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## Distinguishing “Genuine” from “Sham” in Grassroots Lobbying: Protecting the Right to Petition During Elections

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### INTRODUCTION

“[W]hat’s your test to decide whether [an ad is a sham] or . . . a genuine issue ad?”<sup>2</sup> The question was asked by Justice Breyer at the January 2006 oral argument in *Wisconsin Right to Life v. Federal Election Commission* (“WRTL I”).<sup>3</sup> The case challenged the prohibition<sup>4</sup> on corporate “electioneering communications”<sup>5</sup> as applied to three grass-

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2. Transcript of Oral Argument at 20-21, *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (No. 04-1581) (“WRTL I”), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1581.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf) (question from Breyer, J.).

3. 546 U.S. 410 (2006).

4. *Prohibition* herein refers to 2 U.S.C. §§ 441b(a)-(b)(2) (2000 & Supp. IV 2004) (“It is unlawful for any . . . corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election. . . . [C]ontribution or expenditure’ includes . . . any applicable electioneering communication.”).

5. An *electioneering communication* is a broadcast communication referencing a clearly identified federal candidate within sixty days before a general election or thirty

roots lobbying advertisements that Wisconsin Right to Life (“WRTL”) wanted to run in 2004.

Grassroots lobbying is essentially asking citizens to tell lawmakers how to vote on a matter. In July 2004, WRTL began broadcasting advertisements encouraging Wisconsin citizens to contact Senators Feingold and Kohl and encourage them to oppose burgeoning filibusters of President Bush’s judicial nominees.<sup>6</sup> But because Sen. Feingold was a candidate, the ads became prohibited electioneering communications between August 15 and November 2 (Wisconsin’s primary and general election prohibition periods overlapped).<sup>7</sup> WRTL challenged the constitutionality of the prohibition as applied to its advertisements, but the district court denied its motion for a preliminary injunction and dismissed the case.<sup>8</sup>

Before the Supreme Court, James Bopp, Jr. answered Justice Breyer’s test request: “I think you would look at, one whether the . . . ad discusses a current legislative issue; two, whether or not it made any reference to the legislator beyond lobbying him or her about that specific issue.”<sup>9</sup> He continued, “[s]o there should not be any references to the election or the candidacy of the incumbent or any of those type of references. And if you had that, you would have a bona fide, genuine effort to lobby.”<sup>10</sup> The Supreme Court unanimously reversed the dismissal and remanded the case for consideration on the merits.<sup>11</sup>

On December 21, 2006, the district court held that the prohibition was unconstitutional as applied to WRTL’s ads.<sup>12</sup> It first decided that, based on the text and images of the ads,<sup>13</sup> they were “not the

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days before a primary election (or a caucus or convention that nominates candidates) and is receivable by at least 50,000 of the candidate’s intended constituents. See 2 U.S.C. § 434(f)(3) (Supp. IV 2004); 11 C.F.R. § 100.29 (2007).

6. Wisconsin Right to Life v. FEC, 466 F. Supp. 2d 195, 198 (D.D.C. 2006) (“WRTL II”). See also *id.* at 198 n.3 (“Wedding Ad”); *id.* at n.4 (“Loan Ad”); *id.* at n.5 (“Waiting Ad”). The ads are collected in the Appendix, *infra* pp. 401-03. The authors are counsel to WRTL.

7. *Id.* at 199 n.8.

8. *Id.* at 199-200.

9. Transcript of Oral Argument at 21, WRTL I, 546 U.S. 410 (2006) (No. 04-1581).

10. *Id.*

11. WRTL I, 546 U.S. at 411-12.

12. WRTL II, 466 F. Supp. 2d at 210.

13. The district court rejected, on practical and constitutional grounds, an inquisition into the speaker’s intent or the effect of the ad based on external context or expert opinion. See *id.* at 205. The problems of an intent and effect test are addressed below. See *infra* Part IV.C.

functional equivalent of express advocacy.”<sup>14</sup> Employing strict scrutiny, it held that the “common denominator between express advocacy and its functional equivalent . . . is the link” between the communication’s contents and the fitness of an identified candidate for office.<sup>15</sup> In the absence of such a link, the prohibition could not be applied to WRTL’s ads.<sup>16</sup> So the district court’s test for a genuine issue ad is whether there is a link between the content of the communication and the fitness of the candidate for office. The district court did not say which ad details were “essential” to its decision,<sup>17</sup> as the Supreme Court had done in creating the MCFL-corporation exemption,<sup>18</sup> so there still remains uncertainty in the law about advertisements with different details.<sup>19</sup> *Wisconsin Right to Life v. Federal Election Commission* (“WRTL II”) is on appeal<sup>20</sup> and should be decided by the end of the Court’s term in late June 2007.

This article returns to the debate over a proper test by collecting relevant ads and test proposals in an Appendix and using these as tools to analyze a test derived from a grassroots lobbying ad (hereinafter the “PBA Ad”) that was recognized as a genuine issue ad by defense expert Goldstein in *McConnell*.<sup>21</sup> Parts I through III provide the context for Part IV, which derives and analyzes a test from the PBA Ad. Part I pro-

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14. *WRTL II*, 466 F. Supp. 2d. at 208.

15. *Id.* at 209-10.

16. *Id.* (rejecting having a “bright-line rule” as a compelling interest).

17. *See infra* p. 407 (Appendix).

18. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986) (“MCFL”) (“In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b’s restriction on independent spending.”).

19. For example, the 2004 ads did not state the position of Senators Feingold and Kohl on the filibuster issue. *See WRTL II*, 466 F. Supp. 2d at 205; *see also infra* pp. 401-03 (Appendix). But WRTL also sought a preliminary injunction and summary judgment in *WRTL II* for a 2006 grassroots lobbying ad that did state the positions of these Senators on the subject of the grassroots lobbying. *See WRTL II*, 466 F. Supp. 2d at 203 n.15 (reference to 2006 ad); *see also infra* p. 405 (CCPA Ad in Appendix). *WRTL II* noted that the anti-filibuster ads did not state the Senators’ position, but it did not say whether that absence was essential to its decision. *See WRTL II*, 466 F. Supp. 2d at 207-08.

20. *FEC v. WRTL* (No. 06-969) was consolidated with *Senator McCain et al. v. WRTL* (No. 06-970) for review by the Supreme Court.

21. The PBA Ad was called the “Feingold Kohl Abortion 60 Ad” and was a grassroots lobbying ad asking Senators Feingold and Kohl to change their votes on a bill that would ban partial-birth abortion (“PBA”). It was recognized as a “genuine issue ad” by defense expert Dr. Goldstein in the *McConnell* district court. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J., concurring in part, dissenting in part) (stating Goldstein’s recognition and setting out its text); *see also id.* at 905 (Leon, J.) (stating Goldstein’s recognition); *id.* at 748

vides a brief overview of the legislative, rulemaking, and constitutional context. Part II demonstrates that *McConnell* only decided a facial challenge, leaving as-applied challenges for later. Part III shows that the prohibition is unconstitutional as applied here. Part IV analyzes a test derived from a recognized genuine issue ad.

## I. LEGISLATIVE, RULEMAKING, AND CONSTITUTIONAL CONTEXT

### A. BCRA and the Electioneering Communications Prohibition

When Congress enacted the Bipartisan Campaign Reform Act of 2002,<sup>22</sup> it amended the Federal Election Campaign Act (“FECA”)<sup>23</sup> by, inter alia, defining “electioneering communications,”<sup>24</sup> requiring that information concerning them be disclosed, and adding electioneering communications to the existing prohibition on corporate and union expenditures for contributions and independent expenditures at 2 U.S.C. § 441b.<sup>25</sup> Senators Snowe and Jeffords (who introduced the Snowe-Jeffords Amendment that became the prohibition) declared in floor debate that the prohibition excluded grassroots lobbying. Senator Jeffords declared that the proposed prohibition “will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes.”<sup>26</sup> He repeated the statement for emphasis, “The

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(Kollar-Kotelly, J.) (noting Goldstein’s recognition of the ad as “genuine”). See *infra* p. 401 (PBA Ad in Appendix).

22. Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA” or “McCain-Feingold”).

23. Codified at 2 U.S.C. §§ 431-55 (2000 & Supp. IV 2004).

24. See 2 U.S.C. § 434(f)(3) (Supp. IV 2004); 11 C.F.R. § 100.29 (2007) (essentially broadcast communications referencing candidates thirty or sixty days before primary or general elections respectively).

25. It is sometimes objected that *prohibition* is inaccurate because corporations and unions may raise funds into a “separate segregated fund” and that this “political committee” or “PAC” may pay for electioneering communications. 2 U.S.C. § 441b(b)(2)(C) (Supp. IV 2004). But *prohibition* is accurate because the corporation or union itself may not make the communications, i.e., use its general funds (and may not have, or be able to have, a PAC). Moreover, the Supreme Court used *prohibition*, both in *McConnell v. FEC*, 540 U.S. 93, 203 (2003) (“prohibition”), and *WRTL v. FEC*, 546 U.S. 410, 410 (2006) (“prohibits”), as did BCRA, 116 Stat. at 91 (“prohibition on corporate and labor . . . electioneering communications”). A corporation and connected PAC are neither the same voluntary association nor the same legal entity. *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 196 (1981) (“[The] claim that [a PAC] is merely the mouthpiece of [the sponsoring organization] is untenable. [The PAC] instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy.”). See also 2 U.S.C. § 441b(b)(2)(C) (“separate segregated fund” legally distinct from, and its actions not attributable to, connected corporation).

26. 147 CONG. REC. S2813 (daily ed. Mar. 23, 2001).

Snowe-Jeffords provisions do not stop the ability of any organization to urge their lawmakers on upcoming issues or votes,” declaring views to the contrary a “distortion[ ].”<sup>27</sup> “Any organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers,” he concluded, and “[under the Snowe-Jeffords provision, any organization still can undertake this most important task.”<sup>28</sup> Co-sponsor Sen. Olympia Snowe said: “[L]et’s look at the *genuine issue ad*, . . . which this provision would not apply to.”<sup>29</sup> *Genuine issue ad* was a term of art used throughout BCRA’s enactment and the *McConnell* litigation, including such use by the Supreme Court.<sup>30</sup>

Senator Paul Wellstone in offering an amendment to the Snowe-Jeffords Amendment that would eliminate an exemption from the prohibition for nonprofit organizations (under I.R.C. §§ 501(c)(4) or 527) declared, “I am not talking about ads . . . that are legitimately trying to influence policy debates.”<sup>31</sup> He emphasized his point by repetition, “I am not talking about legitimate policy ads. I am not talking about ads that run on any issue.”<sup>32</sup>

From these statements by BCRA’s prime sponsors of the electioneering communication prohibition, it is clear that the congressional intent was to exclude genuine grassroots lobbying. But Congress didn’t make a statutory exemption. It left creation of the test to FEC rulemaking by giving it authority to make exemptions, provided that no exempted communication “promotes or supports . . . or attacks or opposes a candidate” (commonly called “PASO”).<sup>33</sup> So when the FEC did its 2002 electioneering communications rulemaking it solicited comments on four proposed alternatives for a grassroots lobbying exemption.<sup>34</sup>

The BCRA prime sponsors proposed specific wording for a grassroots lobbying exemption and told the FEC that it had authority to

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27. *Id.*

28. *Id.*

29. 147 CONG. REC. S2458 (daily ed. Mar. 19, 2001) (emphasis added).

30. *McConnell*, 540 U.S. at 206 n.88 (“[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”). See *infra* p. 401 (use as a term of art by experts and lower court).

31. 147 CONG. REC. S2846 (daily ed. March 26, 2001).

32. *Id.*

33. 2 U.S.C. § 434(f)(3)(B)(iv) (Supp. IV 2004).

34. Electioneering Communications, 67 Fed. Reg. 51131 (Aug. 7, 2002) (“FEC Proposed Rules for Comment”), specifically, the alternatives are identified as 3A-D. See *infra* p. 408 (FEC Proposed Rules for Comment in Appendix).

enact their rule under BCRA.<sup>35</sup> The sponsors cited the legislative record to illustrate the types of ads they believed Congress intended to exempt from the prohibition<sup>36</sup> and urged the FEC to fashion a “bright-line” rule that corporations, labor unions and membership organizations could easily apply, that would satisfy the statutory PASO requirements.<sup>37</sup> This lends weight to the argument that the legislative history indicates an intent to include a grassroots lobbying exemption, and it reveals that the prime sponsors believed that a rule could be fashioned that would meet the statutory PASO requirement since the PASO terms were not employed in their proposed rule.

However, the FEC decided that the prime sponsors’ statement that their rule complied with congressional intent as to the PASO standard was wrong, “conclud[ing] that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate.”<sup>38</sup> The FEC insisted that “[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, it believed that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner.”<sup>39</sup> What governed was hearer perception, based on a much broader PASO interpretation than that urged by the prime sponsors as what Congress intended. In fact, given the strictness of the rejected Prime Sponsors Test, the FEC’s understanding of PASO clearly encompassed communications having only the remotest speculative possibility of some minimal electoral effect. One effect of the FEC’s refusal to make a rule was that it retained the sole authority to make any exceptions through the advisory opinion mechanism.<sup>40</sup> Another effect is that grassroots lob-

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35. *Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (2002) (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Mai T. Dinh of the FEC), [http://www.fec.gov/pdf/nprm/electioneering\\_comm/comments/us\\_cong\\_members.pdf](http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf). See *infra* pp. 408-09 (Prime Sponsors Test in Appendix).

