COMMENTS ON THE FEC NOTICE OF PROPOSED RULEMAKING ON ELECTIONEERING COMMUNICATIONS TO IMPLEMENT THE SUPREME COURT DECISION IN *FEC v. WISCONSIN RIGHT TO LIFE, Inc.*
By
THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

INTRODUCTION

Pursuant to the request in the Notice of Proposed Rulemaking (NPRM) issued by the Federal Election Commission on August 23, 2007, the Thomas Jefferson Center for the Protection of Free Expression and the Media Institute submit the following comments on the proposed revisions to 11 C.F.R. parts 100, 104, and 114 that would implement the U.S. Supreme Court decisions in *Wisconsin Right to Life, Inc. v. FEC* (*WRTL I*), 546 U.S. 410 (2006) and *FEC v. Wisconsin Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652 (2007).

The Thomas Jefferson Center is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990 the Center has filed briefs as *amicus curiae* in numerous state and federal courts in cases that raised important free expression issues.

The Media Institute (the "Institute") is an independent, nonprofit research foundation in Washington, DC, specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; deregulation of the media and communications industries; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects

and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

COMMENTS

I. THE SUPREME COURT, IN *WRTL I* AND *WRTL II*, RECOGNIZED THE APPROPRIATENESS OF "AS-APPLIED" CHALLENGES TO THE "ELECTIONEERING COMMUNICATIONS" PROVISIONS OF BCRA.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court found that the Bipartisan Campaign Reform Act of 2002 (BCRA) 2 U.S.C. §441b(b)(2) was not facially overbroad under the First Amendment. While the Court found regulation of campaign speech permissible, it recognized that such regulation might not apply to issue ads. *McConnell*, 540 U.S. at 206. The Justices made clear in *WRTL I* that their decision in *McConnell* was limited to upholding a facial challenge. 546 U.S. at 411-12. In keeping with their stance on the appropriateness of as-applied challenges, the Justices went on to "confront such an as-applied challenge" in *WRTL II*, where they found that the BCRA unconstitutionally infringed upon the first amendment rights of Wisconsin Right to Life (WRTL). *WRTL II*, 127 S. Ct. 2652.

A. *Wisconsin Right to Life I*

The Supreme Court in *WRTL I* reversed a district court's dismissal of WRTL's challenge to § 203 of the BCRA as applied to WRTL. *WRTL I*, 546 U.S. at 411. In dismissing that complaint, the district court had relied on a footnote in *McConnell* foreclosing "as-applied" challenges to the prohibition on electioneering communications. *Id.*; *see McConnell,* 540 U.S. at 190, n.73 (upholding "all applications of the primary definition" of electioneering communication). The Supreme Court ruled, however, that the district court had incorrectly read that footnote as precluding subsequent, as-applied, challenges, emphasizing in so ruling that the validation of § 203 in *McConnell* was strictly limited to the facial challenge presented in that

case.

> Contrary to the understanding of the District Court, that footnote merely notes that because we found BCRA's primary definition of “electioneering communication” facially valid when used with regard to BCRA's disclosure and funding requirements, it was unnecessary to consider the constitutionality of the backup definition Congress provided. In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.

WRTL I, 546 U.S. at 411-12. The Court thus vacated the district court’s judgment and remanded the case for the district court to consider the merits of WRTL’s as-applied challenge to § 203. *Id.* at 412.

B. *Wisconsin Right to Life II*

Although *WRTL I* and *WRTL II* did not overrule the Court’s holding in *McConnell* with respect to electioneering communications, these more recent rulings do represent a substantial qualification of the seemingly absolute nature of the earlier judgment. *WRTL II* focused on the application of the ban to specific situations, specifically to issue ads that are not the “functional equivalent” of campaign speech. *WRTL II*, 127 S. Ct. at 2659. The emphasis in *WRTL II*, then, was on the specific application of the ban rather than the ban’s facial or abstract validity. The Justices declared, significantly, that “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.” *WRTL II*, 127 S. Ct. at 2667 (emphasis added). Thus, while *McConnell* seemingly banned all express advocacy covered by the time periods in BCRA, *WRTL II* focused on delineating the boundaries of what can, or more accurately what cannot, be termed “the functional equivalent of express advocacy.”

