BEFORE THE FEDERAL ELECTION COMMISSION

In re:	)	
Notice of Proposed Rulemaking	)	Notice 2007-16
Electioneering Communications	)	
(Federal Register, August 31, 2007)	)	

FREE SPEECH COALITION, INC. AND
FREE SPEECH DEFENSE AND EDUCATION FUND, INC.
COMMENTS ON THE FEC's PROPOSED REGULATIONS ON
ELECTIONEERING COMMUNICATIONS (72 FR 50261)
(October 1, 2007)

The **Free Speech Coalition, Inc.** ("FSC"), founded in 1993, and tax-exempt under section 501(c)(4) of the Internal Revenue Code ("IRC"), is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC's purpose is to help protect First Amendment rights through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights. (Free Speech Coalition, Inc., (703) 356-6912 (telephone); www.freespeechcoalition.org; freespeech@mindspring.com.)

The **Free Speech Defense and Education Fund, Inc.** ("FSDEF"), established in 1996, is the education and litigation sister organization of FSC. FSDEF is tax-exempt under IRC section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

INTRODUCTION

In response to the August 31, 2007 Federal Election Commission ("FEC") notice of proposed rulemaking requesting comments on revisions to FEC rules governing "electioneering communications," the Free Speech Coalition, Inc. and the Free Speech Defense and Education Fund, Inc. submit the following comments in strong opposition to both Alternative 1 and Alternative 2, each of which fails to conform with the June 25, 2007 Supreme Court opinion in FEC v. Wisconsin Right to Life, Inc., ___ U.S. ___, 127 S. Ct. 2652 (2007) (hereinafter "WRTL II").

FSC and FSDEF participated as *amici* in the WRTL II appeal before the U.S. Supreme Court.[1] The Supreme Court's decision in that case forms the basis of the Federal Election Commission's present Notice of Proposed Rulemaking proceeding.

REQUEST TO TESTIFY

The Free Speech Coalition, Inc. and the Free Speech Defense and Education Fund, Inc. hereby request the opportunity for Jeremiah L. Morgan to testify on their behalf on these matters at the hearing on October 17, 2007 (during the afternoon portion of the hearing, if possible).

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[1] FSC and FSDEF filed an *amicus curiae* brief, along with several other parties, in support of Wisconsin Right to Life's challenge. The other parties participating in the *amicus* brief with FSC and FSDEF were Citizens United, Citizens United Foundation, Gun Owners of America, Inc., Gun Owners Foundation, Joyce Meyer Ministries, Conservative Legal Defense and Education Fund, Lincoln Institute for Research and Education, Public Advocate of the United States, DownsizeDC.org, Inc., and Downsize DC Foundation. A copy of that brief may be found at http://www.freespeechcoalition.org/pdfs/WRTL_II_Amicus_Brief_Final.pdf.

ARGUMENT

I. ALTERNATIVE 1 IS BASED UPON A MISREADING OF WRTL II AND BUCKLEY AND DISREGARDS THE SPEECH AND PRESS PRINCIPLE PROTECTING ANONYMITY.

Relying primarily on the fact that Wisconsin Right to Life, Inc. ("WRTL") did not challenge expressly either the reporting or disclaimer requirements applicable to electioneering communications, Alternative I would leave such requirements in place even though the Supreme Court clearly **ruled** in WRTL II that, unless a broadcast communication, on its face, "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," it was not an "electioneering communication" within the meaning of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). (WRTL II, 127 S. Ct. at 2667.) As the Court explained, BCRA's section 203 definition of "electioneering communications" must be "narrowly tailored" so that it reaches only "express advocacy [or] its functional equivalent." (*Id*. at 2671, n.9.)

This "objective [standard] focusing on the substance of the communication rather than [on] amorphous considerations of intent or effect," was necessary, the Court explained, to safeguard the First Amendment liberty "'to discuss publicly and truthfully all matters of public concern without **previous restraint or fear of subsequent punishment.**'" (*Id.* at 2666, emphasis added.) By its express holding, the Court found that such a previous restraint had been imposed on the WRTL ads by the limit upon corporate and labor union financial contributions, as asserted in the WRTL complaint. But, by its reasoning, the Court jettisoned the government's claims of a compelling interest in stemming corruption and the appearance of corruption, except as those claims appertain to "express advocacy and its functional

equivalent," finding such claims insufficient "to justify burdening WRTL's speech." (*See id.* at 2671, 2673.)