36. *Id.* at 5-10.

37. *Id.* at 8. The test proposed by the prime sponsors specifically did not employ PASO terminology, though, to make it less subjective and more user-friendly.

38. *Electioneering Communications*, 67 Fed. Reg. 65190, 65201 (Oct. 23, 2002) (declining to actually create a grassroots lobbying exception after soliciting comments on various proposals for a rule). A rule urged at the time by FEC Commissioner Thomas (“Commissioner Thomas Rule”) is set out *infra* p. 410 (Appendix).

39. *Id.* at 65201-02

40. The FEC made an exception to the prohibition when it said in FEC Advisory Opinion 2004-31 that candidate Russ Darrow, Jr.’s name could be used in what were

bying during prohibition periods, especially the highly active legislative period before general elections, seems to have largely disappeared, likely due to the burdens of the PAC option.<sup>41</sup>

In 2006, the FEC twice rejected requests to make a rule protecting genuine grassroots lobbying, even after the Supreme Court in January of that year expressly pointed to the FEC’s authority to promulgate a grassroots lobbying exception while unanimously rejecting (within less than a week after oral argument) the FEC’s insistence that *McConnell* precluded all as-applied constitutional challenges to the prohibition.<sup>42</sup> At the *WRTL I* oral argument, Justice Breyer noted that “[Congress] told the FEC to go and produce a set of regs that would, in fact, try to screen out that legitimate 7 percent [of genuine issue ads],”<sup>43</sup> and then demanded of the Solicitor General, “why haven’t they done it?”<sup>44</sup> The Solicitor General’s response was that “the FEC has found . . . that it’s very difficult” and that, “unless you’re exceedingly careful,” the exception will be overly large in light of the “creativity of corporate spenders.”<sup>45</sup>

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otherwise electioneering communications by the automobile dealerships that he founded and that bore his name, but were now under the day-to-day control of his son, Russ Darrow, III.

41. For example, all of the ideological corporations recognized as nonprofits under § 501(c)(3) of the Internal Revenue Code cannot even have a PAC. 26 U.S.C. § 501(c)(3) (2000). Additionally, the American Civil Liberties Union, which is a nonprofit under § 501(c)(4), cannot engage in political activity, which includes forming a PAC. Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant at 8 n.3, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581). *WRTL*’s Executive Director, Barbara Lyons, submitted a declaration indicating that PAC money is much more difficult to raise than general fund money, that this scarce resource is usually reserved for express-advocacy “independent expenditures,” and that *WRTL* objected to the compelled speech of having to label as “political” communications things that have nothing to do with candidate advocacy. Aff. of Barbara L. Lyons, August 9, 2004, *WRTL II*, 466 F. Supp. 2d 195 (D.D.C. 2006) (available at 2004 WL 3753188).

42. *WRTL I*, 546 U.S. 410, 411 (2006) (“Although the FEC has statutory authority to exempt by regulation certain communications from BCRA’s prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.”).

43. The 7% figure came from JONATHAN S. KRASNO, *BUYING TIME* 1998 (2000), which was frequently discussed by the three district-court judges in *McConnell v. FEC*. See, e.g., *McConnell*, 251 F. Supp. 2d 176, 743 (D.D.C. 2003) (Kollar-Kotelly, J.) (noting that Krasno later adjusted the figure to 6.1%, *id.* at 745, while plaintiffs’ expert, Dr. Gibson, argued that the percentage of genuine issue ads should be between 50.5-60% based on the same data, *id.* at 745-46).

44. Transcript of Oral Argument at 43-44, *WRTL I*, 546 U.S. 410 (No. 04-1581), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-1581.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf).

45. *Id.* at 45.

The first 2006 rulemaking request was submitted to the FEC on February 16 by counsel for a broad-spectrum coalition of advocacy groups.<sup>46</sup> Although the coalition's petition urged an expedited rulemaking to permit grassroots lobbying through much of the 2006 cycle of caucuses, conventions, and elections, the FEC on March 16 simply solicited comments about the possibility of initiating a rulemaking to be submitted on April 17,<sup>47</sup> and on September 5 it declared its intention to make no rule.<sup>48</sup> The second 2006 request was for an interim final rule, proposed on August 3 by FEC Commissioner von Spakovsky, to be put into effect during the general election prohibition period (and subsequent rulemaking), but the FEC again refused.<sup>49</sup> In both of these refusals, the FEC noted the two pending as-applied challenges,<sup>50</sup> stating that the courts might provide guidance.<sup>51</sup>

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46. Petitioners were the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch. See Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. 13557 (Mar. 16, 2006) (notice of availability). The proposed rule is available at [http://www.fec.gov/pdf/nprm/lobbying/orig\\_petition.pdf](http://www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf), and is also set out *infra* as the Broad Coalition Rule on p. 411 (Appendix).

47. Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. 13557.

48. Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. 52295 (Sept. 1, 2006) (notice of disposition of petition for rulemaking).

49. Memorandum from Hans A. von Spakovsky, "Interim Final Rule Exempting Grassroots Lobbying Communications From the Definition of 'Electioneering Communication'" (FEC Agenda Document No. 06-53), available at <http://www.fec.gov/agenda/2006/mtgdoc06-53.pdf>; FEC, "Minutes of an Open Meeting of the [FEC], Tuesday, August 29, 2006" at 5, available at <http://www.fec.gov/agenda/2006/approve06-58.pdf> (motion to approve Interim Final Rule failed by 3-3 vote).

50. In addition to the *WRTL* case now on appeal for the second time, the Supreme Court has before it the appeal of *Christian Civic League of Me., Inc. v. FEC*, No. 06-0614, 2006 WL 2792683 (D.D.C. 2006) ("*CCLM*"), another grassroots lobbying challenge to the electioneering communications prohibition, but in *CCLM* a different three-judge panel on the same district court (as decided *WRTL II*) dismissed the case as not being within the exception to mootness for cases capable of repetition yet evading review. *Id.* at \*1. *WRTL II* noted the other court's mootness holding, but "disagree[d]," holding that *WRTL* was clearly within the mootness exception. *WRTL II*, 466 F. Supp. 2d 195, 201-02 (D.D.C. 2006). The present authors also represent *CCLM* and have asked the Supreme Court to consider the case with *WRTL II* on the merits.

51. See Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. at 52296 (declining broad-coalition petition); Audio Recording of FEC Open Meeting Agenda, Aug. 29, 2006, available at <http://www.fec.gov/agenda/2006/agenda20060829.shtml>

### B. *Constitutional Protections*

With BCRA’s electioneering communication prohibition, incumbent politicians eliminated the ability of citizens of ordinary means to effectively associate and communicate in order to petition their representatives at the most critical legislative times on vital issues that arise suddenly at times beyond the people’s control (although the timing is often within the control of incumbent politicians, who can take advantage of the prohibition for their own purposes). But the *people* are sovereign,<sup>52</sup> not the politicians who are supposed to represent them. In our constitutional republic, government is restricted to the powers expressly granted by the people.<sup>53</sup> The people created legislators to represent them,<sup>54</sup> and amended the Constitution to require that Senators be “elected by the people.”<sup>55</sup> The people mandated Congress not to restrict their rights to speak, associate,<sup>56</sup> and petition in the exercise of the people’s sovereign right to participate in representative self-government.<sup>57</sup>

The First Amendment is designed “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>58</sup> “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>59</sup> “It is the type of speech indispensable to decisionmaking in

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(declining interim rule). The FEC Office of General Counsel’s (“OGC”) August 29, 2006 Memorandum (Agenda Document No. 06-57) urging the FEC to await guidance from the courts in *WRTL II* and *CCL* is available at <http://www.fec.gov/agenda/2006/mtgdoc06-57.pdf>. The FEC’s complete rule-making file is available at [http://www.fec.gov/law/law\\_rulemakings.shtml#lobbyingw/sae](http://www.fec.gov/law/law_rulemakings.shtml#lobbyingw/sae). While the FEC OGC encouraged the FEC Commissioners to look to these two cases for guidance, the OGC has also expended great effort to avoid any ruling on the merits on those two cases. The FEC neglected to mention in its public statements that *WRTL* offered to settle its case against the FEC if the FEC adopted the broad-spectrum coalition’s rule.

52. U.S. CONST. pmbl; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“In a republic . . . the people are sovereign. . .”).

53. U.S. CONST. amend. X.

54. U.S. CONST. art. I, § 1; art. IV, § 4.

55. U.S. CONST. amend. XVII.

56. “[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . .” *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

57. U.S. CONST. amend. I.

58. *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

59. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted).

a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”<sup>60</sup>

While the individuals who make up a corporation such as WRTL could make electioneering communications,<sup>61</sup> when they associate into an effective advocacy group,<sup>62</sup> the corporation is prohibited from broadcasting grassroots lobbying ads for up to 90 days during an election year (and more in some circumstances),<sup>63</sup> even though these are times of intense legislative activity.<sup>64</sup> Citizen groups formed under the right of association are an essential component of democracy in action. *Buckley* reaffirmed the constitutional protection for associa-

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60. *Id.* at 777.

61. 2 U.S.C. § 434(f) (Supp. IV 2004) (requiring only disclosure if spending exceeds \$10,000 in a calendar year).

62. Effective nonprofit ideological groups incorporate primarily to protect directors from individual liability (e.g., for slips and falls on premises), not to assist in profit-making enterprise.

63. In *WRTL I*, the AFL-CIO provided the scope of the periods of the 2003-04 election cycle in which President Bush and Vice-President Cheney could not be mentioned in broadcast ads (even though the President was unopposed and their nominations were a foregone conclusion): “[B]eginning on December 14, 2003, 30 days before the first primary or caucus, [the prohibition] precluded broadcast references to President Bush in a series of geographic blackouts that continuously rippled throughout the nation, blocking every broadcast outlet, wherever located, whose signal could reach 50,000 persons in an upcoming primary or caucus state, until June 8, 2004.” Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae Supporting Appellant at 13-14 n.5, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581). “Additional 30-day blackout periods transpired from July 18 until the August 17, 2004 Wyoming caucus, and from July 25 until the August 24 Alaska primary.” *Id.* “This blackout became national in scope on July 31, 30 days before the Republican National Convention, and it then continued until the November 2 general election.” *Id.*

64. As to acts of Congress ads that would be captured by the prohibition, the ACLU in *McConnell* listed twenty-nine congressional actions in the sixty days before the November 2000 election that were of special interest to it. Joint Appendix at 622-26, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674) 2003 WL 22070885. Judge Leon, in his *McConnell* district court opinion, listed “important, and controversial, pieces of legislation” considered by Congress within the time frame of prohibition periods that he said illustrate “BCRA’s potential impact on genuine issue advocacy.” 251 F. Supp. 2d 176, 793 n.98 (D.D.C. 2003). *See also id.* at 910-11 (finding that genuine issue ads about important legislation are run in the sixty days before general elections). In *WRTL I*, the Chamber of Commerce documented 157 roll call votes in Congress in the sixty days before the November 2004 election. Brief for Chamber of Commerce of the United States of America as Amicus Curiae supporting Appellant at 6, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581) (citations omitted), and added that “it is not unusual for legislators to maneuver to set sensitive votes in the election period.” *Id.* at 6 (citing Andrew Mollison, *Votes on Guns, Marriage Slated; GOP Leaders in House Push Symbolic Bills*, ATLANTA JOURNAL-CONST., Sep. 28, 2004, at 3A.).

tion: “[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas.”<sup>65</sup> “[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>66</sup> This high level of constitutional protection flows from the essential function of an association, which is to amplify the voice of its members, thereby facilitating their effective participation in our democratic republic.<sup>67</sup>

Grassroots lobbying is also protected by freedoms not considered in *McConnell*, specifically, the inherent constitutional right of sovereign people to participate in self-government<sup>68</sup> and the express right to petition, along with a line of cases protecting the right of corporations to petition lawmakers, both directly and through the public. The right of corporations to petition the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*.<sup>69</sup> In the *Noerr-Pennington* line of cases, the Supreme Court held that attempts to influence the passage or enforcement of laws were constitutionally protected and essential to representative government.<sup>70</sup>

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65. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quotation and citation marks omitted).

66. *Id.* at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)). When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the “contribution regulation was ‘closely drawn’ to match a ‘sufficiently important interest.’” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest. *Buckley*, 424 U.S. at 64-65. This is the same standard employed for expressive association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

67. *Buckley*, 424 U.S. at 22.

68. *See* *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (“this right to petition . . . is implied by ‘the very idea of a government, republican in form’” (citation omitted)).

69. 365 U.S. 127, 138 (1961) (noting the corporate party’s right of petition was protected by the Bill of Rights).

70. “In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.” *Noerr*, 365 U.S. at 137. “The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.” *Id.* at 138. *See also* *Cal. Motor*

In *Bellotti*, the Supreme Court applied the right of petition to corporations seeking “to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question”<sup>71</sup> and held that this was constitutionally protected.<sup>72</sup> *Bellotti* noted that “the First Amendment protects the right of corporations to petition legislative and administrative bodies” and concluded that “there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.”<sup>73</sup> These cases stand for the overarching principle that the people have a right to petition incumbent politicians, directly or by grassroots lobbying, about their official acts without regard to the context in which the need to assert the right to petition arises. And, if they choose to do so through corporate entities, the right to petition is still constitutionally protected.

