back from the Eastern District of Virginia, not normally a place where one finds really liberal interpretations of campaign finance laws, was that both of these ads were express advocacy; that both of them met the no-other-reasonable-interpretation test under Wisconsin Right to Life.

I was stunned and gratified by that because that actually had been my position all along, but, you know, I didn't expect them to agree with me.

But if you look at those two tag lines and say, well, that's express advocacy, I think it's really hard to come back and say a candidate whose word you can't believe in doesn't make the cut. As I said, either

under the direct words of Wisconsin Right to Life or under our regulation, which the court in "Real Truth About Obama" said, you know, was a pretty close matchup to the court's opinion. It pretty much endorsed our regulation as an accurate and precise reflection of the Supreme Court's view.

Now, I recognize that the other draft does attempt to proffer some other explanations for [11] what was going on in that second ad. There are – let's see. Am I on the right draft here? There are, I think, four different proposed – let's see – one, two, three, four – five different proposed interpretations of the ad, none of which go to the tag line, which is, of course, the difference between the two ads. That's why I thought the first draft, the unnumbered – unlettered draft that I support was a good, narrow interpretation of Wisconsin Right to Life and our regulation because even though the ad, I think, does clearly go to Senator Obama's character, without that tag line I think it doesn't quite cross over the line that – the very high bar that the Supreme Court set for us in Wisconsin Right to Life. And as I said, the alternative explanations for even the second ad in the – in Draft B don't address that – that tag line. What the draft does go on to say is that just merely referencing Senator Obama as a candidate doesn't convert the ad into an appeal to vote. Maybe that's true, but in some hypothetical context one could call somebody a candidate without it being an appeal to vote for or against, but there's no other explanation offered as to why that word, candidate, is in there otherwise. What [12]

else does it mean other than here's a candidate; somebody is running for election that you can't trust? What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in.

The draft goes on to say that the ad, even the second ad doesn't comment on his – Senator Obama's fitness or qualifications for office.

On the contrary, it takes issue with Senator Obama's candor with respect to statements supposedly made by the senator about requester; hence, the ad does not say that Senator Obama is a candidate you can't believe in, but instead remains focused on what he supposedly said; thus stating that he's a candidate whose word you can't believe in with respect to what he said about requester. And I have to say I cannot find the legal difference or even the factual difference between those two statements; that he's a candidate you can't believe in as opposed to a candidate whose word you can't believe in because he's not doing mime out there on the campaign trail. He's using words. If you can't believe his words, what is it that you could believe about [13] this guy?

And it's interesting to me – and I don't know; maybe this is inadvertent – that the draft says – it doesn't comment on his fitness or qualifications for office, but it leaves out the word, character, which is in both the Supreme Court test and in our regulation. And I think character is really the key to this because

when you say somebody's word can't be believed in, that's a very direct attack on character. You know, you say somebody's word can't be believed in? In some parts of the country them is fightin' words.

And certainly, when I try and teach my children about what it takes to be a person of good character, what traits they ought to be adopting, honesty and integrity and trustworthiness and having a word that people can believe in are really high on my list of good character traits. And I'm – I'm willing to bet that the other parents on this panel teach their kids the same thing. This does go directly to character. To say that a candidate is – someone who is a candidate whose word you can't believe in, I just don't think there's any reasonable interpretation of those words other than don't [14] vote for this guy. And it's not clear to me actually whether if the ad said don't vote for him because he's a candidate whose word you can't believe in, if that would be enough for my colleagues to say, that makes the ad express advocacy; or whether they would still say, well, there's all this issue talk in there, and that kind of outweighs the even magic words in the context of this ad. I'm not really sure what the end point is of that analysis. I just – I just don't think it's – it's reasonable. I don't think, again, if – if – again, looking to the more conservative of the two ads in, "The Real Truth About Obama," if Obama's callousness reveals a lack of character and compassion, that should give everyone pause is enough to trip the express advocacy standard, I don't see how saying that he's a candidate whose word you