The Court’s holding thus placed the burden squarely on those who would challenge the issue ad in question, permitting advertisements based on issues that mention federal candidates but are not explicitly *and solely* for the purpose of endorsing or opposing a specific candidate or

candidates. The Court invoked for this purpose the principle that "discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election" and emphasized that "where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 127 S. Ct. at 2669. WRTL's challenge of § 203 of the BCRA was an issue of specific application of the ban through a test of functional equivalency to express advocacy, which is held in this case not to be automatically found in all "issue ads." As a first narrowing of the *McConnell* decision's broad rule against express advocacy, this language clearly recognized that mentioning a candidate is not *per se* express advocacy if it can be open to any other interpretation.[1]

II. *WRTL II* GIVES THE COMMISSION A BROAD MANDATE TO UNBURDEN "ISSUE ADS," FAVORING ALTERNATIVE 2 OF THE FEC PROPOSAL.

In *WRTL II*, the Supreme Court held that the BCRA was unconstitutional as applied to the ads WRTL wished to run. Through this decision and the opinion, the Justices showed support for broad deregulation of issue ads. Of the alternatives, Alternative 2 is most consistent with *WRTL II* and the broad deregulatory mandate.

[1] Indeed, the Court's previous jurisprudence establishing a "reasonable" standard is consistent with a formulation that imagines multiple plausible readings of a speech-related situation. *Cf. Morse v. Frederick,* 127 S.Ct. 2618, 2622 (2007) (holding that public "schools may take steps to safeguard those entrusted to their care from speech that *can reasonably be regarded* as encouraging illegal drug use" (emphasis added), the Court affirmed a school's disciplinary actions against a student for holding up a banner with the ambiguous message "Bong Hits 4 Jesus" at a school event. Use of the negative "reasonable interpretation" standard in *WRTL II* suggests that if an ad contains two or more plausible meanings – one as a genuine issue ad and another as express advocacy – the advertisement is not capable of proscription under BCRA § 230.

A. *WRTL II* reflects the Court's support for broad deregulation of issue messages.

Chief Justice Roberts' majority opinion in *WRTL II* gave the FEC a broad deregulatory mandate. The opinion framed the question as "whether it is consistent with the First Amendment for BCRA § 203 to prohibit WRTL from running these three ads." Yet the Supreme Court's reasoning reached beyond simple prohibition, casting doubt on *any* regulatory burden on messages that are neither express advocacy nor the functional equivalent thereof. Aspects of each section of the *WRTL II* opinion justify loosening regulation of issue messages, including the statutory reporting requirements.

The Court's rationale for rejecting the "intent and effect" test proposed by the Government suggests that broader deregulation is appropriate. The Court recognizes that the persistent threat of litigation posed by a subjective, fact-sensitive criterion would leave speakers with "no security for free discussion." *WRTL II*, 127 S. Ct. at 2665 (internal citations omitted). Chief Justice Roberts goes on to urge that the proper test for protection should provide a "safe harbor" for issue ad communications and that such a standard must "reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because an intent-based test would "chill core political speech by opening the door to a trial on every ad within § 203 on the theory that the speaker actually intended to affect an election," such a standard would not properly reflect that commitment. *Id.* at 2665-66. The Court also reminded us that First Amendment rights "need breathing room to survive," which a subjective test could not ensure. *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

When the Supreme Court fashioned its own test for speech that is functionally equivalent to express advocacy, it invoked these same protective principles. That analysis proceeded from the proposition that the First Amendment protects truthful public debate from "previous restraint or fear of subsequent punishment." *WRTL II*, 127 S. Ct. at 2666 (quoting *Bellotti*, 435 U.S. at 776). In order to insure adequate protection, a test on which it depends must "give the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S. Ct. at 2667. The Court recognized that its test (classifying speech as a protected issue ad wherever such an interpretation could reasonably be made) may distinguish between issue ads and express advocacy where, in practical application, there really is no such distinction; this inaccuracy is the price we pay for our First Amendment freedom. As Chief Justice Roberts observed, "Where the First Amendment is implicated, *WRTL II,* 127 S. Ct. at 2669. goes to the speaker, not the censor." Again, such a broadly speech-protective view supports a deregulatory approach that goes beyond merely lifting specific black out periods. The burdens of compliance and the "fear of subsequent punishment" can both be reduced significantly by revising the rules in accordance with Alternative 2 proposed by the Commission.

Finally, in applying strict scrutiny to BCRA § 203, the Supreme Court reminded us that "This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *WRTL II*, 127 S. Ct. at 2670. The Court then appraised the several candidate interests that might warrant regulation, and rejected each of them *categorically*. Such interests were not to be weighed against the degree of harm imposed by the policy, but rather were dismissed as completely inappropriate for the purpose of justifying *any* burden on speech. Accordingly, one must ask, by reference to what possible regulatory interest might reporting requirements be justified? By declaring that none of the putative

justifications for regulating issue ads could satisfy the first prong of the strict scrutiny test, the Court gave this Commission ample warrant to take broad deregulatory steps.