Thus, the Court left no room for Alternative 1, which would treat the disclosure and reporting requirements differently from the funding limitations. According to the rationale of WRTL II, any burden on political speech that is **not** express advocacy or its functional equivalent would constitute an unconstitutional "previous restraint" and create a "fear of subsequent punishment" by the FEC, the jurisdiction of which must be strictly confined to the protection of the integrity of the electoral process, and not allowed to spill over into the constitutionally-guaranteed arena of issue advocacy. As the Court observed, "the proper standard for an as-applied challenge to BCRA § 203 must give the benefit of any doubt to protecting rather than stifling speech." (*Id.* at 2666.)

In its notice, however, the FEC has suggested that the electioneering communication reporting and disclosure requirements, unlike the funding limitations, are not subject to such "strict scrutiny," but to a lower standard of "important state interests." Thus, the FEC has proposed in Alternative 1 that the reporting and disclosure requirements may be imposed upon the broadcast of genuine issue ads and other broadcasts that are not the functional equivalent of express advocacy, even though such broadcasts are not subject to the funding limitations, having fallen short of the compelling interest standard. *See* Notice of Rulemaking, 72 *Federal Register* at 50262. The FEC is mistaken.

The constitutionality of reporting and disclosure requirements is wholly dependent upon their being linked to funding limitations imposed upon candidacies for election to federal office. As pointed out in Buckley v. Valeo, 424 U.S. 1, 66-67 (1976), reporting and

disclosure requirements serve "substantial governmental interests" only insofar, and so long as, they:

> (a) "provide[] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," uncovering "[t]he sources of a candidate's financial support [to] alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office" [424 U.S. at 66];
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> (b) "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity" [424 U.S. at 67]; and
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> (c) "[serve as] an essential means of gathering the data necessary to detect violations of the [funding] limitations." [424 U.S. 68, (footnotes omitted).]

In sum, if the **funding limitations** placed upon a broadcast of a genuine issue ad or any other broadcast communication is found to be unconstitutional, then the **reporting and disclosure requirement** that would otherwise be attached to the ad because it is the functional equivalent of express advocacy cannot be justified by the Buckley standard of a "substantial government interest." *See* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 356 (1999).

Even more significantly, reporting and disclosure requirements, when imposed independent from campaign finance laws, have been consistently struck down as violative of the First Amendment speech and press principle forbidding forced disclosure of the identity of the communicator. Since Talley v. California, 362 U.S. 60 (1960), the Supreme Court has consistently found the speech and press provisions protect "[t]he freedom to publish

anonymously." *See* McIntyre, 514 U.S. at 341-42. *See also* Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150, 166-67 (2002). As the Court observed in McIntyre, the constitutional protection against forced identity disclosure is governed by "strict scrutiny," not by a "more lenient standard" as the FEC has suggested here. *See* McIntyre, 514 U.S. at 347. Furthermore, as the McIntyre case has also established, the government may not justify a rule requiring reporting and disclosure on the ground that it has an "interest in providing the electorate with relevant information" (*id.*, 514 U.S. at 348), in that such a rule intrudes upon the First Amendment press guarantee that editorial control of the contents of a communication rests with the people, not with the government:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. [*Id.* (citing, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).]

II. ALTERNATIVE 2 PLACES THE FEC IN CONFLICT WITH THE SUPREME COURT'S WRTL II ADMONITION AGAINST IT ASSUMING THE UNCONSTITUTIONAL ROLE OF A CENSOR.

Under Alternative 2, the FEC proposes to bring its electioneering communication regulations into compliance with WRTL II by promulgating **additional exemptions** to the statutory definition of "electioneering communication," thereby freeing genuine issue broadcast ads and other similarly situated communications not only from the funding restrictions imposed upon electioneering communications, but the reporting and disclosure requirements that would otherwise unconstitutionally "stifle" such broadcasts. In crafting its exemptions, however, the FEC has not provided the wide berth necessary to ensure that the FEC not assume the role of a national censorship board threatening to excise from broadcast communications the names of persons who happen to be candidates for election to federal office, just as movie censorship boards in the past threatened to excise "obscenity" before a public showing.