can't believe in could possibly be anything other than urging somebody – urging anybody who hears this to – to vote against him. And indeed, the fact that he came in here and said, I want a 20-day AO even though I'm not entitled to it, and I really wanted – my colleagues know I really did try to get an answer as quickly as possible on this. I [15] wanted to answer his question quickly because I always assumed that these ads were all about the election. You wouldn't need a 20-day AO if it was just an issue ad, and he wasn't seeking to affect the election. The reason that he needed to – was urging us to get him an answer quickly, I think, is because the election is coming up. And I think, you know, it would be better if we could have answered even quicker and even better if we could agree on the result; although, I'm not – I'm not optimistic.

So for all of those reasons I support the first draft, the unlettered draft, and not Draft B. And I would be happy to move Draft – Draft Unlettered – it's very confusing; sorry – Draft 08-32 at the appropriate time, or we could have further discussion, whatever my colleagues prefer.

CHAIRMAN MCGAHN: The problem I have with the unlettered draft is – well, essentially the flip side of the same coin that Commissioner Weintraub raised, page 8, lines 13 through 19, when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing it as much on Senator Obama's bid for the Presidency as his actions as a [16] state legislator.

Additionally, the advertisement manipulates senator Obama's campaign slogan, "Change We Can Believe In" to attack his character and call into question his trustworthiness as a candidate whose word you can't believe in. The idea that the tone of the ad is now the standard to me is not a standard at all, and I think this ends up devolving into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other. To me the issue is whether or not you can read an ad as something other than an appeal to vote, and I think that both ads you can. Merely because you mention that someone is a candidate doesn't convert the ad into something other than – it doesn't convert that into an appeal to vote or preclude reading it as something other than an appeal to vote. Simply because they want an answer before the election that somehow we're going to read some inference into this being therefore the functional equivalent of express advocacy to me is a farfetched argument because folks who want to run issue ads tend to use the [17] campaign cycle as the vehicle to bring their issue to the public attention because, well, that's when the most people are paying attention. You're not necessarily going to run an issue ad on an issue of public in court, you know, the second week of January or something. I mean, you may run it during the Super Bowl; but you run it during election season, and that's when folks have the most opportunity to be heard. So, of course, they're going to use it.

And then as far as the issue being a past legislative issue, the issue that is coming up apparently constantly all across the country in state legislatures, when I first read the ad, I thought, well, okay, these folks are Right-to-Life folks who 365 days a year care about their issue set, and now they've found a vote from a current candidate that illustrates their issue; and they have been called liars, I guess, and they want to essentially defend themselves. They want to make the point that this fellow is a candidate who what he says about is you can't believe in. And that's how I read the ad originally, and that's how I still read the ad.

And it just goes back to what I said [18] initially. This is a tough case because these are essentially a test case. They're very carefully scripted ads. But when we get into those sorts of ads, it does become tough. And, you know, when you get into the tone of the ad and factors and that kind of thing, I just don't see that as – as something that provides a sort of bright-line rule that the Supreme Court thought they were doing in the Wisconsin Right to Life.

Since it was raised – I wasn't going to raise it, but "The Real Truth About Obama" litigation, the end of the opinion, the court says that plaintiff is free to disseminate their message and make any expenditures they wish. And so, you know, it seems – it seems like we may even disagree over what that district court said or didn't say.

With that being said, I mean, this is – I read the Wisconsin Right test as a rather simple bright-line test. And if you can – if you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis. And in fact, you can't really export the other – the other analyses without the full – the full package goods of the Wisconsin Right to Life; and in close calls the tie goes in favor of the speaker and all that [19] sort of thing. And to me I've tried to offer a variety of other reads of the ad. And whether or not they're reasonable or unreasonable, have that debate, that devolves into an issue of fact, and I don't read this as a fact issue. I read this as an issue of law; and hence, that's why I support Draft B.

Other comments?