B. Alternative 2 accords most closely with the Supreme Court's ruling in *WRTL II* to protect freedom of expression.

The Thomas Jefferson Center for the Protection of Free Expression and the Media Institute strongly prefer Alternative 2, believing that such a preference also accords most closely with the Supreme Court's ruling in *WRTL II*. In that judgment, the Justices were most conscientiously solicitous of freedom of expression, ruling that a court must give the "benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S. Ct. at 2667. The Court went on to declare that "where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id*. at 2669. Further demonstrating its speech-protective stance, the Justices insisted that any application of BCRA should be narrowly tailored to achieve a compelling interest. *Id.* at 2664.

These principles suggest a strong preference for broad deregulation rather than a mixed approach that would retain the reporting requirement. Obviously reporting requirements do not impose burdens as grave or intrusive as the prospect of litigation – they do not typically, as the *McConnell* opinion observed, "prevent anyone from speaking." *McConnell*, 540 U.S. at 201. But reporting imposes a cost of compliance and poses a risk that once the government collects information on political speech, it will act on that information in a way that is adverse to the speaker. A burden is a burden, and *WRTL II* clearly expressed a categorical commitment to unburdened expression. Declining to extend the reporting requirements would significantly further that commitment, by removing the costs of compliance and the fear of retribution for political speech.

Within this framework, Alternative 2 far better exemplifies the spirit of the *WRTL II* decision than does Alternative 1. While Alternative 1 would create an exemption "solely from the prohibition on the use of corporate and labor organization funds to finance electioneering communications," Alternative 2 would wholly exempt such communications from the definition of "electioneering communication." Notice of Proposed Rulemaking, 72 Fed. Reg. 50261, 50262-63 (Aug. 31, 2007). The principal difference between Alternative 1 and Alternative 2 appears to be that reporting requirements will continue under Alternative 1 and will cease under Alternative 2. *Id.* If, as the Supreme Court ruled, non-express communications are simply not regulable, then reporting requirements are not in the spirit of *WRTL II*. By maintaining the reporting requirements, the FEC would create a category of quasi-regulable communications. While the message would not be regulable to the extent of total prohibition or by application of criminal sanctions to its mere utterance, it would anomalously be regulable through the reporting requirement. Since the Supreme Court confidently concluded that such messages may not be regulated directly for the most compelling of First Amendment interests, consistency and logic dictate that these communications should be completely non-regulable, not partially non-regulable.

Moreover, under Alternative 2 the exemption would extend to any entity that pays for "communications that satisfy the exemption articulated in *WRTL II*." Notice of Proposed Rulemaking, 72 Fed. Reg. at 50263. This extension would reflect directly and logically the spirit of *WRTL II*. By applying the exemption in this manner, the FEC would protect First Amendment speech of all entities, not just corporations. The Supreme Court declared that "discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 127 S. Ct. at 2669. The Court did not limit such discussion to corporations, but rather

espoused an expansive view of the protection of expressive activity, focused on the nature of the communications rather than limited by an examination of the source. The proposed extension of the exemption, then, would clearly reflect the rationale and reasoning of *WRTL II*.

Overall, Alternative 2 is clearly and substantially more consistent with the decision in *WRTL II*. The Supreme Court resolved any doubts in favor of First Amendment rights and made clear that Government interference should be minimal. By not having reporting requirements and extending the exemption to all entities that satisfy the exemption, Alternative 2 ensures that Government interference is minimal and that First Amendment speech is protected.

III. THE COMMISSION'S PROPOSAL OF A SAFE HARBOR FOR COMMERCIAL AND BUSINESS ADVERTISEMENTS IS CONSISTENT WITH THE SUPREME COURT'S EXPANSIVE VIEW OF THE FIRST AMENDMENT IN *WRTL II*.

The Commission should be commended for its proposal to establish a Safe Harbor for Commercial and Business Advertisements, particularly the proposed revision of 11 C.F.R. 100.29(c)(6)(ii) included within Alternative 2. Notice of Proposed Rulemaking, 72 Fed. Reg. at 50269. The creation of such a Safe Harbor would give meaningful effect to the expansive holding of *WRTL II*, which should not be confined to communications containing issue advocacy or grassroots lobbying, but rather should extend to other types of communications that are not the functional equivalent of express advocacy. The Commission has invoked support for this Safe Harbor by recognizing that "issue advocacy is not the only conceivable non-electoral 'reasonable interpretation' to which a communication might be susceptible." *Id.* While *WRTL II* did not expressly modify "the long-standing jurisprudence that commercial speech is entitled to less Constitutional protection than political speech," no revision of the commercial speech doctrine would be required in order to recognize the Safe Harbor for Commercial Advertisements. *Id.* Indeed, the Supreme Court's expansive dicta relating to the First Amendment protections

available to commercial speakers surely implied the Justices' conviction that commercial speech should not fall under the proscriptions of the BCRA if it falls within the "reasonable interpretation" rule.