Because of these powerful constitutional mandates, the government must bear the burden of justifying statutes that target speech based on its content—especially speech at the core of our constitutional system of government—under the strict-scrutiny test.<sup>74</sup> “Under the strict-scrutiny test, [the government has] the burden to prove that the [challenged provision] is (1) narrowly tailored, to serve (2) a compelling state interest.”<sup>75</sup> “In order . . . to show that a given statute is narrowly tailored, [the State] must demonstrate that it does not ‘unnecessarily circumscrib[e] protected expression.’”<sup>76</sup> And specifically, where the government mandates the use of the PAC alternative, as it does with the electioneering communication prohibition, the government bears the strict scrutiny burden of justifying this infringement on the peoples’ liberty.<sup>77</sup>

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*Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“the right to petition extends to all departments of the government”).

71. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 769 (1978).

72. *Id.* at 776-78, 790-96.

73. *Id.* at 791 n.31.

74. See *WRTL II*, 466 F. Supp. 2d 195, 209-10 (D.D.C. 2006) (applying strict scrutiny after concluding that WRTL’s ads were not the functional equivalent of express advocacy). See also *Buckley v. Valeo*, 424 U.S. 1, 39, 44-45 (1976) (“exacting scrutiny”); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 496 (1985); *MCFL*, 479 U.S. 238, 251-52 (1986) (“compelling interest”).

75. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982), and citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989)).

76. *Id.* (citations omitted).

77. See *MCFL*, 479 U.S. at 256; *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990).

Where a First Amendment *facial* challenge is brought (i.e., the remedy sought is enjoined enforcement as to all applications), the Supreme Court still requires a compelling interest and narrow tailoring,<sup>78</sup> but it then requires the challenger to prove that the restriction is substantially overbroad “relative to the scope of the law’s plainly legitimate applications.”<sup>79</sup> *McConnell* decided only a facial challenge to the prohibition,<sup>80</sup> and the Court expressly held in *WRTL I* that neither the language nor the logic of *McConnell* precluded a challenge to the prohibition as applied to grassroots lobbying.<sup>81</sup> *McConnell* did not recognize that the government had met its strict-scrutiny burden as applied to the “genuine issue ads” that *McConnell* recognized.<sup>82</sup> And *McConnell* did not consider the express right of petition and the inherent necessity of people participating in self-government. When these additional rights are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying, especially where, as discussed in Part IV, “genuine” is distinguishable from “sham” grassroots lobbying.

## II. THE *McCONNELL* CONTEXT

When the Supreme Court declared in *McConnell* that “we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*,”<sup>83</sup> it was using a term of art that was employed throughout the *McConnell* litigation<sup>84</sup> and

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78. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 205 (2003).

79. *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (citation omitted). See also *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

80. 540 U.S. at 206 (“vast majority” of issue ads during prohibition period were functional equivalent of express advocacy).

81. 546 U.S. 410, 411-12 (2006) (the Supreme Court “did not purport to resolve future as-applied challenges”).

82. 540 U.S. at 206 & n.88.

83. *Id.* at 206 n.88 (emphasis added).

84. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 527 (D.D.C. 2003) (Kollar-Kotelly, J.) (“I will generally use the nomenclature candidate-centered issue advertisements . . . and genuine or pure issue advertisements. Genuine issue advertisements include both legislation-centered and general image-centered issue advertisements.”). See also *id.* at 881 (Leon, J.) (Finding 289: “Advertisements designed to genuinely influence debate over a particular issue are known as ‘true’ or ‘genuine’ issue advertisements, while those issue advertisements designed to influence a [sic] federal elections are known as ‘electioneering’ or ‘candidate-centered’ issue advertisements.” (citations omitted)); *id.* at 914 (section of Judge Leon’s Findings entitled, “*Representative Examples of Genuine Issue Advertisements Aired Within 30 Days of a Primary Election, or 60 Days of a General Election, and Mentioning the Name of a Federal Candidate*”); *id.* at 918 (section of Judge

keeping the door open to an as-applied challenge to protect genuine issue ads. The following discussion of *McConnell*'s facial-overbreadth constitutional analysis in the context of the overall *McConnell* litigation demonstrates that (A) the recognized class of "genuine issue ads" included grassroots lobbying and (B) *McConnell* held only that the overbreadth inherent in prohibiting these genuine issue ads was not "substantial" enough for *facial* invalidation.

A. "*Genuine Issue Ads*" Include Grassroots Lobbying

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his PASO-oriented approach to the electioneering communication definition

assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).*<sup>85</sup>

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Leon's Findings entitled "*Representative Examples of Candidate-Centered Issue Advertisements Aired Within 30 Days of a Primary Election or 60 Days of a General Election*").

85. *McConnell*, 251 F. Supp. 2d at 802-03 (Leon, J.) (emphasis added except as to "unrelated" and "see"). Judge Leon provided "representative" examples of both candidate-centered issue ads, *id.* at 918, and genuine issue ads that would have been prohibited by the primary definition of "electioneering communications" (the definition eventually upheld by the Supreme Court in *McConnell*, 540 U.S. at 190 n.73). *McConnell*, 251 F. Supp. 2d at 914-18. One called "Barker," *id.* at 914-15 ("Barker Ad"), is set out *infra* at 401-02 (Appendix). Judge Leon noted that defense expert Magleby identified the Barker Ad as a "genuine issue advertisement because it 'doesn't mention how [the candidate] voted. It doesn't represent what [the candidate] has said about the issue. The body of the ad has no referent to [the candidate] whatsoever. The only referent to [the candidate] is the call line.'" *Id.* at 915 (citation omitted). Judge Leon noted that Magleby "explain[ed] that 'a generic call your Congressman, call your Senator, when then linked to a legislation and call your

The *McConnell* district court judges noted the wide-ranging expert estimates as to what percentage of prohibited ads were “genuine issue ads” (which included grassroots lobbying), with possibly more in years with hot-button legislative issues.<sup>86</sup> Before the Supreme Court, the *McConnell* defendants conceded that up to six percent of all ads subject to the prohibition were “genuine issue ads.”<sup>87</sup>

The term *genuine issue ad* was also used by defense expert Kenneth M. Goldstein in his expert witness report in *McConnell*.<sup>88</sup> Goldstein reported concerning the analysis that he had asked a team of student coders to do on advertisements in an effort to determine their nature: “In this report, I refer to ads coded as providing information or urging action as ‘Genuine Issue Ads,’ and ads coded as generating support or opposition for a particular candidate as ‘Electioneering Ads.’”<sup>89</sup> Goldstein recognized as a genuine issue ad a National Pro-Life Alliance advertisement, entitled “Feingold Kohl Abortion 60”

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Congressman or Senator about this legislation without a referent to their position on the issue, seems to me substantively different than when they are mentioned in view of what their position is on that issue”—and by “substantively different” Magleby meant “with respect to whether the advertisement communicates an electioneering message.” *Id.* (citation omitted) (excerpt from questions and answers in cross exam).

86. *See, e.g., McConnell*, 251 F. Supp. 2d at 798-99 (Leon, J.). The experts used different data sets, disputed changed evaluations by student evaluators employed for studies, and employed different formulas that yielded widely disparate results. Judge Leon picked two of the fairly moderate percentages as being sufficient to hold the prohibition overbroad. *Id.* at 798 (“Percentage discrepancies aside, I find that 14.7% and 17% of the ads run in the months leading up to the 1998 and 2000 elections, respectively, represents a ‘substantial amount’ of protected speech and renders the primary definition defective as constitutionally overbroad.”). Judge Henderson’s finding of fact 43 found that “credible record evidence indicates that BCRA will actually capture a vast number of ‘genuine’ issue advertisements.” *Id.* at 307. She cited evidence in the record that the 7% (of genuine issue ads) cited by the Executive Director of the Brennan Center for Justice to Congress in 2000 was rejected by him as “flat out false” with the correct number being forty percent. *Id.* at 309 (citation omitted). And she noted plaintiff expert Dr. James Gibson’s testimony that if a Brennan Center publication entitled *Buying Time 1998* had employed the original codings by Dr. Goldstein’s students (instead of changing some from genuine to sham), “64 per cent of all group-sponsored issue ads aired during the last 60 days of the 1998 election were ‘genuine’ and would have been covered by BCRA.” *Id.* at 310 (citation omitted) (noting that no defense expert challenged this finding, although Dr. Gibson revised it to at least 50.5% and likely more).

87. Brief for the FEC at 105-06, *McConnell* 540 U.S. 93. *Cf.* Redacted Brief of Defendants at 131, 161, *McConnell*, 251 F. Supp. 2d 176 (same).

88. Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants at 7, *McConnell*, 251 F. Supp. 2d 176, 2002 WL 33100340.

89. *Id.*

(called the “PBA Ad” herein),<sup>90</sup> that mentioned Wisconsin Senators Feingold and Kohl (a candidate) and was broadcast within sixty days of the 2000 general election.<sup>91</sup> This defense-expert-endorsed “genuine issue ad” from the *McConnell* record is remarkably like the grassroots-lobbying Wedding Ad run by WRTL.<sup>92</sup>

#### B. *McConnell’s Facial-Challenge Analysis*

Since *McConnell* was a facial challenge, the central issues before the Supreme Court were (1) whether the prohibition was narrowly tailored to a compelling interest in general and (2) whether the prohibition was substantially overbroad for reaching too many “genuine issue ads.”

##### 1. *Strict Scrutiny by Analogy*

Rather than start from scratch in the mandatory strict-scrutiny analysis, *McConnell* employed an abbreviated analysis by analogy. First, it noted that, since *Buckley*, Congress had been able to require corporations and unions to use a PAC “to finance advertisements *expressly advocating* the election or defeat of candidates in federal elections,” which “provided . . . a constitutionally sufficient opportunity to engage in *express advocacy*.”<sup>93</sup> In justification of this restriction, *McConnell* cited the interest in regulating corporations (and mentioned circumvention) and concluded: “In light of our precedents, plaintiffs do not contest that the Government has a compelling interest in regulating advertisements that *expressly advocate* the election or defeat of a candidate for federal office.”<sup>94</sup>

As to narrow tailoring, the Court continued in the “express advocacy” analogy it had set up by answering “plaintiffs['] argu[ment] that the justifications that adequately support the regulation of *express*

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90. *McConnell*, 251 F. Supp. at 312 (Henderson, J., concurring in part, dissenting in part) (quoting this PBA Ad, which is set out in the Appendix, *infra* p. 401). Judge Henderson noted that Goldstein was “certain” that the ad was a genuine issue ad, although the two authors of a Brennan Center study based on Goldstein’s research split on whether it was genuine). *Id.* See also *supra* note 21.

91. *Id.* at 905 (Leon, J.) (noting that Goldstein considered the PBA Ad a “genuine issue advertisement” and had testified that it was not “clearly intended to support or oppose the election of a candidate”). See also *id.* at 748 (Kollar-Kotelly, J.) (noting Goldstein’s recognition of the ad as “genuine”). See also *supra* note 21.

92. See *infra* pp. 402-03 (Appendix). Note that this expert-recognized genuine issue ad stated the position of Senators Feingold and Kohl on the issue, although the Wedding Ad did not mention their position on the judicial filibusters.

93. *McConnell v. FEC*, 540 U.S. 93, 203 (2003) (emphasis added).

94. *Id.* at 205 (emphasis added).

*advocacy* do not apply to significant quantities of speech encompassed by the definition of electioneering communications” with the holding that “[t]his argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of *express advocacy*.”<sup>95</sup>

Consequently, a central question in *WRTL II* is whether the proposed ads are the “functional equivalent of *express advocacy*.”<sup>96</sup> “[T]o the extent that [WRTL’s] ads . . . are [not] . . . equivalent,” the argument of inadequate justification for the prohibition does not “fail.”<sup>97</sup> This functional equivalence question is answered by comparing WRTL’s ads to the acknowledged “genuine issue ad” in the *McConnell* record<sup>98</sup> and the example of the sham ad cited in *McConnell*, i.e., the Yellowtail Ad.<sup>99</sup> The district court in *WRTL II* held that the key to functional equivalence is whether there is a “link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office.”<sup>100</sup> It is easy to distinguish the genuine PBA Ad from the sham Yellowtail Ad—and to see that the ads of WRTL are genuine issue ads—on the basis of such a test. As shown in Part IV this “link” helps create a test to distinguish “genuine” from “sham.”

## 2. *Substantiality of the Overbreadth*

As noted above, expert opinions in *McConnell* varied widely as to how many genuine issue ads were captured by the electioneering communication prohibition.<sup>101</sup> So the Supreme Court was faced with the problem of how to resolve the degree of facial overbreadth on disputed facts and disparate findings by the three district-court judges (and in a relatively short amount of time before the prohibition periods began going into effect before the 2004 elections).

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95. *Id.* at 205-06 (emphasis added). The Court went on to say, “The justifications for the regulation of *express advocacy* apply equally to ads aired during those periods if the ads are intended to influence the voters’ decisions and have that effect.” *Id.* at 206. This intent-and-effect language was borrowed from defense expert reports attempting to demonstrate that the percentage of genuine issue ads captured by the prohibition was not substantial enough for facial invalidation, so it is merely descriptive of the sham ads that had just been declared to be “the functional equivalent of *express advocacy*” and is not (nor could it be) a constitutionally-permissible test in and of itself. *See infra* Part IV.C.