COMMISSIONER PETERSEN: I'll just add briefly that I, too, interpret the Chief Justice's test that he set forth in Wisconsin Right to Life as setting a very high bar with regard to which kinds of ads may be subjected to BCRA's prohibition against corporate or labor-funded electioneering communications. I mean, as has been said already, Chief Justice Roberts said in that case, "The Court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than in its appeal to vote for or against a specific candidate. The test contemplates that there may be close calls as we – as – and I agree with the chairman that this was crafted in a way to be a close call. And – but the tests set forth by the chief justice contemplates those close [20] calls; that you could

have situations where two people who are reasonable, one could interpret it as being the functional equivalent of express advocacy. The other one could think of it as issue advocacy. And he said when that happens, the tie goes to the speaker and not the sensor. So the way I – again, I look at that test as setting a very high standard. And as the draft – Draft B shows, there are a number of reasonable interpretations other than as appeals to vote when you look at those ads that were proposed by the requester in this case. And for that reason I'll be supporting Draft B.

COMMISSIONER HUNTER: Mr. Chairman, thank you. I support the comments of the chairman and Commissioner Petersen. Today a non-for-profit corporation, the National Right to Life Committee, would like to exercise its First Amendment rights by running two radio ads 60 days before a general election regarding an issue that's at the core of its mission. BCRA states that a corporation may not pay for advertisements that mention a candidate within 60 days of the general election. National Right to Life can attempt to ensure that the speech doesn't cross the line by expressly [21] advocating the election or defeat of a specific candidate, by analyzing case law, the statute, and FEC regulations; but if they get it wrong, it's a potential federal crime.

In this case the National Right to Life Committee decided to file an advisory opinion, and we are in the unenviable position of determining whether an ad should be afforded the protection of the First Amendment. In June of '07 the Supreme Court decided the

Wisconsin Right to Life decision, which we have talked about today, and held that the relevant section of BCRA unconstitutional as applied to issue ads that a not-for-profit corporation wanted to air within 30 days of a primary election. So very similar facts to the Wisconsin Right to Life decision are before us today, both non-for-profit corporations. Both would like to air ads within the relevant time period before the relevant electorate.

The Supreme Court found 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.

As has been noted today, Draft B notes that [22] there are several other reasonable interpretations other than of an appeal to vote.

In drawing the line between campaign advocacy and issue advocacy, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. I will support Draft B because I believe neither ad before us today is the functional equivalent of express advocacy under an analysis of the Supreme Court precedent or FEC regulations. Thank you.

CHAIRMAN MCGAHN: Ms. Weintraub again.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I don't want to short-circuit

anybody else who wants to talk. I just wanted to respond very briefly to a couple of comments that you made. It's true that the "Real Truth About Obama" decision says that the plaintiff is free to disseminate their message and make any expenditures they wish. The next sentence reads, "Their only limitation is on contributions based on constitutionally permitted restrictions." And that's always the case when we have to decide. Nobody is ever forbidden from speaking. The question is what kind of money can you use, and are there going to be any disclosure [23] ramifications. So I don't –

CHAIRMAN MCGAHN: Well, if I could just –

COMMISSIONER WEINTRAUB: Sure.

CHAIRMAN MCGAHN: So if a corporation – if a corporation would be banned from speaking, and this is a nonprofit entity giving us an Advisory Opinion request – they're a 501c4; they're not an MCFL accepted, so they are prohibited from speaking.

COMMISSIONER WEINTRAUB: Many organizations – I'm not – in fact, I'm pretty sure this one does, too – many 501c4's in that position have a PAC, and they fund these kinds of communications through their PAC. And I believe this one is one of those, so, again, it goes to funding.

CHAIRMAN MCGAHN: We agree that the C-4 is a separate entity from a PAC?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. So the C-4 is banned.

COMMISSIONER WEINTRAUB: The C-4 can't do it out of their C-4 account. They can do it out of their PAC.

The only other point that I wanted to make is that I hear what you're saying about words like [24] "tone" and "factors," and I would be happy to strip all that language out and just go by a straight meeting of the words if that would gain any votes on the other side. I'm not optimistic that it would, but I – I'm happy to make the offer.