A. The Safe Harbor Provision Accords with the Expansive Holding of *WRTL II.*

The Commission's proposed approach would effectuate the broad category of protected political speech recognized in *WRTL II*, in which the Court expressly repudiated a "greater-includes-the-lesser approach" to the regulation of issue advocacy under the BCRA. *WRTL II*, 127 S. Ct. at 2672. In reaching this conclusion, the Court cautioned that a "greater-includes-the-lesser" rule ultimately "would dictate that virtually all corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech." *Id.* The Court's rejection of an "intent-and-effect test" for determining whether a particular ad is the functional equivalent of express advocacy further supports a reading of *WRTL II* that would include commercial messages within the realm of protected political speech. The Court was specifically concerned that FEC proscription of issue ads under the BCRA might, (1) effect a broad proscription of constitutionally protected political speech, and (2) proscribe speech solely based on the identity of the speaker. *See id.* at 2665-66. These interests may likewise be applied to commercial advertisements. Under *WRTL II*, commercial advertisements are protected so long as they may reasonably be interpreted as something other than express advocacy. Because commercial advertisements by definition must be interpreted as having a meaning apart from express advocacy, *WRTL II* dictates that this speech must not be proscribed by the BCRA.

Nor does fact that commercial messages may be conveyed by or through corporate speakers diminish in any way the degree of First Amendment protection they should receive. In

the course of dispelling possible FEC concerns regarding the stated "compelling interests" for prohibiting the WRTL advertisements, the Court specifically invoked *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978). *See WRTL II*, 127 S. Ct. at 2673 (rejecting the FEC's "greater-includes-the-lesser" argument because this notion "would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights"). In *Bellotti*, the Court had restated a familiar premise of its First Amendment jurisprudence – that discussion of governmental affairs is "indispensable to decisionmaking in democracy" – in holding that the corporate identity of the speaker did not abrogate this basic right. *Bellotti*, 435 U.S. at 776-77 (asserting that the "inherent worth" of political speech, measured by its capacity to inform the public, "does not depend on the identity of its source, whether corporation, association, union, or individual"). Accordingly, the Commission's creation of a Safe Harbor for Commercial and Business Advertisements would effectuate the expansive holding of *WRTL II*, which offered broad First Amendment protection in the context of issue ads. In addition, the Safe Harbor would comport closely with the dicta of *WRTL II* which recognize that corporations are no less entitled to participate in political discourse than are natural persons, so long as the speech at issue is not the "functional equivalent" of express advocacy.

B. The Interests Supporting Protection of Issue Advocacy in *WRTL II* Apply Comparably in the Context of Commercial Advertisements

The Court in *WRTL II* expressly reaffirmed that corporations are permitted to seek the protections of the First Amendment. *WRTL II*, 127 S. Ct. at 2671 (rejecting the proposition that *McConnell*, or any other decision, would justify the regulation of all corporate speech). But while this language likely indicates the Court's willingness to accord to corporate speech an expansive range of First Amendment protections, the Justices did not explicitly address the

category of commercial and business advertisements in *WRTL II*. Nevertheless, by applying the "reasonable interpretation" test and the underlying interests used by the Court to arrive at the holding in *WRTL II*, it seems clear that commercial and business advertisements should receive the same degree of First Amendment protection as issue advertisements.

The Court's framework in *WRTL II* derived from the two "compelling interests" asserted respectively in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990): (1) the government's interest "in preventing corruption and the appearance of corruption" in election campaigns, and (2) the interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *WRTL II*, 127 S. Ct. at 2672. But when both issue advertisements and commercial advertisements are capable of a characterization that is not the equivalent of "express advocacy," then under *Buckley* the Government's interest in preventing *quid-pro-quo* corruption (or the appearance thereof) cannot justify regulations upon commercial advertisements. And in *Austin*, the ban on corporate campaign was justified, in part, by the fact that corporations remain free to speak on other political issues. *Id.* at 2673. Therefore, the Commission seems correct in its understanding that some commercial advertisements falling within the definition of "electioneering communications" could reasonably be interpreted as having a non-electoral, business or commercial purpose. Notice of Proposed Rulemaking, 72 Fed. Reg. at 50269. Consequently, the Commission's explicit recognition of the application of *WRTL II* to the area of commercial speech is a valuable addition to the proposed revisions, and the Safe Harbor provision should be commended as direct application of the speech-protective imperative of the *WRTL II* decision.

Respectfully submitted,

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