

FEDERAL ELECTION COMMISSION

Petition for Rulemaking: Protecting “Genuine Issue Ads” From the “Electioneering Communication” Prohibition & Repealing 11 C.F.R. § 100.22(b)

The James Madison Center for Free Speech petitions the Commission for a rulemaking, 11 C.F.R. Part 200, implementing the holding of the United States Supreme Court in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (“*WRTL I*”), that the prohibition on corporate and union “electioneering communications,” 2 U.S.C. § 441b(a), (b)(2), cannot be constitutionally applied to genuine issue ads. This requires two changes in the Commission’s regulations.

I. Recognize Protection for “Genuine Issue Ads”

The Commission should add a rule recognizing protection for what *McConnell* called “genuine issue ads,” *McConnell v. FEC*, 540 U.S. 93, 206 & n.88 (2003), from the “electioneering communication” prohibition. *WRTL II* embraced the term “genuine issue ad,” 127 S. Ct. at 2659 (Roberts, C.J., joined by Alito, J.) (quoting *McConnell*, 540 U.S. at 206 n.88). Instead of defining an exception for genuine issue ads, the Court defined the limited scope of the electioneering communication prohibition itself. *Id.* at 2667 (Roberts, C.J., joined by Alito, J.). In *McConnell*, the Court upheld the prohibition against facial constitutional attack because some electioneering communications were “the functional equivalent of express advocacy.” *McConnell*, 540 U.S. at 206. *WRTL II* established 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.” 127 S. Ct. at 2667 (Roberts, C.J. joined by Alito, J.). All ads outside this narrow definition of “functional equivalent” ads are genuine issue

ads that may not be prohibited.

Promulgating such a rule should be neither complex nor time-consuming because the Commission should simply adopt the Court's own statement of the test for communications that are subject to the "electioneering communication" prohibition and then affirm that all other ads that fall within the "electioneering communication" definition are lawful and outside the prohibition. So the prohibition of corporations or unions from "making payments for an electioneering communication to those outside the restricted class," 11 C.F.R. § 114.2(b)(2)(iii), requires the qualification that "this paragraph (b)(2)(iii) shall apply only if the electioneering communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." And 11 C.F.R. § 114.14 should be similarly modified to show that its proscriptions only apply to "electioneering communications" that meet the Supreme Court's test. The FEC could then provide the regulated community with some examples of communications that are genuine issue ads, such as the grass roots lobbying that the WRTL ads represent, efforts to lobby federal candidates to take positions on certain issues, and communications that provide relevant information to voters about the position of candidates on issues. Furthermore, the Commission could consider adopting factors that would either establish or preclude establishing that certain ads are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

II. Repeal the Alternative Definition of "Expressly Advocating"

The Commission should repeal 11 C.F.R. § 100.22(b), which is the Commission's controversial alternative definition of "expressly advocating." This is necessary, at a minimum, to ensure that there is a bright line between what is considered a prohibited "electioneering

communication” and an “independent expenditure” because the definition of “electioneering communication” excludes “independent expenditures.” 2 U.S.C. § 434(f)(3)(B)(ii). The alternative definition of “expressly advocating” at § 100.22(b) contains some of the features of the *WRTL II* Court’s narrow application of “electioneering communication” prohibition. To the extent that they are alike, there is an overlap between the definition of express advocacy (which governs “independent expenditures”) and the definition of “electioneering communication,” leaving the regulated community at a loss as to which regulatory regime they must follow.

There are additional substantive reasons to repeal the alternate definition at subsection § 100.22(b). First, subsection (b) is constitutionally overbroad under the Court’s analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976), *McConnell*, and *WRTL II*. While *McConnell* said that the express advocacy test itself was not a constitutionally-mandated line, there was just such a line identified in *Buckley*. *Buckley* employed the express advocacy construction to both expenditure and disclosure provisions in *Buckley* to assure that any restriction was “unambiguously campaign related.” *Id.* at 81. The key to the *Buckley* analysis here is the clearly articulated constitutional question of whether “the *relation* of the information sought to the purpose of the Act [i.e., to regulate federal elections] *may be too remote*,” and, therefore, “*impermissibly broad*.” *Id.* at 80 (emphasis added). The Court immediately provided the benchmark for measuring whether a regulation is overbroad for regulating activity too remote from regulating elections, namely, that the government may only regulate First Amendment activities that are “*unambiguously related* to the campaign of a particular federal candidate.” *Id.* at 80 (emphasis added).