96. 540 U.S. at 206.

97. *Id.*

98. *See infra* p. 401 (PBA Ad in Appendix).

99. *See* 540 U.S. at 193 & n.78 (providing text of ad). *See infra* p. 402 (Yellowtail Ad in Appendix).

100. *WRTL II*, 466 F. Supp. 2d 195, 209 (D.D.C. 2006).

101. *See supra* note 86 and accompanying text.

The Court's specific substantial overbreadth analysis began with the following framing of the issue: "[P]laintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to *significant quantities* of speech encompassed by the definition of electioneering communications."<sup>102</sup> It ended by holding that "[w]e are therefore not persuaded that plaintiffs have carried their heavy burden of proving that [the prohibition] is overbroad."<sup>103</sup> "Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech," the Court continued, "that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is *substantial*, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'"<sup>104</sup> It concluded that "[f]ar from establishing that BCRA's application to pure issue ads is *substantial*, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion."<sup>105</sup>

This issue and holding are clearly framed in the language of a First Amendment "substantial" overbreadth analysis, so there is no mistaking what the Court was doing in this section of *McConnell*. It was recognizing that there were genuine issue ads and trying to show that the number of genuine issue ads captured by the electioneering communication prohibition was not sufficiently substantial for facial invalidation of the prohibition. If there were no genuine issue ads,<sup>106</sup> there would be no reason for this section on the substantiality of the prohibition's effect on them. Between this issue and holding, the Court made the following analysis to show that the asserted overbreadth was insubstantial, and that it could be even less substantial in the future:

The *precise percentage* of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. See 251 F. Supp. 2d, at 307-312 (Henderson, J.); *id.*, at 583-587 (Kollar-Kotelly, J.); *id.*, at 796-798 (Leon, J.). Nevertheless, the *vast majority* of ads clearly had such a purpose. Annenberg Report 13-14; App. 1330-1348 (Krasno &

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102. *McConnell*, 540 U.S. at 205-06 (emphasis added).

103. *Id.* at 207 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

104. *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003)) (emphasis added).

105. *Id.* (emphasis added).

106. See, e.g., *McConnell v. FEC*, 251 F. Supp. 2d 176, 580 (D.D.C. 2003) (Kollar-Kotelly, J.) (Finding 2.11.7: "There is a disputed issue of fact about whether advertisements [that qualify as electioneering communications] are ever pure issue advertisements.").

Sorauf Expert Report); 251 F. Supp. 2d, at 573-578 (Kollar-Kotelly, J.); *id.*, at 826-827 (Leon, J.). Moreover, whatever the *precise percentage* may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund. n88

n88 As Justice Kennedy emphasizes in dissent [reference omitted], we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads. . . .<sup>107</sup>

The Court did not made its “in the future” comment in isolation as a statement rejecting future as-applied challenges, nor as somehow shifting the strict scrutiny burden from the government and placing on challengers the burden of proving that these options are inadequate,<sup>108</sup> but rather between its opening issue statement and holding on overbreadth. This indicates that the comment was made for the purpose of demonstrating that the effect of the prohibition on “genuine issue ads”<sup>109</sup> or “pure issue ads”<sup>110</sup> was not “significant”<sup>111</sup> or “substantial,”<sup>112</sup> i.e., that “plaintiffs ha[d not] carried their heavy burden of proving that [the prohibition] is overbroad.”<sup>113</sup> Thus, the Court in *McConnell* was doing a straightforward substantial overbreadth analysis when it used the phrase, “[m]oreover, whatever the *precise percentage* may have been in the past, in the future . . . .”<sup>114</sup> And this “precise percentage” reference is in turn within a paragraph that spoke of “the *precise percentage*” being “a matter of dispute,” but that the “*vast majority*” of electioneering communications had an “electioneering purpose.”<sup>115</sup> These are words clearly addressed to the substantiality (or lack thereof) of facial overbreadth.

So the “in the future” comment, in context, was about lack of overbreadth in the future. The Court was considering the “percentage” of “genuine issue ads” that would be captured by the prohibition (as compared to the “sham issue ads” that *McConnell* recognized were the

107. *Id.* at 206 & n.88 (emphasis added).

108. Defendants in *WRTL* made both of these arguments, which are erroneous as seen in the present analysis. *WRTL I* rejected the no-as-applied-challenges argument. 546 U.S. 410 (2006). *WRTL II* employed traditional strict scrutiny analysis, thereby rejecting the burden-shifting argument. 466 F. Supp. 2d 195, 209-10 (D.D.C. 2006).

109. *McConnell*, 540 U.S. at 206.

110. *Id.* at 207.

111. *Id.* at 206.

112. *Id.* at 207.

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.* (emphasis added).

intended target of the prohibition) in order to determine whether the overbreadth was sufficiently broad for facial invalidation. After noting that the experts had fought over the “precise percentage,” the Court declared that prospectively the overbreadth could be reduced in any event because, with knowledge of the prohibition, speakers could take measures to avoid the prohibition’s reach in some situations.<sup>116</sup> But this “in the future” statement could not apply to *all* situations because the Court immediately left open as-applied challenges by recognizing the category of “genuine issue ads” and expressly stating that it “assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>117</sup>

Consequently, the meaning of the “in the future comment” is confined to its context and simply means that prospectively the overbreadth of the prohibition is not sufficiently substantial for facial invalidation. The comment may not be ripped from its context and forced to mean things entirely foreign to its plain contextual meaning. The comment does not shift the strict scrutiny burden from the gov-

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116. If any residual doubt on this point could possibly remain, it should be erased by the fact that Judge Leon used nearly identical “future” language in holding that the primary definition of electioneering communication was unconstitutionally overbroad and likely to be higher in a “particularly contentious, or active, legislative period.” *McConnell v. FEC*, 251 F. Supp. 2d 176, 798-99 (D.D.C. 2003). He continued, “[T]here is reason to believe that the amount of issue advocacy likely to be generated in future election cycles will be at least as substantial as it was during those years.” *Id.* at 799 (emphasis added). The Supreme Court was simply answering Judge Leon’s argument by saying that “in the future” percentages might actually drop in light of people’s knowledge of the elements of the prohibition, making overbreadth less substantial. *McConnell*, 540 U.S. at 206.

117. *McConnell*, 540 U.S. at 206 n.88. See also *WRTL I*, 546 U.S. 410 (2006) (as-applied challenges permitted despite argument based on “in the future” statement). The “in the future” comment was part of the two-part facial overbreadth analysis, *McConnell*, 540 U.S. at 207, for which the *McConnell* Court cited the leading case of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The *McConnell* Court summarized its holding under the two parts as follows: “Far from establishing that BCRA’s application to pure issue ads is substantial, either in an absolute sense or *relative to its application to election-related advertising*, the record strongly supports the contrary conclusion.” 540 U.S. at 207 (emphasis added). The discussion of “pure issue ads,” *id.*, or “genuine issue ads,” *id.* at 206 & n.88, was to establish that the prohibition was not overbroad in the context of “election-related advertising,” *id.* at 207, which included both “electioneering ads” and “genuine issue ads,” to use the terminology of defendants’ expert Goldstein in his report in the *McConnell* litigation. See *supra* note 89.

Consequently, the Supreme Court was required by its analysis to talk about “genuine issue ads” in its facial overbreadth analysis. It was not gratuitously throwing in words about “genuine issue ads” that were irrelevant to its analysis and intended to be employed outside that context. So its “in the future” sentence had a distinct meaning in the facial overbreadth analysis context, but none beyond it.

ernment and force challengers to prove that the mentioned options are inadequate. It does not say that the other options are adequate. In fact, the Court clearly held that the PAC option was “constitutionally sufficient” only as to “*express advocacy*.”<sup>118</sup> Only to the extent that an ad can be proven by the government to be the “functional equivalent of express advocacy”<sup>119</sup> is the PAC option adequate. So *McConnell* only employed facial overbreadth analysis to sustain the prohibition and left for another day the task of distinguishing “genuine” from “sham.”

### III. AS-APPLIED STRICT SCRUTINY OF THE PROHIBITION

Applicable constitutional protections have already been discussed in Part I.B. This Part sets out more specifically the analysis for considering the constitutionality of the prohibition as applied to genuine grassroots lobbying and then applies it to show that the prohibition is unconstitutional as applied to WRTL’s ads.

#### A. *Constitutional Guidelines*

We deal here with activity at the core of the American system of constitutional government, so we must begin with first principles, i.e., the constitutional guarantees, asserted interests, and the need to work with a scalpel instead of a splitting maul.<sup>120</sup> At issue here is the right of the sovereign people to participate in self-government through guaranteed freedoms of expression, association, and petition. *McConnell* addressed the free expression and association freedoms only to the extent of deciding that the prohibition’s infringement on genuine issue ads was not sufficiently substantial to warrant facial invalidation. The right to petition was not asserted or considered in *McConnell*, but it is central to these grassroots lobbying cases and is “one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’”<sup>121</sup>

As to governmental interest, *McConnell* pointed to “a compelling interest in regulating advertisements that expressly advocate the elec-

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118. *McConnell*, 540 U.S. at 203 (emphasis added).

119. *See id.* at 206.

120. The Supreme Court in *MCFL* noted that “freedom of thought and speech ‘is the matrix, the indispensable condition, of nearly every other form of freedom’” and warned of the temptation “to accept in small increments a loss that would be unthinkable if inflicted all at once.” 479 U.S. 238, 264-65 (1986). “For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction,” it continued, and “curtail speech only to the degree necessary to meet the particular problem at hand.” *Id.* at 265. “Congress [must not choose] too blunt an instrument for such a delicate task.” *Id.*

121. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (citation omitted).

tion or defeat of a candidate for federal office.”<sup>122</sup> Because regulating express advocacy has never been held, in and of itself, to be a compelling interest, the Court was apparently framing the interest in this way to set up its analysis-by-analogy holding that Congress could restrict communications “to the extent that . . . [they] are the functional equivalent of express advocacy.”<sup>123</sup> In this *prohibition* context, the Court was simply asserting the corporate-form interest: “The . . . question—whether the state interest is compelling—is easily answered by our prior decisions . . . , which represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”<sup>124</sup> That this corporate-form concern is the foundation for the prohibition is self-evident from the fact that only *corporations* are *prohibited* from making electioneering communications (as are unions for parity).

No disclosure interest is at issue because BCRA’s disclosure requirements were not challenged by WRTL. So the ads contain the

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122. *McConnell*, 540 U.S. at 205. See also *supra* Part II.B.1. The Supreme Court has spoken of an overarching governmental interest in “the integrity of our system of representative democracy,” *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976), or “the integrity of the electoral process,” *id.* at 58, but the Court has not engaged in strict scrutiny at this highly-generalized level of abstraction, choosing instead to restrict its constitutional analysis to the more specific interests discussed here.

123. *McConnell*, 540 U.S. at 206.

124. *Id.* at 205 (quotation marks and citations omitted). *McConnell* then added: “Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ‘circumvention of valid contribution limits.’” *Id.* (brackets and citations omitted). The two cases cited, *FEC v. Beaumont*, 539 U.S. 146, 155 (2003), and *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 (2001) (“*Col. Rep. II*”), identified circumvention as a legitimate interest in the context of a corporation making *contributions* to candidates, not *independent expenditures*. *Col. Rep. II* involved coordinated expenditures, which are considered contributions. 533 U.S. at 456. As to independent expenditures (which are neither coordinated nor contributions), *Buckley* expressly reversed an appellate court holding that an independent expenditures cap was constitutionally permissible “to prevent circumvention of the contribution limitations,” 424 U.S. at 44, and instead held that, “[r]ather than preventing circumvention of the contribution limitations, [the cap] severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Id.* at 47. Since *McConnell* expressly declared that sham issue ads are “the functional equivalent of ” independent expenditures, 540 U.S. at 206, no circumvention interest should be applicable where genuine issue ads are at issue because they are not the functional equivalent of express advocacy. But even if making a donation to a corporation that is then used for express advocacy is a cognizable circumvention of a donor’s contribution limits, that interest could only engage as to express advocacy or its functional equivalent, i.e., “sham” or so-called “issue ads.” See *id.* at 129 (“[P]olitical parties and candidates used the availability of so-called issue ads to circumvent FECA’s limitations”).

required disclaimer,<sup>125</sup> all information required by Congress would be reported, and *McConnell*'s concern about “misleading names”<sup>126</sup> would be eliminated. Quid pro quo corruption, or the appearance thereof, is inapplicable because the expenditures at issue are independent.<sup>127</sup>

Although the First Amendment strictly prohibits abridgement of the people's liberties of expression, association, and petition,<sup>128</sup> the Supreme Court has held that the Constitution permits infringements in extraordinary cases where the government proves that the infringement is necessary to advance a compelling interest and the chosen means is narrowly-tailored and is the least-restrictive means to further that interest.<sup>129</sup> So the underlying question is whether the prohibition is narrowly-tailored and is the least-restrictive way to protect the corporate-form interest as to a “genuine issue ad,” such as the PBA Ad.<sup>130</sup> For its facial challenge analysis, *McConnell* placed the functional-equivalence test atop this foundational question, but absent a valid corporate-form concern, the foundation for a *prohibition* crumbles and there can be neither a prohibition nor a functional-equivalence test. The functional-equivalence concern is not freestanding as to a prohibition.

