No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

Benjamin W. Bull
Counsel of Record
Erik W. Stanley
ALLIANCE DEFENSE FUND
15100 N. 90TH Street
Scottsdale, AZ 85260
(480) 444-0020

Robert J. McCully
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108

Tyson C. Langhofer
Megan E. Garrett
Court T. Kennedy
Thomas A. Simpson
Nicholas G. Frey
STINSON MORRISON HECKER LLP
1625 N Waterfront Pkwy, Suite 300
Wichita, KS 67206

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in these topics, and who have a right to express those views through this nation's political process. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and organizations being harassed for expressing their viewpoints in the political arena.

SUMMARY OF ARGUMENT

The portion of *McConnell v. FEC*, 540 U.S. 93 (2003), upholding the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b ("BCRA"), should be overruled. Despite the best efforts of this Court after *McConnell* to constitutionally validate Section 203's expansion of restrictions on political expression, the amount of administrative disputes and litigation which *McConnell* has generated demonstrates that Section

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

203 cannot be administered and enforced without chilling substantial amounts of previously protected First Amendment rights. Any attempt at determining whether a communication is the "functional equivalent of express advocacy" necessarily leads to a subjective, intent-based, contextual evaluation by the governmental enforcer as to whether the enforcer believes that the communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This subjective, contextual, intent-based, evaluation of political discourse is constitutionally prohibited and unquestionably chills speech which would have otherwise been communicated but for the threat of both civil and criminal penalties.

ARGUMENT

I. THE COURT HAS RECOGNIZED THE CONSTITUTIONAL REQUIREMENT OF USING BRIGHT-LINE, OBJECTIVE TESTS TO DISTINGUISH REGULATED CAMPAIGN SPEECH FROM NON-REGULATED CAMPAIGN SPEECH.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that while the Government possesses the authority to regulate elections, the First Amendment requires that such regulation be carried out in a manner protective of speech. The Court established a bright-line test between regulable election-related activity and constitutionally protected political speech, by holding that the Government may only

regulate speech that is "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. The Court went on to identify such speech as that which in "express terms advocate the election or defeat of a clearly identified candidate" for public office. *Id.* at 44. The Court noted that only communications containing words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" would be subject to regulation as "express advocacy." *Id.* at 44 n.52. This bright line standard was applied consistently from 1976 through the 2002 passage of BCRA. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249 (1986); *Faucher v. FEC*, 928 F.2d 468, 470-72 (1st Cir. 1991); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386-87 (2d Cir. 2000); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *FEC v. Colorado Repub. Fed. Campaign Comm.,* 59 F.3d 1015, 1023 n.10 (10th Cir. 1995), *rev'd on other grounds*, 518 U.S. 604 (1996).

After the enactment of the BCRA, this Court was forced to determine whether Section 203's definition of "electioneering communications", which dramatically expanded the scope of regulable speech, fit within the constitutional parameters established by its prior rulings in *Buckley* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). This Court rejected a facial challenge to Section 203 in *McConnell,* 540 U.S. at 204-07, by recognizing a second category of regulated speech, denoted as the "functional equivalent of express

advocacy." *See FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007)("*WRTL*"). In doing so, however, this Court recognized that "the interests it had found to justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206 n. 88. As originally set forth by this Court, a communication would not be considered the "functional equivalent of express advocacy" unless the communication was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See WRTL,* 127 S. Ct. at 2667. In the subsequent *WRTL* opinions, this Court attempted to articulate standards to be applied to distinguish between regulated and non-regulated speech. The Court looked for a standard that would be applied as an objective test, and not as a test relying upon subjective and contextual considerations. As the Court observed:

> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. 127 S. Ct. at 2665-66.

A listener-based test is subject to the same infirmities, as such a test would "typically lead to a

burdensome, expert-driven inquiry, with an indeterminate result." *Id.* at 2666. A standard that bases the regulation on speech on how the listener will perceive or understand the message subjects the speaker to the varied understandings his listeners may have. *Id.*

To address these concerns and to safeguard First Amendment rights, the Court held that "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* at 2666. As explained by the Court,

> It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation . . . . And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.