CHAIRMAN MCGAHN: I still struggle, though, with this. We have a requester who is a candidate – or who alleges that a candidate for national office called them a liar. And we're not going to get into what the truth or – I mean, the requester included all kinds of backup for the ad; and, you know, for purposes of this, I think you just take everybody at their word for the purposes of the AO. We don't need to get into whether or not who is winning the name-calling contest, but from a pulpit he wouldn't have had if he wasn't running for president. So my view is we shouldn't foreclose a nonprofit from defending itself in the same arena, which is his candidacy. I mean, if they want to comment at a time – and to me they throw out the word, candidate, not only – and I don't think – obviously, when you mention the word, candidacy, it has something to do with

the election, right? But to me, that's not the only reason why they put in the word, candidate. It's [25] another reason not to believe what he's saying because here's a situation where the candidate is saying something about a grass-roots nonprofit group, and they want to say, well, is he a candidate whose words you can't believe in? And the word is that – what he said about this nonprofit is the way I read it. And I'm not so sure stripping out the tone language still changes the end result. If the tag line had said that – said a politician whose words you can't believe in, would that change your view?

COMMISSIONER WEINTRAUB: I'm not sure. That is a much closer call. I'd have to go back and look at the regulation again and see what –

CHAIRMAN MCGAHN: Okay. Well, let's take a look.

COMMISSIONER WEINTRAUB: It says, "Mentioned an election, candidacy, political party, opposing candidate or voting by the general public."

Maybe. I'd want it – I'd want to give it more than 10-seconds thought.

CHAIRMAN MCGAHN: So maybe if they changed that one word, that could –

COMMISSIONER WEINTRAUB: But you still have the – the very direct attack on character. So like [26] I said, I'd want to give it more than 10-seconds thought here at the table.

CHAIRMAN MCGAHN: Okay. So these are not as easy calls as some maybe would think. One word here and there can make a difference in these ads. But in any event, Vice Chair is looking at the regs as well.

VICE CHAIRMAN WALTHER: We all have looked at our regs off and on. I want to say this. I'm probably the most conservative approach on this one because I don't – to me, the added sentence in the second example doesn't make such a difference. In my own mind it makes one express advocacy, and the other one not. Everyone knows Obama is a candidate, so it's not really an issue. And even if it were an issue, I mean, even under Roberts' opinion there are minor things that can be identified and clarified, or interpretation can be developed through discovery. The whole idea, as I understand it, is that we don't want to be able to prevent free speech by engaging in protracted litigation, and then delay is what prevents it. But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly.

[27] And I think when you look at this, then the next question is whose word you can't believe in. Well, if you read one, you can argue that perhaps Obama could redeem himself if he made an apology. But when you look at what's really the message here is the public would know about his extreme position that he opposed very defining every baby born alive after an abortion as deserving a protection; that what we're talking about is trying to convey that Senator

Obama holds this position. It's unacceptable; and in addition, he's not telling the truth. And I really think at this particular point we find enough in it so that it appears an express advocacy; one is as well.

Because we're in litigation, however, I think my remarks are minor. I'm inclined to just make them as truncated as possible because in getting this interpreted in the next round of our litigation.

CHAIRMAN MCGAHN: Certainly agree. Ms. Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. I share many of Commissioner Weintraub and a certain amount of Commissioner Walther's concerns about this draft as well. I'll [28] support Draft A because I believe its consistent with our regulations and Supreme Court law.

And some of – just some of my concerns about Draft B include that I agree the Supreme Court set a very high bar, and I think that the commission went back and wrote a regulation consistent with that stringent test. And we could, you know, disagree whether that's the right test or the wrong test, but that's, you know, frankly not our role. But the Supreme Court did give us some guidance about how to interpret its tests, and in my view Draft B doesn't fully take account of what I think are important guidants – guiding factors that are directly applicable here. The Supreme Court talks about indicia of express advocacy including mentioning an election or a candidate and an attack on character. And I don't

have children, but I agree with you. My mother taught me that telling the truth was an important thing.