#### B. Less Restrictive Means

Strict scrutiny of the prohibition readily reveals two less restrictive means of dealing with the corporate-form concern and the overlaid functional-equivalence concern. The first eliminates the corporate-form concern by eliminating corporate money, which is discussed

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125. See 11 C.F.R. § 110.11 (2007). WRTL's ads, *infra* pp. 401-04 (Appendix), show the required disclaimer.

126. *McConnell*, 540 U.S. at 128.

127. *Buckley*, 424 U.S. at 47 (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”). If Congress had asserted any quid pro quo interest in BCRA with respect to electioneering communications, it would have capped amounts spent as it originally did with independent expenditures (which was rebuffed in *Buckley*). Congress did require the PAC alternative (with its source and amount restrictions on donations to the PAC), but that was based on the corporate-form interest, not quid pro quo, because there is no cap on how much a PAC may spend on independent expenditures or electioneering communications.

128. U.S. CONST. amend I.

129. See, e.g., *MCFL*, 479 U.S. 238, 264 (1986) (“the state interest . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee”).

130. See *infra* p. 401 (Appendix).

here. The second, which is the focus of Part IV, retains corporate money but eliminates the functional-equivalence concern by defining grassroots lobbying narrowly. These are sufficient to show that the prohibition is not narrowly tailored as applied.

When it enacted BCRA, Congress had before it one less restrictive means of eliminating any concerns about corporate-form corruption, namely “a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence . . . directly to this account for electioneering communications . . . .”<sup>131</sup> Congress said that an entity permitted to broadcast electioneering communications and required to report disbursements for them would only have to report contributors of \$1,000 or more to that *account* (as opposed to general fund donors) if it made its disbursements for electioneering communications from such a segregated bank account.<sup>132</sup> Although the corporate-form interest is arguably not strong as applied to WRTL, which is an ideological nonprofit,<sup>133</sup> WRTL stated in its complaint that it would make all disbursements for electioneering communications from such an account if the court would not grant relief from the prohibition as to disbursements from its general account, and WRTL actually raised funds into such an account in hopes of being able to continue its grassroots lobbying with such funds.

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131. 2 U.S.C. § 434(f)(2)(E) (Supp. IV 2004) (account may also be used for other purposes).

132. 2 U.S.C. § 434(f)(1) (Supp. IV 2004).

133. In fact, *McConnell* held that the prohibition could not be applied to ideological nonprofits that qualify as *MCFL*-corporations. *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003); see *MCFL*, 479 U.S. at 263-64 (an *MCFL*-corporation must be ideological, nonstock, nonprofit corporation that cannot engage in business or receive corporate contributions). While WRTL and CCLM are ideological nonprofits, neither is a “qualified nonprofit corporation” under the FEC’s narrow rule implementing the *MCFL*-corporation exemption. See 11 C.F.R. § 114.10 (2007) (giving requirements for such QNPs). What would prevent them from certifying that they qualify as QNP would be receipt of business income or corporate donations, regardless of how minimal. But the segregated bank account would eliminate precisely these disqualifiers from QNP status. Note also that all Circuits to consider the matter have rejected the FEC’s wooden position that if a group receives *any* business income or business corporation contributions it doesn’t qualify, and these courts have permitted such income and contributions, as long as they were “de minimis” and not “substantial.” See *FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130 (8th Cir. 1997); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994); *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 292 (2nd Cir. 1995).

Had Congress enacted this segregated bank account option in place of the prohibition, Congress would have entirely eliminated corporate-form corruption concerns because the corporation would not have been using any money from business activity or receipts from other corporations. This option is further narrowly tailored to corporate-form concerns because it would be more useful to ideological non-profit corporations than business behemoths. This is because the former primarily raise money from donations by like-minded donors, which in this case would be only certain qualified individuals, while the latter raise their substantial funds through business activity done with the advantage of the corporate form. So this option advances First Amendment freedoms.

It bears repetition that the reason for a *prohibition* is the corporate-form concern. The segregated bank account eliminates that interest. While corporations should be able to engage in genuine grassroots lobbying without employing either a PAC or a segregated bank account, the latter reveals a less-restrictive means to accommodate the corporate-form interest than a prohibition.<sup>134</sup> Therefore, the prohibition is unconstitutional as applied.

And as discussed next, careful definition of an exception from the prohibition for grassroots lobbying would accommodate any governmental interest while retaining the use of corporate funds.<sup>135</sup> This is

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134. It may be objected that the segregated bank account option does not provide the same level of restriction and disclosure as is imposed on PACs. A PAC is a “separate segregated fund,” 2 U.S.C. § 441b(b)(2)(C) (Supp. IV 2004), and is distinguished by source and amount restrictions on its receipts as well as the requirement to disclose all of its transactions on the theory that for PACs everything they do is clearly related to elections. But this objection loses sight of the fact that the interest underpinning the *prohibition* is the corporate-form interest, which is eliminated by a “separate segregated fund.” And for persons permitted by BCRA to make electioneering communications (because the lack of the corporate-form interest prohibits Congress from imposing a prohibition) there is no source and amount restriction. Moreover, as noted next, a “genuine issue ad” like the PBA Ad is not even the functional equivalent of express advocacy, so analysis by analogy to express advocacy restrictions is not permissible.

135. For example, if Congress had adopted a statutory exemption from the electioneering communication prohibition for grassroots lobbying along the lines of the Prime Sponsors Rule, *see infra* pp. 408-09 (Appendix), that would have been a less restrictive means than the prohibition and would have, according to the prime sponsors, resolved all concerns about asserted governmental interests. *See Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002)).

less restrictive, again showing that the prohibition is not narrowly tailored.<sup>136</sup>

#### IV. A TEST FROM A *McCONNELL* “GENUINE ISSUE AD”

All three district court judges in their separate *McConnell* opinions noted that defense expert Goldstein recognized the PBA Ad as a “genuine issue ad,” and Judge Henderson included the text of the ad.<sup>137</sup> So when the Supreme Court in *McConnell* recognized that some “genuine issue ads” were captured by the electioneering communication prohibition,<sup>138</sup> the Justices were fully aware of the ad and likely had it in mind as a “genuine issue ad.” The PBA Ad has remarkable similarities to WRTL’s ads, including the facts that both were run by pro-life ideological corporations, both mentioned Senators Feingold and Kohl (one a candidate and the other not) in similar ways, and both were grassroots lobbying ads about current matters before the legislative branch. The one notable difference is that the PBA Ad mentioned the position of the Senators on the issue that was the subject of the grassroots lobbying, while the WRTL ads did not. So the PBA Ad provides a unique benchmark for measuring whether WRTL’s ads are gen-

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136. Yet another means that would be less restrictive on the people’s First Amendment liberties would be for Congress to recess during elections along the British model. For example, Congress might recess for sixty days before general elections and thereby reduce the need for grassroots lobbying during these times. Along these lines, some have suggested a shorter prohibition period. See, e.g., Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1802 (2001) (“Narrow drafting may include shorter time periods,” e.g., 30 days rather than 60 days). It must be remembered that part of the perceived problem set out to justify the electioneering communication prohibition is based on matters wholly in control of Congress or the executive branch and out of the hands of the people, namely, (a) that Congress remains in session right up to elections, (b) the period before the general election is a particularly intense and important legislative time, see *McConnell v. FEC*, 251 F. Supp. 2d 176, 911 (D.D.C. 2003) (Leon, J.) (stating that prohibition periods “are often periods of intense legislative activity” and “[s]ome of the President’s or Attorney General’s boldest initiatives are advanced during election years—often within 60 days of an election”), and (c) where the person being lobbied is an incumbent, he or she has become a candidate because of the official’s decision to run for office again. Of course, if Congress adjourned before elections, that would not resolve the potential need for grassroots lobbying of the executive branch.

137. *McConnell*, 251 F. Supp. 2d at 312 (Henderson, J., concurring in part, dissenting in part) (noting Goldstein’s recognition of the PBA Ad, called there the “Feingold, Kohl Abortion 60” ad, as genuine and setting it out in full), 748 (Kollar-Kotelly, J.) (noting Goldstein’s recognition of the ad as “genuine”), 905 (Leon, J.) (noting that Goldstein considered the ad a “genuine issue advertisement”).

138. See *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003).

uine issue ads and, for present purposes, creating a test to distinguish genuine from sham in grassroots lobbying. This part focuses on: (A) the advantage of a judicial test; (B) the immateriality of minor effects; (C) the necessity of focus on the text; (D) prior acknowledgments that genuine is distinguishable from sham; (E) deriving a test from the PBA ad; and (F) analyzing other elements of a test from various rule proposals.

#### A. *Advantage of a Judicial Test*

The First Amendment requires that courts at least provide judicial relief for ads substantially similar to the “genuine” PBA Ad and then sort out the contours of a grassroots lobbying exception on a case-by-case basis. The district court in *WRTL II* took this approach, declaring the prohibition unconstitutional as applied to three specific ads without providing a holding with a detailed test of general applicability, although it did give some guidance as to a proper test.<sup>139</sup> It left to “future as-applied challenges,” likely “evaluated on an emergency basis,” to sort out the constitutionality of the prohibition as applied to other ads.<sup>140</sup> But a case-by-case approach has disadvantages.<sup>141</sup>

A preferable approach is a judicial test with sufficient detail to indicate where the First Amendment mandates a safe haven for genuine grassroots lobbying—the sort of test created for *MCFL*-corporations.<sup>142</sup> It was clear from the *WRTL I* oral argument that members of

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139. See generally *WRTL II*, 466 F. Supp. 2d 195 (D.D.C. 2006).

140. *Id.* at 205.

141. One disadvantage is that the FEC has, to date, adopted a scorched-earth discovery and litigation approach to these cases, meaning small citizen groups daring to face this foe must endure intrusive discovery, intimidating depositions, substantial loss of time from their ideological mission, significant expense, and no hope of the court-awarded attorneys fees and costs available in a successful suit against a state. This will always be the case if a contextual intent and effect test is employed, as advocated by the FEC. Things may improve under *WRTL II*, which demonstrated the necessity of an analysis limited to the “four corners” of the communication, 466 F. Supp. 2d at 207, and rejected a broad-ranging intent and effect test. *Id.* at 205-06. However, the FEC may insist that any factual differences in new cases somehow warrant invasive, burdensome discovery again. As the *WRTL* and *CCLM* cases have demonstrated, even with BCRA-mandated expedition, it has been impossible for *WRTL* or *CCLM* to obtain judicial relief in time to run their ads while the need existed. (This may improve somewhat in the wake of *WRTL II*, but that is not certain.) Case-by-case litigation is not the best approach for judicial economy. And the core political freedoms at issue require bright lines that favor speakers, not speech restrictors, so that the people and their liberties have room to breath without the delay and burden of multiple cases.

142. *MCFL*, 479 U.S. 238, 262 (1986).

the Supreme Court were interested in such a test. Justice Breyer, for example, asked: “what’s your test?”<sup>143</sup> Justice Stevens expressed the need for a test.<sup>144</sup> The Solicitor General argued BCRA’s bright-line approach is required because “there isn’t any neat division between issue ads and candidate ads.”<sup>145</sup> And Justice Scalia responded that he “thought that . . . the line that the [McConnell] opinion was trying to . . . draw . . . was whether it’s an issue ad or . . . a phony issue ad.”<sup>146</sup>

### B. Immateriality of Minor, Incidental Effects

The mere possibility of some incidental, de minimis effect on an election would not be constitutionally cognizable as a governmental interest. The FEC has already conceded this before the Supreme Court in *WRTL I* when Justice Scalia asked: “You think Congress has the power to prohibit any First Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?”<sup>147</sup> The Solicitor General responded: “No, Justice Scalia, it’s not.”<sup>148</sup>

And after extensive discovery and employing two experts, the FEC could only come up with the possibility that *WRTL*’s ads might have some unquantifiable “electoral effect.”<sup>149</sup> The *WRTL II* court reviewed the FEC’s best efforts to prove this electoral effect at summary judg-

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143. Transcript of Oral Argument at 20, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581).

144. *Id.* at 15 (“there isn’t a practical way to tell the difference”).

145. *Id.* at 50. A mere desire for a bright line is not a compelling interest. *MCFL*, 479 U.S. at 263. Bright lines are preferred in the First Amendment, of course, but only when they favor speakers (i.e., they create a First Amendment safe haven), not speech restrictors. *See id.* at 263-64 (providing holding of general applicability for *MCFL*-corporation exception). The unanimous reversal and remand of *WRTL I* necessarily rejected the Solicitor General’s argument on this point.

146. Transcript of Oral Argument at 34, *WRTL I*, 546 U.S. 410 (No. 04-1581).

147. *Id.* at 31.