As the nation enters into the 2008 election season, the FEC may indeed find itself pressed increasingly into the role of censor, as it will be inundated with complaints that "unmentionable" references to a bevy of presidential candidates have appeared not only in grassroots lobbying ads, but radio talk shows, situation comedies, public service announcements, public policy documentaries, business ads, and other broadcasts. Because the presidential campaign has already begun and will continue through the rest of 2007 and into the first week of November 2008, the 30-day "primary or preference election" will stretch in some way from December 2007 until August 2008, only to be extended even further by the 60-day "general election" period which will kick in from early September 2008 to November 4, 2008.

Additionally, the FEC can expect a similar outpouring of complaints throughout 2008 generated by references to elected officials who happen to be candidates for reelection. In short, the time periods designed by Congress to limit jurisdiction over broadcasts that refer to a candidate for election to federal office will prove to be no limit at all, with the FEC occupied for the entire year ferreting out genuine issue ads from the functionally equivalent express advocacy ads.

While Alternative 2's exemption approach to the definition of "electioneering communication" may theoretically conform to the WRTL II ruling, it falls far short of a practical means whereby to avoid the role of national censor of political speech during the most important seasons of national debate. In his noteworthy final paragraph of his WRTL II opinion, Chief Justice Roberts issued an apt warning that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to [FEC regulation] — **we give the benefit of the doubt to speech, not censorship.**" (*Id.* at 2674 (emphasis added).) In its notice of rulemaking, however, the FEC has failed to pay heed to this admonition, choosing to enhance, rather than to diminish, the FEC role as censor. By electing not to "narrowly tailor" the meaning of an "electioneering communication," as the Supreme Court indicated should be done, the FEC has proposed to attempt a definition of those broadcasts that are not "electioneering communications," imposing upon the latter the burden of showing that they meet one or more minutiae of regulatory-nuanced categories.

While Alternative 2 would create a number of what the FEC has labeled to be "safe harbors" for different kinds of broadcast ads, the very use of the term "harbor" indicates that there will be a "sea" of broadcasts referring to a candidate for election to federal office that

will not make it safely to the protected shore. Instead, such ads will be buffeted by "wave after wave" of public complaints and, as a consequence, may never be broadcast lest they run up against a FEC "shoal" of investigative inquiry in the form of a Matter Under Review ("MUR").

Instead of placing the burden upon the disseminator of a broadcast ad that refers to a candidate for election to federal office that such ad is **not** express advocacy or its functional equivalent, the FEC should clarify its definition of express advocacy and its functional equivalent in such a way as the terms are "narrowly tailored" as WRTL II clearly requires. (*Id*. at 2671.) Otherwise, the FEC's role will gravitate toward the censorial, imposing by threat of burdensome administrative investigations and hearings the very "chilling effect" on speech that the Supreme Court was attempting in WRTL II to avoid. (*See id.* at 2682.)

Indeed, by choosing the "exemption" approach, the FEC has assumed a role wholly unauthorized by the First Amendment guarantees of the freedom of speech and of the press — that of dictating the content of broadcast ads that are outside of its regulatory jurisdiction. As Chief Justice Roberts observed in WRTL II, that editorial function belongs exclusively to the broadcaster who, according to "'the fundamental rule of protection under the First Amendment … has the autonomy to choose the content of his own message.'" *Id*. at 2671-72, n.8. Thus, as is the case with Alternative 1, Alternative 2 invites the FEC into the unconstitutional role of assuming editorial control over broadcasts, dictating whether they may include a reference to an elected official simply because that official is a candidate for reelection. As noted above, the speech and press guarantees secure that right to the people, free from government interference. *See* McIntyre, 514 U.S. at 348-49.

CONCLUSION

Since, for the reasons set out above, Alternatives 1 and 2 are flawed, and FSC and FSDEF submit that the FEC should promulgate a new, narrowly-tailored definition of "express advocacy and its functional equivalent" consistent with WRTL II and clarify that the FEC's reporting and disclosure requirements extend no further than that narrow definition.

Respectfully submitted,

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