So those are my concerns with Draft B, and so I will be supporting Draft A, or the unlettered draft as we refer to it.

COMMISSIONER WEINTRAUB: Make a motion?

CHAIRMAN MCGAHN: Time for a motion.

COMMISSIONER WEINTRAUB: All right, [29] Mr. Chairman. I move approval of Agenda Document Number 08-32. That's the one without the letter.

CHAIRMAN MCGAHN: That's the unlettered.

COMMISSIONER WEINTRAUB: The unlettered one.

CHAIRMAN MCGAHN: Even though we have a Draft B, we don't have a Draft A, so that would be Pseudo A. On that motion all in favor say aye.

VICE CHAIRMAN WALTHER: May I comment before we vote?

CHAIRMAN MCGAHN: Sure.

VICE CHAIRMAN WALTHER: I would just like to say I would support the portion of the motion

that relates to question number 2, but not with respect to question number 1; so I'll be voting against it.

And I also do have problems with the use of the word, tone. I think that's not the message or really the appropriate one to make this decision on.

CHAIRMAN MCGAHN: Okay. All in favor of the motion say aye.

COMMISSIONER WEINTRAUB: Let me just throw in one more thought, and that is that I appreciate the vice chairman's comments. That's why I think this is the compromised draft because it says one [30] is, and one isn't express advocacy. I'm finished now.

CHAIRMAN MCGAHN: Okay. We can vote now?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: We're all set?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. I'm just looking both ways before I cross the street here. Okay. All in favor say aye.

COMMISSIONER WEINTRAUB: Aye.

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 2 to 4 with Commissioners Weintraub and Bauerly voting in favor, the remainder voting in opposition for apparently different reasons.

Any other motions?

UNIDENTIFIED MALE SPEAKER: Mr. Chairman, I would move that we approve Agenda Document Number 08-32-A, otherwise known as Draft B.

CHAIRMAN MCGAHN: All in favor say aye.

(MEMBERS VOTE AYE)

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 3-3 with [31] myself, Commissioner Petersen and Hunter voting in favor; Vice Chair, Commissioner Bauerly and Commissioner Weintraub voting in opposition. My sense is we have consensus; however, where five of us agree that the first ad – and I don't have the questions in front of me, so I don't want to say. Depending how you frame the question, do we have the okay for the c4 to run, I think, is the best way; and the second, we don't have consensus. So maybe the best thing to do at this point is ask the counsel to prepare a draft that reflects the common areas where we have in five on the first ad and then unable to reach a conclusion on the – with respect to

the second ad. I think that's an accurate representation of the views up here. If it's not – yes.

COMMISSIONER WEINTRAUB: I just want to say to you what I've already said to one or two of your colleagues, and that is that I'm not – I haven't decided yet whether I would vote for that answer. In part, it depends on the legal rationale, but in part I wasn't actually kidding that I thought Draft A was a compromise. And I'm not sure that I'm willing to say, you know, just to give the permission without the complementary [32] restriction on the other ad. So I'm just – I'm continuing to ponder, and it will depend on the wording of the draft.

CHAIRMAN MCGAHN: Do we have any management administrative matters?

UNIDENTIFIED MALE SPEAKER: We do not.

CHAIRMAN MCGAHN: Okay. Anything else for the good of the order?

Okay. With that, we will adjourn our open session. Thank you.

(MEETING ADJOURNED)

[33] STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

I, Renee R. Dobson, a Notary Public in and for said county and state, do hereby certify that I listened to the audiotape recording of a meeting;

That said meeting was taken down in Stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of said meeting;

I do further certify that I am a disinterested person in this matter; that I am not a relative or attorney of any of the parties, or otherwise interested in the event of this matter, and am not in the employ of the parties.

IN WITNESS WHEREFORE, I have hereunto set my hand and affixed my notarial seal this 13th day of November, 2008.

/s/ Renee R. Dobson, RMR
Renee R. Dobson,
Notary Public,
Residing in Vigo
County, Indiana

My Commission Expires:
September 6, 2015