Id. at 2666-67 (citations omitted; alteration in original). As such, the Court has concluded that:

> (1) [t]here can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of 'contextual' factors

highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. *Id.* at 2669 n.7.

II. THE COURT'S LAUDABLE ATTEMPTS TO FASHION A BRIGHT-LINE, OBJECTIVE TEST TO VALIDATE BCRA SECTION 203 HAVE PROVEN UNWORKABLE IN PRACTICE.

In theory, the standard might be constitutional as written. However, experiences since the enunciation of this standard demonstrate that applications of this purported objective standard have devolved into considerations of subjective intent, context, and, most often, effect on the listener. The standard apparently cannot be applied by regulators without their subjective inquiry into the unconstitutional considerations of the speaker's intent or the effect on the hearer. Necessarily, the entities determining whether particular speech may be regulated must decide whether the communication is "susceptible of no other interpretation other than as an appeal to vote for or against a specific candidate." To do so, the regulator must interpret the speech based upon what they perceive the communication to convey. The regulator is compelled to ask how the speech makes him feel and whether, given the words in the ad, the regulator finds no other purpose for the ad than an appeal to vote. Unavoidably, that individual will

draw upon his or her own subjective interpretation of the message they believe to be conveyed by the communication.

Such a conundrum is illustrated by instances where enforcing agencies have looked to contextual considerations, such as the timing of the communication, the audience to which it is made, and the speaker's other activities, to resolve internal disagreements as to whether a communication is susceptible of "no other interpretation." *See, e.g., National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1150 n.10 (D. Utah 2008) (Lieutenant Governor's proposed context-based analysis considering that ads were "run in the midst of a contentious referendum signature gathering campaign" "flies in the face of the Supreme Court's mandate for clarity"); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281, 284 (4th Cir. 2007) (North Carolina Legislature's statute allowing consideration of contextual factors when nature of communication is "unclear" was unconstitutional; "speakers are left to guess and wonder whether a regulator, applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable as electoral advocacy"). Moreover, these same types of contextual considerations were expressly rejected by the Court in *WRTL*. *See WRTL*, 127 S. Ct. 2668-69 (rejecting as improper the consideration of factors such as speaker's active opposition to candidate in same election cycle, timing of the ads, and reference to website). The fact that regulatory agencies continue to resort to these "contextual" factors to determine

whether an ad or other statement is the "functional equivalent of express advocacy" chills political speech because the speaker cannot be sure whether the agency will subjectively determine that the ad is regulable and bring an enforcement action based upon that subjective determination. The following case and administrative adjudication serve as a prime illustration of what has become, in practice, an unworkable standard.

In *National Right to Work,* 581 F. Supp. 2d at 1135-36, the National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") challenged the constitutionality of several provisions of the Utah Code regulating campaign-related expenditures. The Utah Legislature enacted legislation permitting students to use state-funded scholarships, or vouchers, to attend private schools. *Id.* at 1136. The law was met with public opposition, leading to a ballot referendum seeking its repeal. *Id.* The Utah Teacher's Association was one of the proponents of the referendum, and several teachers and other public school employees contacted the Foundation claiming harassment and intimidation by union agents in efforts to collect signatures on petitions in opposition to the voucher bill. *Id.* at 1136-37. The Foundation, whose purpose is to defend "the rights of workers who are suffering legal injustice as a result of employment discrimination under compulsory unionism arrangements, and to assist such workers in protecting rights guaranteed to them under the Constitution and laws of the United States," began to run an radio and television ad campaign "in an effort to inform public school

employees of their rights and to oppose the Union." *Id.* at 1137 (citations omitted). The radio ad stated:

> Recently, teacher union officials have launched a state-wide political blitz in Utah's public schools. Their goal? To sabotage a popular new law meant to improve the quality of education for Utah's children.
>
> If you are a teacher or school employee, you have the right not to participate in the union's petition drive. In fact, the attorney general's office has just warned that the use of school time or resources for politics violates Utah's criminal laws. If you are pressured by a union activist, you have the legal right to say no – without fear of union retaliation. For free legal aid, contact the National Right to Work Foundation at 1-800-336-3600. Or righttowork.org.
>
> It's just plain wrong for union bosses or any special interest ground to misuse our public schools to promote their narrow political agenda. You have rights. Once again, that's 1-800-336-3600. Or righttowork.org.