148. *Id.*

149. *See, e.g.*, Defendant Federal Election Commission’s Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment at 9, *WRTL II*, 466 F. Supp. 2d 195 (D.D.C. 2006) (The FEC argued that the ads would “likely” have a significant electoral effect.”). What Bailey said at deposition was that *WRTL*’s ‘Waiting’ Ad “could have, could have, it might have no impact, but could have substantial impact on the election itself.” Bailey Deposition at 43, *WRTL II*, 466 F. Supp. 2d 195 (No. 04-1260). Moreover, when called upon to compare the Waiting Ad, *infra* pp. 403-04 (Appendix), to the PBA Ad, *infra* p. 401 (Appendix), expert Bailey thought that *WRTL*’s ad was more subtle and so might be more effective in influencing elections. Bailey Dep. at 42-43. This statement, by logical extension, yields the remarkable proposition that the *less* an ad is the functional equivalent of express advocacy the stronger the government interest is in regulating it.

ment and then rejected the “highly questionable assumption[ ] that . . . the speculative conjecture of experts can *actually* project the ‘likely impact’ of a given ad on the electoral process,” for which assumption it did not find “sufficient evidence.”<sup>150</sup> So the government could not meet its strict scrutiny burden to prove that it has a cognizable interest in regulating WRTL’s ads.

It is important also to note that no corporate-form governmental interest exists as to grassroots lobbying per se because the Supreme Court has recognized that “the First Amendment protects the right of corporations to petition legislative and administrative bodies.”<sup>151</sup> There is no inherent risk of corruption in asking citizens to contact their legislators, which citizens may or may not do, based on their own choice. Therefore, any anti-corruption interest relating to grassroots lobbying must arise from some risk of corruption relating to elections. And that must be something more than some speculative, minimal effect.

### C. *Necessity of Focus on the Text*

*WRTL II* held that the proper functional equivalence analysis is limited to “consideration [of] language within the four corners of the . . . ads.”<sup>152</sup> It said that an intent and effect test is “practically unacceptable because as-applied challenges . . . must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable.”<sup>153</sup> “More importantly,” the court added, “it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election,

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150. 466 F. Supp. at 205-06 (emphasis in original).

151. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972)); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

152. *WRTL II*, 466 F. Supp. 2d at 207. There is, of course, a relevant context which the district court treated as given, based on the facts of this case, and so did not discuss. The first part of the relevant context is whether the electioneering communication definition is met, i.e., was there a targeted broadcast communication within a prohibition period that referenced a federal candidate? This goes to whether the ad is an electioneering communication to begin with. The second part of the relevant context is about whether the communication is genuine grassroots lobbying, i.e., is the lobbying about a current legislative or executive branch matter? The existence of this relevant context, which requires a limited look beyond the four corners of the document, in no way justifies an intent-and-effect inquisition into a broader context.

153. *Id.* at 205.

regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) . . . experts can *actually* project the ‘likely’ impact of a given ad on the electoral process.”<sup>154</sup> It wrote that the Supreme Court had already recognized that “delving into a speaker’s subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake.”<sup>155</sup>

*McConnell* did not purport, in any way, to overrule *Buckley* on this point, which is central to free expression, when it followed its holding that sham issue ads could be prohibited to corporations and unions because they were “the functional equivalent of express advocacy”<sup>156</sup> with the statement that “[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters’ decisions and have that effect.”<sup>157</sup> *McConnell* had already specifically connected this “intent” language to the sham “Yellowtail Ad” as being an ad “no less clearly intended to influence the election” than an express advocacy ad.<sup>158</sup> So the Supreme Court was not creating a new “intent and effect” test for determining whether a communication is “the functional equivalent of express advocacy.” Rather, the *McConnell* Court was simply citing language used by defense expert Kenneth Goldstein, who used student coders to separate ads provided to them into the categories of “Genuine Issue Ads” or “Electioneering Ads.”<sup>159</sup> “Specifically, coders were asked whether the purpose of the ad was to ‘generate support or opposition for candidate,’ or to ‘provide information or urge action.’”<sup>160</sup> Based on the coders’ perceptions and his analysis, Goldstein argued “that BCRA’s definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office.*”<sup>161</sup> The Supreme Court was plainly echoing

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154. *Id.* at 205-06 (emphasis in original).

155. *Id.* at 206. The district court pointed to the Supreme Court’s rejection of an intent and effect test in *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (citing with approval *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

156. *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

157. *Id.*

158. *Id.* at 193 & n.78.

159. Amended Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants at 24, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-581 and consolidated cases). Goldstein’s report, as presented to the United States Supreme Court in Vol. III of the Joint Appendix, is available at <http://www.law.stanford.edu/publications/projects/campaignfinance/>. In the Supreme Court’s *McConnell* records, the report was in Defendants’ Exhibits, Vol. 3, Tab 7.

160. *Id.* at 24 n.20.

161. *Id.* at 26 (emphasis added)

that conclusion for purposes of its broad-brush facial-challenge analysis, not creating a new and constitutionally problematic test based on criteria it had already rejected, as the district court noted.<sup>162</sup>

And the expert-endorsed PBA Ad was declared genuine based on its content, not some contextual probing into intent and effect (as were all ads coded by Dr. Goldstein’s student coders for the *Buying Time* studies that were central to the *McConnell* evidence).<sup>163</sup> Furthermore, the Prime Sponsors Rule, a grassroots lobbying exemption rule proposed to the FEC in 2002 by Senators McCain and Feingold and other prime BCRA sponsors, likewise examined the four corners of a communication and required no contextual inquisition into intent and effect.<sup>164</sup> So based on practicality, constitutional imperative, and the FEC’s failed effort to prove cognizable intent and effect through discovery and expert testimony, the *WRTL II* court rightly rejected any reliance on an intent and effect test to distinguish genuine from sham issue ads.<sup>165</sup>

#### D. Acknowledgments that Genuine Can Be Distinguished from Sham

Although the Solicitor General argued to the Supreme Court in the *WRTL I* oral argument that BCRA’s bright-line approach is required because “there isn’t any neat division between issue ads and candidate ads,”<sup>166</sup> the BCRA prime sponsors who have intervened as defendants in *WRTL II* (and opposed a grassroots lobbying exemption) conceded in the 2002 FEC rulemaking on “electioneering communications” that it is possible to distinguish genuine from sham solely on the basis of the content of the communication. They did so by proposing their own rule to do just that:

#### Prime Sponsors Rule

The term “electioneering communication” does not include any communication that:

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(x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication’s only reference to the clearly identified federal candidate is a

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162. *WRTL II*, 466 F. Supp. 2d 195, 206 (D.D.C. 2006).

163. See, e.g., *McConnell*, 251 F. Supp. 2d at 307 (Henderson, J., concurring in part, dissenting in part) (“The students were asked to ‘code’ the ads based on their content.”).

164. See *infra* pp. 408-09 (Appendix).

165. *WRTL II*, 466 F. Supp. 2d at 205.

166. Transcript of Oral Argument at 50, *WRTL I*, 546 U.S. 410 (No. 04-1581).

statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term “Your Congressman,” “Your Senator,” “Your Member of Congress” or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate’s record or position on any issue; (ii) the candidate’s character, qualifications or fitness for office; or (iii) the candidate’s election or candidacy.<sup>167</sup>

This same, content-only rule was set out as the perfect balance of competing interests in the Campaign and Media Legal Center’s comments<sup>168</sup> and in the comments by Common Cause and Democracy 21.<sup>169</sup> Lawrence Noble<sup>170</sup> submitted comments for the Center for Responsive Politics in the 2002 rulemaking that also proposed a content-based rule to distinguish genuine from sham:

#### CRP Rule

(c) *Electioneering communication* does not include any communication that:

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- (6) (i) Contains the following elements:
- (A) The communication is devoted exclusively to a pending legislative or executive branch matter;
  - (B) The communication’s only reference to a clearly identified Federal candidate is a statement urging the public to contact that Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter; and

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167. See sources cited *infra* note 259.

168. Letter from Glen Shor to Mai T. Dinh at 10-11 (Aug. 21, 2002) (“CMLC Comments”) (Trevor Potter, who was General Counsel for CMLC when these comments were submitted, *id.* at 1, is presently counsel for the Campaign Legal Center representing Senator McCain et al. in *WRTL II* as intervenors who insist that it is “startling[ ]” that the *WRTL II* court employed a test that “focuses solely on the face of the ads.” Jurisdictional Statement at 15, *WRTL II*, 466 F. Supp. 2d 195.).

169. Letter from Donald J. Simon to Mai T. Dinh at 12 (Aug. 22, 2002) (adding that “this proposed exception properly balances the competing concerns” and avoids “sham communications”).

170. Noble was FEC General Counsel from 1987 to 2000. See <http://skadden.com/index.cfm?contentID=45&bioID=6033> (biographical information).

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- (ii) Does not contain any of the following elements:
  - (A) Any reference to any political party, including the candidate’s political party;
  - (B) Any reference to the candidate’s record or position on any issue; or
  - (C) Any reference to the candidate’s character, qualifications or fitness for office or to the candidate’s election or candidacy.<sup>171</sup>

While these two rule proposals differ slightly, e.g., as to whether the official who is the subject of grassroots lobbying may be identified by name or only by title, they both acknowledge that genuine and sham are distinguishable in grassroots lobbying based on a content-based test. So the true issue is not whether genuine can be distinguished from sham in the grassroots lobbying context but which test does it best.

*E. A Test from the PBA Ad*

Because the PBA Ad was recognized as a “genuine issue ad” in the *McConnell* litigation,<sup>172</sup> it is what the Supreme Court had in mind when it spoke of “genuine issue ads” and not what it meant by “the functional equivalent of express advocacy.”<sup>173</sup> Therefore, that ad necessarily lacks any cognizable electoral effect and is a good pattern for creating a test. It also serves as a benchmark for measuring other possible elements from the various rules proposed by and to the FEC in prior rulemaking efforts. In other words, if the PBA Ad is already a genuine issue ad, so that its details pose no risk to elections, then what improvement (if any) would be added by piling on more restrictive elements that are not readily derivable from it? Of course, a test based on the PBA Ad would not include grassroots lobbying concerning an executive branch action or general public issue advertising that might mention a candidate. Thus, a rule modeled on the PBA Ad would not be the precise rule that the FEC should ultimately adopt if the Supreme Court upholds the district court’s holding in *WRTL II*. As may be seen from the numerous comments over proposed wording in the 2002 FEC

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171. Letter from Lawrence Noble and Paul Sanford to Mai T. Dinh (Aug. 21, 2002) (“CRP Comments”) (reprinted in the attached “Comments of FEC Watch and the Center for Responsive Politics” at 5-6).

172. See, e.g., *McConnell v. FEC*, 251 F. Supp. 2d 176, 748 (D.D.C. 2003) (Kollar-Kotelly, J.) (noting defense-expert Goldstein’s recognition of the ad as a genuine issue ad).

173. *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

rulemaking about an electioneering communication exemption,<sup>174</sup> there may be arguments over specific terms in actual rulemaking. However, the authors intend their following suggested “PBA Ad Test” test to contribute to the discussion concerning how a court could state an appropriate judicial test that would provide sufficient guidance for such a rulemaking. The PBA Ad Test is stated in the form of the Supreme Court’s statement of the *MCFL*-corporation test, including some of that opinion’s language.<sup>175</sup> The suggested test is based on the details of the PBA Ad and employs some language from prior rule proposals. It is the sort of judicial test that the Supreme Court could state in its opinion in the *WRTL* case, just as it stated a similarly worded test in *MCFL*. It demonstrates that the Supreme Court could indeed state a judicial test along these lines to distinguish genuine issue ads from sham ads in the grassroots lobbying context.

#### PBA Ad Test

In particular, the PBA Ad has two features essential to our holding that this grassroots lobbying ad may not constitutionally be prohibited under § 441b as an electioneering communication. *First*, based on the contents of the communication, it focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity. *Second*, consistent with the focus on the legislative branch matter, the ad does not mention any election, candidacy, political party, or challenger, or the official’s character, qualifications, or fitness for office, and any statement of the legislator’s position on the matter is objectively accurate and based on publicly available means of verification. These particular features fur-

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174. The comments on the 2002 FEC rulemaking on “electioneering communications” are available online at <http://www.fec.gov/law/RulemakingArchive.shtml#electioneering> and provide numerous valuable insights as to a proper test, some of which are included here. For example, the comments of the American Taxpayers Association note that a test should not be limited to just legislative and judicial branch matters because nonprofits “frequently do grass roots lobbying ads to influence public opinion on general issues, rather than specific pending legislation.” Letter from Heidi K. Abegg to Mai T. Dinh at 7 (Aug. 21, 2002) (“ATA Comments”). This is so because “there may be several competing pieces of legislation, none of which completely reflects the non-profit’s position.” *Id.* “[T]here may be proposals bandied about, but none formally introduced” or “a non-profit may not yet be ready to take a position on particular legislation but may want to lobby generally on the issue.” *Id.* at 7-8. So they should not be compelled “to take a stand on one particular piece of legislation.” *Id.* at 8. “[A]rmed with . . . knowledge” about the issue, the citizen can “decide how best to lobby.” *Id.*

175. See *MCFL*, 479 U.S. 238, 263-64 (1986) (stating the test for *MCFL*-corporations).

ther assure that there is no constitutionally cognizable risk of an attempt to influence an election. So long as the corporation follows this pattern, it is free to argue the merits of the matter and the official's position on it as if it were not a corporation.

The first part of this test makes the ad a grassroots lobbying ad and, by its “focus”<sup>176</sup> requirement, eliminates cognizable electoral effect. The second part further assures a lack of such cognizable effect. An effort has been made to avoid vagueness so far as language and brevity permit.