In *WRTL II*, the Court reasserted this unambiguously-campaign-related requirement in its test restricting the reach of the electioneering communication prohibition in order to protect

genuine issue ads: “[A]n 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.” 127 S. Ct. at 2667 (Roberts, C.J. joined by Alito, J.). *See also id.* at 2672 (corporate-form corruption interest does not “extend[] beyond campaign speech”). *WRTL II* also strictly restricted appeals to context in making the “no reasonable interpretation” determination. *Id.* at 2667-69. And it declared that close proximity to an election cannot establish functional equivalence to express advocacy. *Id.* at 2668.

By contrast, the FEC’s alternative definition of “expressly advocating” at 11 C.F.R. § 100.22(b) does not meet the “unambiguously campaign related” test because it embraces “external events” as important in establishing express advocacy and singles out “proximity to the election” as significant. Where *WRTL II*’s rule requires that an ad constitute “an appeal to vote,” 127 S. Ct. at 2667, the FEC’s definition employs the more vague “advocacy of the election or defeat of one or more . . . candidates,” a phrase that *Buckley* expressly held to be unconstitutionally vague and so imposed the express advocacy construction in an attempt to save the provision at issue. 424 U.S. at 42. The FEC’s alternative definition would allow a finding of express advocacy where an ad “could only be interpreted by a reasonable person as containing advocacy . . . because “[t]he electoral portion is . . . suggestive of only one meaning” The term “suggestive” is very vague, and the formulation permits a finding of express advocacy based on a reasonable person standard. *WRTL II*’s test for the functional equivalent of this express advocacy permits such a finding “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” 127 S. Ct. at 2667, which focuses on the words of the text and their objective meaning and permits a finding of equivalence only if no

other interpretation is reasonably possible.¹

Second, the test is based on an erroneous interpretation of how the Ninth Circuit treated the express advocacy test in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Subsection (b) utilizes some of the analysis in *Furgatch*, assuming that the Ninth Circuit was not requiring explicit words of advocacy of election or defeat, as required by subsection (a) of § 100.22. This, however, is erroneous, as the Ninth Circuit itself has recently explained. *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (“a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy”).

Third, subsection (b) itself has been declared unconstitutional in two Circuits and the Southern District of New York, *Maine Right to Life v. FEC*, 98 F.3d 1 (1st 1996) (per curiam); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D. N.Y. 1998), and other circuits have rejected *Furgatch*-style definitions. See *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002); see also *North Carolina Right to Life v. Leake*, 482 F. Supp. 2d 686 (E.D.N.C. 2007); *Gov. Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (Cal. Ct. App. 2002); *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 4 P.3d 808 (Wash. 2000). As a result, Subsection (b) is unenforceable in many areas of the county.

Fourth, *McConnell* said that the express advocacy test employed in *Buckley*, 424 U.S. 1, “was the product of statutory interpretation rather than a constitutional command” so that “a

¹The FEC test does include the “suggestive of only one meaning” language, but “suggestive” moves from actual meaning of the words at issue to what they might suggest.

statute that was neither vague nor overbroad would be required to toe the same express advocacy line.” 540 U.S. at 192. But since *McConnell*, several courts have embraced the express advocacy construction as an indispensable tool in dealing with vague or overbroad provisions. For example, the Ninth Circuit in *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004), followed the Sixth Circuit in endorsing the express advocacy test as the appropriate tool where a provision is vague and overbroad:

Nevertheless, as stated recently by the Sixth Circuit, *McConnell* “left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.” *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

See also *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, No. 06-0425) (N.D. Cal. Sep. 20, 2006) (Order Granting Plaintiff’s Motion for Summary Judgment and Denying Defendants’ Motion for Summary Judgment). Subsection (b), because it eschews a bright line and goes beyond express advocacy, continues to be unconstitutionally vague after *McConnell*.

In sum, *WRTL II* and other federal court decisions make it clear that the government may restrict only two types of speech in this area: (1) express advocacy under *Buckley*’s “express words of advocacy of election or defeat” formulation, 424 U.S. at 44 n.52, and (2) the “functional equivalent of express advocacy” under *WRTL II*’s formulation, i.e., communications run *within the “electioneering communication” prohibition periods* that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S. Ct. at 2667. Accordingly, the alternative definition of “expressly advocating” at § 100.22(b) must be

repealed.

The “electioneering communication” blackout periods of the 2008 election cycle are fast approaching. Rather than requiring groups to seek as-applied exceptions to the “electioneering communication” prohibition from the courts, the Commission should adopt a rule, as it did to implement the Court’s *MCFL* exemption, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”), to give effect to the Court’s ruling in *WRTL II*.

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Respectfully submitted,

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