Id.[2]

[2] The television ad used similar language. *National Right to Work*, 581 F. Supp. 2d at 1137-38.

The Utah Lieutenant Governor's office warned the Foundation that the ads may be subject to the Utah Election Code and instructed the Foundation to register as a political issues committee. *Id.* at 1138. The Lieutenant Governor's office believed that the phrases "sabotage a popular new law," "petition drive" and "narrow political agenda" subjected the ads to regulation. *Id.* (citations omitted). As a political issues committee, the Foundation would be subject to various disclosure and reporting requirements. *See id.* at 1139. The Foundation responded that it was not a political issues committee, but instead was "a 'legal aid organization offering free assistance to any public employee who might be coerced or intimidated in the exercise of their political rights by union agents.'" *Id.* at 1138, 1139-40. The Lieutenant Governor's office ultimately concluded that "although the Foundation was not a political issues committee, their ads constituted political issues expenditures, requiring the Foundation to comply with the reporting and disclosure requirements of [Utah Code Ann.] § 20A-11-702." *Id.*

Utah defined "political issues expenditure" as a "'payment . . . of money made for the purpose of influencing the approval or the defeat of a ballot proposition.'" *Id.* at 1140 (quoting Utah Code Ann. § 20A-11-101(30)(a)(ii)) (alterations in original). After reviewing *Buckley*, *McConnell*, and *WRTL*, the district court stated that "campaign finance laws may constitutionally regulate only those activities that are unambiguously campaign related." *Id.* at 1140-44. The court concluded that the government

may regulate only: (a) "express advocacy" that uses the "magic words" discussed in *Buckley* and (b) "the functional equivalent of express advocacy" meeting the definition of "electioneering communications" under the BCRA and being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 1144 (citations omitted).

Using these precedents as its guide, the court determined that the definition of "political issues expenditure" could apply only to "those expenditures that unambiguously relate to the enactment or defeat of a particular ballot measure." *Id.* at 1149. The court concluded that the ads were not express advocacy. *Id.* While the ads did refer to the voucher law and may have suggested the Foundation's support for the law, they did not "expressly advocate for either the success of vouchers or the failure of the petition drive." *Id.* at 1149-50. Moreover, the advertisements were not the functional equivalent of express advocacy because they did not meet the BCRA's definition of "electioneering communications." *Id.* at 1150.

The State, however, claimed that "any communication deemed to be the functional equivalent of express advocacy – whether it meets BCRA's definition of 'electioneering communication' or not – is constitutionally regulable." *Id.* at 1150. According to the State, when the context of the ads is considered, "a reasonable person hearing the ads would understand that a central purpose of the ads is to engender support for school vouchers" and was the

functional equivalent of express advocacy. *Id.* The court rejected this argument, reiterating the objective nature of the test for "functional equivalent of express advocacy" and noting that the State's context-based argument "flies in the face of the Supreme Court's mandate for clarity" and "provides no meaningful boundaries of regulable versus non-regulable speech, and will only lead to further disputes and litigation." *Id.* at 1150 n.10.

While the court in *National Right to Work* properly applied the constitutional standard and corrected the Lieutenant Governor's error, this case demonstrates how the standard in *McConnell* has become unworkable in practice. While the Court has eschewed standards that lead to discovery and litigation because of their chilling nature, the *McConnell* standard has had just that result. To substantiate its regulated speech position, Utah argued that the speech was the "functional equivalent of express advocacy" because of the context in which the ads were run. While the standard itself prescribes an objective view of the communications, the practical application of the standard by persons interpreting, applying, and enforcing the law is wholly subjective.

