FEDERAL ELECTION COMMISSION
Hearings on Notice of Proposed Rulemaking
Definition of "Electioneering Communications"
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Chairman Lenhard and Members of the Commission:

My name is Jeremiah Morgan. I am an attorney with the law firm William J. Olson, P.C. and am appearing today on behalf of both the Free Speech Coalition and the Free Speech Defense and Education Fund. Thank you for the opportunity to testify on the proposed regulations.

The Free Speech Coalition was founded in 1993 as a group of ideologically-diverse nonprofit organizations, primarily Internal Revenue Code section 501(c)(4) organizations and the companies that work with them. Its purpose is to help protect such organizations' First Amendment rights through the reduction or elimination of excessive regulatory burdens on those rights. The Free Speech Defense and Education Fund was established in 1996, and is the section 501(c)(3) education and litigation sister organization of FSC. We filed written comments on behalf of both organizations on October 1, 2007.

Whenever an administrative agency loses a case in court and is required to rewrite its regulations, it faces the temptation to minimize its loss through the rulemaking process. We urge the Commission to resist this temptation.

In this rulemaking proceeding, the Commission should pick up where Chief Justice Roberts left off in WRTL II. In the final paragraph of the Chief Justice's opinion, he said, "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to [the electioneering communications] ban — the issue we *do* have to decide — we give the benefit of the doubt to speech, not censorship." The regulations proposed by the Commission do not appear to follow suit; they do not give the benefit of the doubt to the rights guaranteed by the First Amendment.

- "Express advocacy" using "magic words" was the brightline test for the Commission's jurisdiction, developed in Buckley. BCRA extended Commission jurisdiction in regulating Electioneering Communications. In turn, BCRA itself was limited in McConnell and WRTL II to the "functional equivalence of express advocacy."

So, the Commission's jurisdiction is limited to the regulation of federal **elections**, and yet the Commission is being asked by some in Congress and some who testify here today to protect **incumbents** from criticism or pressure from their constituents. That should no longer be possible as the Supreme Court in WRTL II blew a hole in Congress' attempt to give each Congressman and Senator a pre-election trademark on the use of their names.

- Alternative 1's exemption would unconstitutionally maintain the **reporting** requirement for issue advertisements such as WRTL's. While the NPRM maintains that the Commission "could construe" WRTL II as not affecting the reporting requirements for electioneering communications, such a reading is not only illogical, but unconstitutional. The Commission cannot demand reporting without a nexus to federal elections. If it cannot regulate certain electioneering communications, it obviously cannot require reports on those expenditures. The same is true for **disclaimer** requirements.

- Likewise, Alternative 2 is unconstitutionally structured to exempt issue ads from its definition of "electioneering communication." This is backwards.

  The WRTL II Court's opinion did not allow WRTL's ads as an exemption to BCRA § 203. Instead, the Court defined an ad that 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." The NPRM converts this into an exemption "if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate." The converse of a statement is not the same as a statement, and when in doubt, stick with the Court's configuration.

- Actually, neither alternative proposed in this NPRM would adequately incorporate the principles of the Supreme Court's decision in WRTL II. The two proposals appear to be based on the presumption that the constitutional difficulties can be remedied by creating an **exemption** in the faulty regulations. This has the effect of shifting the burden of proof to those engaging in political speech that they are covered by the **exemptions** or within the **safe harbors**. The Supreme Court in WRTL II affirmed that ads such as WRTL's are political speech. Thus, the application of BCRA § 203 is subject to strict scrutiny, and therefore the Commission has the burden to prove that a particular ad is a prohibited electioneering communication. Commission regulations should not be written so that an organization has to prove that it is exempt.

- We suggest that a proper incorporation of the WRTL II decision requires the Commission to revise its definition of "electioneering communication" to clearly define what activity is **prohibited**, and not focus on what is **exempted** from the

prohibition. Giving First Amendment rights the benefit of the doubt means not treating those rights as exceptions or afterthoughts. While redefining "electioneering communication" may be considered a difficult task, yet a proper rulemaking now might reduce later the **administrative** burden as well as the **litigation** burden of enforcing or defending inappropriately drafted regulations. And it will **chill** less speech, allowing for **robust** discourse of the sort the nation's founders protected by the First Amendment.

- Lastly, with respect to the NPRM's interest in the "basic background information" clause of the Supreme Court's decision, the NPRM treats that decision with selective creativity, which appears to show a lack of respect for the actual text of the opinion. The Chief Justice said, "Courts need not ignore **basic background information** that may be necessary to put an ad in context."

  The Commission could avoid entirely any consideration of "basic background information" if it heeded the Court's other admonitions. The Court said, for example, that "the proper standard … must entail **minimal** if any discovery" (p. 2666), "there generally should be **no discovery** or inquiry into the sort of 'contextual' factors highlighted by the FEC" (p. 2669, fn.7), and finally, "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" (p. 2669). And yet none of these relevant portions of the Chief Justice's opinion were even discussed by the NPRM.

  Sadly in discussing "basic background information," the NPRM **manipulates** the Court's language to **maximize** its own role and to **minimize** the sphere of political speech. Hopefully, the Commission will reject both alternatives and adopt one which honors the language of the First Amendment as Chief Justice Roberts did at the close of his WRTL II opinion.

Thank you.