The fact that courts have corrected the misguided attempts of executive agencies to enforce campaign speech laws does not ameliorate the chilling effect that the prospect of enforcement may have upon a speaker. *See WRTL*, 127 S. Ct. at 2666 ("[l]itigation on such a [hearer-based] standard may or may not accurately predict electoral effects, but it will

unquestionably chill a substantial amount of political speech"). The fact that courts may be able to correct the unconstitutional application of *McConnell*'s standard does not assuage the fears of a speaker that faces civil and criminal sanctions for speaking. Because of the way in which *McConnell*'s standard is applied in practice, to engage in any speech that has the possibility of being interpreted as the functional equivalent of express advocacy requires a speaker willing and able to navigate through agency opinions and lawsuits, and willing to undertake the time and expense to comply with onerous reporting and disclosure requirements to speak. This situation cannot be what the *McConnell* Court envisioned or intended when it enunciated its standard for political speech.

The Commission has likewise struggled to objectively apply *McConnell*'s standard. In fact, it has adopted context-based regulations that allow a finding of express advocacy "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because . . . [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b). Although this statement of law explicitly mandates an inquiry of how the hearer interprets the statements, and further mandates the examination of contextual factors, at least one court has

interpreted the "reasonable minds could not differ" portion of the regulation to be "virtually the same test" set forth in *WRTL*. *See, e.g., The Real Truth About Obama, Inc. v. FEC*, Case No. 3:08-CV-483, 2008 WL 4416282, *11 (E.D. Va. Sept. 24, 2008). A context-based test seems to be anything but that which was contemplated by the *WRTL* Court.

It is clear that contextual and subjective factors necessarily play a role in determining whether speech is the functional equivalent of express advocacy, and resort to those factors may simply be inevitable. Within the Commission itself, various commissioners continue to struggle to apply *McConnell*'s standard without resort to subjective considerations. A case from the most recent election cycle starkly illustrates the issues faced by individuals attempting to apply an objective standard that requires them to review a communication to determine whether it is capable of an interpretation other than an appeal to vote.

In 2008, the National Right to Life Committee, Inc. requested an advisory opinion from the Commission to determine whether two proposed advertisements were regulated speech. *See* Transcript of Commission Proceedings, October 23, 2008 ("Transcript"), Appendix at 10a. The advertisements included statements such as "Will Obama now apologize for calling us liars when we were the ones telling the truth?" and "Barack Obama: a candidate whose words you can't believe in." Transcript, Appendix at 5a n.4. Despite the black-and-white scripts that were available to the

Commission, it was unable to conclude whether the advertisements were subject to regulation. While debating the issue, the Commission internally debated the extent to which contextual factors and subjective interpretations should influence the Commission's determinations.

The transcript from the October 23, 2008 Commission meeting at which the advertisements were discussed discloses that the Commission considered contextual and subjective factors in determining whether the ads were subject to regulation. *See* Transcript, Appendix at 10a-35a. In particular, the Commission unsuccessfully grappled with the proper place that "tone" and other "factors" had in its analysis. To illustrate, Chairman McGahn mentioned Obama's candidacy for president, indicating that "when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing [sic] it as much on Senator Obama's bid for the Presidency as his actions as a state legislator." Transcript, Appendix at 20a. The chairman noted how the ad was related to Mr. Obama's campaign slogan, observing that "the advertisement manipulates senator [sic] 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." Transcript, Appendix at 20a-21a. According to the chairman, though, "[t]he idea that the tone of the ad is now the standard to me is not a standard at all….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." Transcript, Appendix at 22a.

In response, Commissioner Weintraub, who favored finding one of the advertisements to be regulated speech, stated that "I hear what you're saying about words like 'tone' and 'factors,' and I would be happy to strip all that language out and just go by a straight meeting [sic] 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." Transcript, Appendix at 27a. The Commission, however, was unable to divorce itself from considering outside factors, and another commissioner even suggested that "there are minor things that can be identified and clarified, or interpretation that can be developed through discovery....But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly." Transcript, Appendix at 29a.

The "tone" and "factors" considered were influenced by the commissioners' own subjective thoughts, experiences, and interpretations. One commissioner recognized that, as a parent, she had taught her children to be honest while another commissioner noted that her mother "taught me that telling the truth was an important thing." Transcript, Appendix at 30a. Commissioner Weintraub also concluded that "honesty and integrity and trustworthiness and having a word that people

can believe in are really high on my list of good character traits . . . 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 vote for this guy." Transcript, Appendix at 19a.

The Commission also considered the effect the ads would have on the hearer by examining how a reasonable person would interpret the ads, specifically in the context of an actual mention of an individual's candidacy for office. One of the first considerations the Commission discussed during the meeting was whether referencing Mr. Obama as a "candidate" made the advertisement an appeal to vote. Commissioner Weintraub postulated that

> Maybe that's true that [just merely referencing Senator Obama as a candidate doesn't convert the ad into an appeal to vote], 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 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."

Transcript, Appendix at 18a (emphasis added).

III. THE FAILURE OF BRIGHT-LINE, OBJECTIVE TESTS IN THE CONTEXT OF "FUNCTIONAL EQUIVALENTS OF EXPRESS ADVOCACY" CREATES UNCERTAINTY AND CHILLS PROTECTED SPEECH. IN THE ABSENCE OF SUCH A CERTAIN STANDARD, SECTION 203'S BROAD PROHIBITION ON SPEECH CANNOT BE PERMITTED TO STAND.

It is true that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad 'describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future,' – but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *WRTL*, 127 S. Ct. at 2669 (quoting *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006)). While this guidance on *McConnell*'s standard appears workable on its face, its subsequent use in application evinces that it cannot be used by individuals without resort to the same subjective factors recognized as unconstitutional because of their chilling nature.

The consideration of the effect of a communication on the listener, the context of the speech in relation to other facts, and individual interpretations of intent by regulators leads to unlimited and

undefined factors that may be used to categorize a particular advertisement as "express advocacy," the "functional equivalent of express advocacy," or otherwise subject to regulation. The standard itself, while announced and envisioned by the Court as an objective standard, cannot be objectively applied without resort to unconstitutional "intent and effect" and contextual considerations and, instead, becomes a subjective determination based upon a morass of personal opinions and random factors, multiplied by the fact that there will likely be numerous regulatory agencies reviewing the same communication. This result hardly provides the bright line necessary to protect political speech, which is at the core of First Amendment protections. Instead of being evaluated on objective factors, speakers are left to rely upon the personal opinions, upbringings, and thoughts of a few commissioners and enforcing officials to determine whether the message the speaker wants to convey will be seen as the functional equivalent of express advocacy. As observed in *Buckley*,

> [W]hether words intended and designed to fall short of invitation would miss that 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.

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

CONCLUSION

Amicus Alliance Defense Fund respectfully requests that this Court now overrule that portion of *McConnell* that upholds the facial validity of Section 203 of the Bipartisan Campaign Reform Act, reverse the judgment of the District Court, and remand the case to that court for further proceedings.

Respectfully submitted,

Benjamin W. Bull
Counsel Of Record
Erik Stanley
Alliance Defense Fund
15100 North 9th Street
Scottsdale, Arizona 85260
(480) 444-0020

Tyson C. Langhofer
Megan E. Garrett
Court T. Kennedy
Thomas A. Simpson
Nicholas G. Frey
Stinson Morrison Hecker LLP
1625 North Waterfront Pkwy, Suite 300
Wichita, Kansas 67206

Robert J. McCully
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, MO 64108-2613

Attorneys for Amicus Curiae

July 30, 2009

APPENDIX 1

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")[3] 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

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

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 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.[4]

---

[4] 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.

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*.

> **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 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?

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), 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, 11C.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
Kaylan Lytle Phillips
1 South Sixth Street
Terre Haute, Indiana 47807
812-232-2434

* * * *

CROSSROADS COURT REPORTING
Renee R. Dobson, RMR
9733 Sable Ridge Lane
Terre Haute, IN 47802
812-299-0442

[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
My Commission Expires:
September 6, 2015
Renee R. Dobson,
Notary Public,
Residing in Vigo
County, Indiana