The PBA Ad Test's proscription against mentioning “the official's character, qualifications, or fitness for office is based on the understanding that it does not exclude a forceful discussion of the merits of the matter coupled with the corporation's and official's positions on the matter, which together merely say that the candidate is wrong or right on the issue (grassroots lobbying is used both to firm up previously taken positions and to change minds), not wrong for office. This could be made clear in a court's opinion.

This PBA Ad Test describes the subject of a grassroots lobbying appeal with the phrase “focuses on a particular current legislative branch matter.” As may be seen in the Appendix, the FEC Proposed Rules for Comment from the 2002 rulemaking offered the following alternatives: (A) “[i]s devoted exclusively to urging support for or opposition to particular pending legislative or executive matters”; (B) “[c]oncerns only a pending legislative or executive matter”; (C) “[r]efers to a specific piece of legislation or legislative proposal, either by formal name, popular name or bill number; or refers to a general public policy issue capable of redress by legislation or executive action”; (D) “[u]rges support of or opposition to any legislation, resolution, institutional action, or any policy proposal.”<sup>177</sup> Words such as “exclusively” and “only” are employed in an effort to limit the ability of a communication to focus on anything other than the subject of the grassroots lobbying, but they introduce the potential for overzealous

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176. The comments of the AFL-CIO in the 2002 rulemaking make several valuable observations on the nature of a final FEC rule, such as employing language that permits a communication to talk of other general matters in addition to the grassroots lobbying message. In other words, the whole communication should not have to be “focused on,” “exclusively devoted to,” or similarly restricted to one topic but may include a grassroots lobbying message focused on a current public policy issue (and the rest of the message could speak of other matters, e.g., news concerning unions). See Letter from Laurence E. Gold and Michael B. Trister to Mai T. Dinh at 13 (Aug. 29, 2002).

177. See *infra* p. 408 (Appendix).

enforcement by the FEC.<sup>178</sup> The use of “focuses on” in the PBA Ad Test captures the idea of limiting the subject of the grassroots lobbying portion of a communication to the matter at issue without risking overreaching enforcement. Words such as “particular” and “pending” seek to assure that the matter is a real and “current”<sup>179</sup> public issue, but “pending” raises questions about whether a legislative issue must have taken the form of an introduced bill. Note that the Broad Coalition Rule requires that “[t]he communication exclusively discusses a particular current legislative or executive branch matter,”<sup>180</sup> while the Prime Sponsors Rule merely specifies that it “concerns only a legislative or executive branch matter.”<sup>181</sup>

The Broad Coalition Rule would also require that the object of the grassroots lobbying be an “incumbent.”<sup>182</sup> It is, of course, noteworthy that genuine grassroots lobbying asks citizens to contact officials in their lawmaker capacity, i.e., as persons able to act in an official capacity on legislative or executive branch matters. These incumbents are persons who have chosen to become (and seek reelection as) the people’s representatives in a system where the people are sovereign and

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178. For example, in *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006), the Crossroads Ad at issue said, “Unfortunately, your senators voted against the Marriage Protection Amendment two years ago.” See *infra* p. 405 (Appendix). The district court adopted the FEC’s argument in stating that “the League’s advertisement—which characterizes Senator Snowe’s past stance on the Marriage Protection Amendment as ‘[u]nfortunate[ ]’—is the sort of veiled attack that the Supreme Court has warned may improperly influence an election” and so pronounced it a “sham.” *CCLM*, 433 F. Supp. 2d at 89 (opinion denying motion for preliminary injunction). Even though Senator Snowe was running unopposed in a primary election, the district court insisted that “the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.” *Id.* If there is a chance that the FEC would employ “exclusively” or “only” in a test as excluding a term such as “unfortunately” (which is only a statement of group’s viewpoint on the issue and their representative’s position on it), then such terms should be excluded from any test or rule.

179. A grassroots lobbying ad that is a genuine issue ad deals with a current legislative or executive branch matter, not a past issue, which *McConnell* judges found to be a useful way to distinguish genuine from sham issue ads. See, e.g., *McConnell v. FEC*, 251 F. Supp. 2d 176, 577 (D.D.C. 2003) (Kollar-Kotelly, J.) (rejecting ad as genuine for “failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting”); *id.* at 918 (Leon, J.) (his examples of “candidate-centered ads” cited past votes of legislators).

180. See *infra* p. 411 (Appendix).

181. See *infra* pp. 408-09 (Appendix).

182. See *infra* p. 411 (Appendix).

have guaranteed self-government rights of speech, association, and petition for the very purpose of maintaining the accountability of those representatives. Challengers to the incumbent lack this ability to act. Coupled with the exclusion of ads based on past matters, the focus on persons able to act in an official capacity eliminates vast quantities of the issue ads discussed in considerable detail by the *McConnell* district court, and disclosure eliminates other problems. However, in the 2002 FEC rulemaking on electioneering communications, OMB Watch, a nonprofit government watchdog group, noted that sometimes there is a need to “urge[ ] the public to contact a state legislator, [m]ayor or governor who also happens to be challenging a Member of Congress in a primary or general election.”<sup>183</sup> Citizen groups should have the same right to grassroots-lobby such challengers as they would a “Member of Congress” or an “incumbent,”<sup>184</sup> so such terminology should be omitted from the test.<sup>185</sup>

Some additional test elements suggested in various proposed rules are: (1) whether a candidate may be named (as opposed to requiring the substitution of a reference such as “your Congressman”); (2) whether and how a legislator’s position on the issue may be stated; (3) whether and how contact information for the legislator must be provided; and (4) whether there should be a separate PASO element. These test elements are considered seriatim.

### 1. *Concealing Officials’ Names*

By definition, an electioneering communication “refers to a clearly identified candidate for Federal office.”<sup>186</sup> In the 2002 rulemaking, the FEC defined “[r]efers to a clearly identified candidate” as including “an unambiguous reference such as ‘the President,’ ‘your

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183. Letter from Kay Guinane to Mai T. Dinh at 4 (Aug. 21, 2002) (OMB Watch comments on FEC rulemaking on electioneering communications).

184. *See infra* p. 408 (Appendix) (“Member of Congress” in FEC proposed Alternative 3-A), p.411 (“incumbent” in Broad-Coalition Test).

185. The 2002 rulemaking comments prove again that broad debate on the wording of a rule focuses the issues and improves the final product (assuming the comments are heeded and there actually is a product). The authors had hoped that when the U.S. Supreme Court in *WRTL I*, 546 U.S. 410 (2006), remanded the case for consideration on the merits, the FEC (and intervening prime sponsors) would engage in the debate on the proper wording for an exemption. However, the defendants refused, choosing instead to resist an exemption. The Broad Coalition Rule demonstrated again how an ongoing conversation over the scope of a rule improves the product. It was a very well-considered proposal that was clearly designed to relieve any realistic concerns about an exemption affecting elections and to be a rule that the FEC might actually adopt.

186. 2 U.S.C. § 434(f)(3)(A)(i)(I) (Supp. IV 2004).

Congressman,' or 'the incumbent.'<sup>187</sup> Therefore, unless a communication references a candidate, it is not an electioneering communication. And if there is to be a test stating an as-applied grassroots lobbying exemption, then the test necessarily begins with the fact that the communication will reference a federal candidate within the prohibition periods, among other factors, or else there would be no issue.

All rule proposals to date, save the Prime Sponsors Rule, assume that a grassroots lobbying communication will name the persons who are the object of the grassroots lobbying effort. But the Prime Sponsors Rule would require that "the communication refer[ ] to the candidate only by use of the term 'Your Congressman,' 'Your Senator,' 'Your Member of Congress' or a similar reference and . . . not include the name or likeness of the candidate in any form, including as part of an Internet address."<sup>188</sup>

At the oral argument before the Supreme Court in *WRTL I*, the Solicitor General argued that a corporation could evade the prohibition by simply "avoiding making an express reference to the candidate, which ought not to be too difficult if you're really just engaged in issue advocacy . . ."<sup>189</sup> Justice Scalia immediately denied that it was easy to do grassroots lobbying without naming names.<sup>190</sup> Justice O'Connor asked, "Could they have said in the ad, call your elected representatives, not naming any names?" General Clement responded, "They also could have done that."<sup>191</sup> But *WRTL* could *not* have done that because the FEC's regulations prohibit the substitution of "any unambiguous references such as 'the President,' 'your Congressman,' or 'the incumbent'" for the incumbent's name.<sup>192</sup> So in the Wedding Ad<sup>193</sup> *WRTL*

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187. 11 C.F.R. § 100.29(b)(2) (2007).

188. See *infra* pp. 408-09 (Appendix).

189. Transcript of Oral Argument at 37, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581).

190. Justice Scalia responded, "I deny . . . that it's easy to do issue ads without naming the candidate." *Id.* "The . . . point of an issue ad is to put pressure on . . . the candidate that you want to vote your way," he continued. *Id.* He concluded that "[w]ithout . . . telling people to call . . . the office of that incumbent, you're not doing very much." *Id.*

191. Transcript of Oral Argument at 38, *WRTL I*, 546 U.S. 410 (No. 04-1581). He immediately went on to argue that the fact that *WRTL* "couldn't resist the temptation to link the filibuster issue to Senator Feingold [wa]s not that surprising" and was interrupted at that point by Chief Justice Roberts: "That may be because the people who were doing the filibuster were the Senators. It's not . . . a surprising thing to link the Senators to that issue." *Id.*

192. 11 C.F.R. § 100.29(b)(2) (2007). The FEC regulation would even ban use of "Contact your Senators . . ." because that would still be "any unambiguous reference" (which is prohibited) and encompassed by the prohibited phrase "your Congressman"

could not have run its ads by replacing “Contact Senators Feingold and Kohl and tell them to oppose the filibuster”<sup>194</sup> with “Contact Senator Kohl and your other Senator and tell them. . . .”<sup>195</sup>

Under the Prime Sponsors Rule, however, WRTL could have run the ad by substituting “Your Senator’ . . . or a similar reference” for Senator Feingold’s name.<sup>196</sup> So, WRTL’s Wedding Ad would have been permissible under that rule if it had simply substituted Feingold’s title for his name. The Prime Sponsors Rule brings the analysis to a fine point. If clearly identifying a candidate by title creates no functional equivalence to express advocacy, does simply informing citizens of their lawmaker’s name suddenly create functional equivalence? Does depriving the public of public information prevent functional equivalence? Is it even possible for such a title-for-name dictate to reduce functional equivalence if the PBA Ad Test already reflects an ad that did name a candidate and yet had no cognizable electoral effect because it was a recognized “genuine issue ad”?

Narrow tailoring requires a “nexus” (a non-tenuous, relevant link)<sup>197</sup> between the asserted compelling interest and the restriction and an examination of whether the “interest asserted by the Government is . . . substantially advanced” by the prohibition.<sup>198</sup> Since *McConnell* upheld the prohibition facially,<sup>199</sup> it has a general nexus to, and advancement of, the corporate-form interest and a substantial number of ads captured by the prohibition are “the functional equivalent of express advocacy.”<sup>200</sup> But are these “nexus” and “advancement” requirements met by withholding a lawmaker’s name? The *WRTL II* district court found the necessary nexus in the “link” between an ad’s words and the lawmaker’s fitness for office:

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(and would be even less ambiguous because there are only two Senators while Wisconsin has eight Representatives).

193. See *infra* pp. 402-03 (Appendix).

194. The presence of this phrase demonstrates that the Solicitor General was also wrong when he responded to Justice Scalia that WRTL “didn’t even do that” in response to the Justice’s comment that unless you “tell[ ] people to call the office of that incumbent, you’re not doing very much.” Transcript of Oral Argument at 37, *WRTL I*, 546 U.S. 410 (No. 04-1581).

195. The Solicitor General acknowledged correctly that Senator Kohl could be named because he was not a candidate. *Id.* at 39.

196. See *infra* pp. 408-09 (Appendix).

197. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 793 & n.7 (1988).

198. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 388 (1984).

199. 540 U.S. 93, 207 (2003).

200. *Id.*

The common denominator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office. [n.22] Indeed, it is that very link which evinces, on the face of the ad, the intent to influence the election that the *McConnell* Court imposed as a critical requirement to functional equivalency. Conversely, it is the absence of that link that enables an issue ad to be fairly regarded as a genuine issue ad.

[n.22] See *McConnell*, 251F. Supp. 2d at 796 (Leon, J.) (“It is the absence of a link between the advocacy of an issue and a candidate’s fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads . . . unconstitutional.”).<sup>201</sup>

And the district court noted that a missing link meant missing corruption:

More importantly, it is the absence of that link which obviates the likelihood of political corruption and public cynicism in government where the ad, on its face, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for federal office. Thus, while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such.<sup>202</sup>

The only reference to Sen. Feingold in WRTL’s anti-filibuster ads was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted in *McConnell*, even the defendants’ own expert concluded that an ad mentioning a candidate’s name is a genuine issue ad, if “the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line.”<sup>203</sup> Naming the candidate is necessary to grassroots lobbying, as Judge Leon noted from the *McConnell* record.<sup>204</sup> Grassroots

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201. *WRTL II*, 466 F. Supp. 2d 195, 209 (D.D.C. 2006).

202. *Id.* at 209-10 (emphasis in original).

203. *McConnell v. FEC*, 251 F. Supp. 2d 176, 795 (D.D.C. 2003).

204. Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations: “[t]he testimony of various plaintiffs’ witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate’s name in these advertisements in order to focus the public’s attention on a particular pending piece of legislation.” *Id.* at 794. For example, bills are named after sponsors. *Id.* “[C]andidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect.” *Id.* (citation omitted) “[I]f

lobbying is ineffective without telling constituents to whom their call should be made. Often only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of Congress. Thus, they would not know whom to call, and some would hesitate to call a switchboard and acknowledge this ignorance. So, requiring ads to either say, “Call your Senator,” or that direct listeners to a switchboard greatly reduces the effectiveness of grass-lobbying.<sup>205</sup>

A title-for-name dictate also reduces the amount of information that citizens receive, which runs counter to First Amendment values. Moreover, it violates the hearers’ right to receive information, and deprives the people, who are the real sovereigns and are being called upon to exercise that sovereignty, of vital information needed to fulfill their civic function in our system of government. Depriving the people of important information even runs counter to a purported purpose of campaign finance reform legislation, which is to increase the relevant information available to citizens. Given the protections already in place in the PBA Ad Test, there is no nexus between a title-for-name dictate and any interest in protecting the integrity of our system of government when the dictate undercuts the very core functioning of that system. The dictate does not substantially advance any interest, but rather it impedes the people’s exercise of their constitutional rights and their participation in self-government. Consequently, it fails the functional equivalence test and strict scrutiny.

## 2. *Concealing Officials’ Positions*

Does adding a requirement that the incumbent’s record or position on the matter that is the subject of the petitioning be concealed from the people in a grassroots lobbying communication survive strict

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an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*” *Id.* (citation omitted) (emphasis in original). “[I]t is often necessary to refer to a federal candidate by name because [t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question.” *Id.* (citation omitted).

205. At the *WRTL I* oral argument, Justice Kennedy said, “It’s such an odd calculus. Who is the person more likely to be influenced with an issue ad?” Transcript of Oral Argument at 40, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581). “And that’s . . . the one area where the ad is prohibited,” he added. *Id.* The Solicitor General conceded the point as to effectiveness: “Obviously, you’re right . . .” *Id.*

scrutiny? None of the three ads that WRTL attached as exhibits to its complaint stated the position of Senators Kohl or Feingold on filibusters,<sup>206</sup> but the CCPA Ad for which WRTL sought relief in 2006 did so,<sup>207</sup> as did the proposed Crossroads Ad in the *CCLM* case.<sup>208</sup> The Prime Sponsors Rule<sup>209</sup> and the Commissioner Thomas Rule<sup>210</sup> proscribe any reference to “the candidate’s record or position on any issue.” The Broad Coalition Rule would permit such a reference “[i]f . . . it does so only by quoting the candidate’s own public statements or reciting the candidate’s official action, such as a vote, on the matter.”<sup>211</sup> The PBA Ad, the gold-standard genuine issue ad, stated the Senators’ position,<sup>212</sup> so the PBA Ad Test adopts the position that a statement about the lawmaker’s record or position on the issue is permissible, but it does include language about the nature of the statement in the PBA Ad (somewhat along the lines of the Broad Coalition Rule) that assures objective fairness and eliminates or reduces concerns about affecting elections.

Employing the same analysis as already established with regard to the title-for-name dictate, the issue is whether the safeguards already built into the PBA Ad Test so diminish any serious possibility that a grassroots lobbying ad might have a cognizable effect on an election that a position-concealment dictate can survive strict scrutiny. As with concealing the incumbent official’s name, concealing the incumbent’s position burdens the people’s right to receive information and their self-governing ability. It reduces the amount of information available to the public, thus running counter to First Amendment values and a purported purpose of campaign finance reform legislation. In fact, knowing a legislator’s position on the issue is especially vital both to a citizen’s decision whether to call a legislator and the citizen’s preparation of what to say if he or she decides to call. Upon learning the incumbent’s position, the citizen may decide not to call because he or she agrees with the position taken and does not believe that there is a need to firm up the official’s commitment to the position. If the citizen decides to call, he or she may wish to first research and marshal arguments in order to effectively petition the official (either to alter or

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206. See *infra* pp. 402-04 (Appendix).

207. See *infra* p. 405 (Appendix).

208. See *infra* p. 405 (Appendix).

209. See *infra* pp. 408-09 (Appendix).

210. See *infra* p. 410 (Appendix).

211. See *infra* p. 411 (Appendix).

212. See *infra* p. 401 (Appendix) (“Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure.”)

retain the stated position). Depending on the gravity of the issue and the official's position on it, the citizen will decide whether to email, phone, write, or try to see the lawmaker in person. Keeping citizens in the dark as to their representatives' position on important public issues makes all of these self-governing tasks more difficult.

It is true that misrepresenting an incumbent's vote or position on an issue would hinder the people in their self-governing task, but that issue is about how to deal with possible misrepresentations, not about the permissibility of concealing the position of the people's representatives on public issues from the people themselves. Those problems exist equally outside of electioneering communication prohibition periods, so they provide no basis for a prohibition in periods before elections. There are less-restrictive means of dealing with misrepresentations than a prohibition, including the means provided in the PBA Ad Test<sup>213</sup> and the Broad Coalition Rule.<sup>214</sup> If the risk of misrepresentation in public debate constitutionally permits prohibition of that debate, then the prohibition is woefully underinclusive and Congress would be permitted to ban all public debate. But that would not be the America that the Framers bequeathed to us. And the people's representatives are supposed to be accountable to the people, so there is absolutely no justification for any representative of the people to avoid accountability to the people for his or her record or position. Incumbents should not be able to shield themselves, their records, or their position on upcoming legislative or executive branch actions from their constituents at the most vital times. The First Amendment protects robust public debate, not an incumbent-protection gag rule that permits politicians to hide from the sovereign people.

Finally, disclosure of an incumbent politician's imminent planned public policy decisions is about legislative and executive branch action right now, not whether that lawmaker should be a lawmaker next term. One might ardently support the official for reelection but be vehemently opposed to his or her present position on a particular matter. Or, one might have no position on a candidate's reelection but support his or her action on a particular issue, which was the case with the CCPA Ad that WRTL wanted to run in the fall of 2006.<sup>215</sup> So, the necessary nexus between a position-concealment dictate and protect-

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213. See *supra* p. 401.

214. See *infra* p. 411 (Appendix).

215. See *infra* p. 405 (Appendix). WRTL approved Sen. Kohl's prior vote on the Child Custody Protection Act, although it had no position on his candidacy. See Third Aff. of Barbara L. Lyons at 7, *WRTL II*, 466 F. Supp. 2d 195 (D.D.C. 2006) (No. 04-1260).

ing elections is missing. There is no functional equivalence, and, therefore, this dictate fails strict scrutiny.

### 3. Dictating Contact Information

Does strict scrutiny justify allowing government to dictate that a communication contain certain contact information? One of the four alternatives set out by the FEC for comment in its 2002 rulemaking required that the grassroots lobbying communication “[c]ontain[ ] a phone number, toll free number, mail address, or electronic mail address, internet home page or other world wide web address for the person or entity that the ad urges the viewer or listener to contact.”<sup>216</sup> But none of the other three alternatives propounded by the FEC, the Prime Sponsors Rule,<sup>217</sup> the Commissioner Thomas Rule,<sup>218</sup> nor the Broad Coalition Rule,<sup>219</sup> contained such a dictate as to detail.<sup>220</sup> The PBA Ad, the Crossroads Ad, WRTL’s 2006 Filibuster Radio Ad, and the CCPA Ad provided the U.S. Capitol Switchboard phone number.<sup>221</sup> WRTL’s 2004 anti-filibuster ads pointed recipients to a website<sup>222</sup> that provided contact information for the Senators (and included the ability to send an email directly to the Senators and provided more information on the judicial filibuster problem) and was chosen because it was more memorable than a number.<sup>223</sup>

The idea of requiring specific contact information doubtless came from the fact that “sham” ads in the *McConnell* record often lacked such information.<sup>224</sup> But Judge Leon in his *McConnell* Findings identified representative “genuine issue ads” in the record that were captured by the prohibition, with three of the six ads having no phone number or other contact information.<sup>225</sup> Therefore, providing a phone number cannot be determinative. While providing contact information is help-

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216. See *infra* p. 408 (Appendix) (Alternative 3-C).

217. See *infra* pp. 408-09 (Appendix).

218. See *infra* p. 410 (Appendix).

219. See *infra* p. 411 (Appendix).

220. The Center for Responsive Politics comments, authored by Larry Noble and Paul Stanford, rejected the requirement of specific contact information: “We . . . believe that using phone numbers . . . as one of the criteria . . . will invite attempts to use these elements to inoculate communications from BCRA’s coverage.” CRP Comments, *supra* note 171 at 6.

221. See *infra* p. 405 (Appendix).

222. See *infra* pp. 402-04 (Appendix).

223. Transcript of Oral Argument at 5-6, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581) (statement of James Bopp, Jr.).

224. An example is the Yellowtail Ad. See *infra* p. 402 (Appendix).

225. *McConnell v. FEC*, 251 F. Supp. 2d 176, 195-96 (D.D.C. 2003) (AFL-CIO’s “Call” ad); *id.* at 916 (AFL-CIO’s “Spearmint” ad), 917 (AFL-CIO’s “Label” ad).

ful and may be in the communicator’s interest, it is not the role of government to tell citizens how best to communicate: “The First Amendment protects [WRTL’s] right not only to advocate [it’s] cause but also to select what [it] believe[s] to be the most effective means for doing so.”<sup>226</sup> The government has no per se interest in increasing the amount or dictating an exact type of information that would justify requiring communicators to list any particular contact details. And the government has no interest that would justify telling WRTL that it must provide a phone number in its ads as opposed to providing a website that provides even more contact information and even permits the viewer to send an email to the legislators from within the website.

Finally, there is no “link” between mandated contact details and a candidate’s fitness for office. There is no nexus to protecting our electoral system and no functional equivalence to express advocacy involved. Thus, this dictate fails strict scrutiny.

#### 4. A PASO Requirement

BCRA permitted the FEC to make a rule exempting communications from the electioneering communication prohibition provided that no exempted communication “promotes or supports . . . or attacks or opposes a candidate” (collectively “PASO”).<sup>227</sup> In one proposal set out by the FEC in its 2002 rulemaking, the FEC actually imported PASO language, requiring that the call to contact a legislator be done “without promoting, supporting, attacking or opposing the candidate.”<sup>228</sup> In late 2006, FEC Commissioner Hans von Spakovsky’s proposed an interim rule<sup>229</sup> that followed the Broad Coalition Rule<sup>230</sup> very closely but added PASO language, apparently in an effort to persuade a reluctant FEC to adopt an interim rule. Of course, no court is bound by BCRA’s PASO restriction, so that standard would not govern a test stated in a holding or a new FEC rule based on that holding.

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226. *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

227. 2 U.S.C. § 434(f)(3)(B)(iv) (Supp. IV 2004). Representative Shays discussed the reason for this rulemaking authority on the house floor, noting that “it is possible that there could be communications that will fall within [the prohibition] even though they are plainly and unquestionably not related to the election” and the rulemaking authority permitted the FEC to exempt “such communication . . . because they are wholly unrelated to an election.” 148 CONG. REC. H401-11 (Feb. 13, 2002).

228. See *infra* p. 408 (Appendix) (FEC Proposed Rules for Comment, Alternative 3-A).

229. See *infra* pp. 411-12 (Appendix) (Commissioner von Spakovsky Rule).

230. See *infra* p. 410 (Appendix).

The problem with PASO language is its vagueness.<sup>231</sup> *McConnell* upheld PASO language against a vagueness attack, but only in the limited context of political parties and politicians (who supposedly have higher skills in separating PASO from non-PASO language),<sup>232</sup> not as to other entities. If included in a test for a grassroots lobbying exemption, it would be applied even to diminutive, unsophisticated advocacy groups. Its vagueness would chill the people's speech as they try to exercise their self-governing role by petitioning government officials. Strict scrutiny burdens are not met by introducing vagueness. In fact, one of the arguments that the Solicitor General made in the *WRTL I* oral argument was that, in creating the prohibition, Congress had "to regulate in a way that's not vague, that's not overbroad, but is not so under-inclusive that it can be easily evaded."<sup>233</sup> A properly-worded test eliminates the prohibition's overbreadth and avoids easy evasion without a PASO test. A communication created under the PBA Ad Test would not PASO, but it would accomplish that goal by the test's terms and not by introducing vague PASO language. PASO language is not needed to prevent functional equivalence because there are less-vague, less-restrictive, and less-chilling ways to do so.

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231. There was universal agreement among commentators addressing the issue in the 2002 FEC rulemaking (BCRA Prime Sponsors, AFL-CIO, CMLC, Common Cause & Democracy 21, and Independent Sector) that PASO language in a rule providing a grassroots lobbying exemption would raise serious constitutional problems of vagueness. See, e.g., *Detailed Comments of BCRA Sponsors Sen. John McCain, Sen. Russ Feingold, Rep. Christopher Shays, Rep. Marty Meehan, Sen. Olympia Snowe, and Sen. James Jeffords* at 8 (2002), available at [http://www.fec.gov/pdf/nprm/electioneering\\_comm/comments/us\\_cong\\_members.pdf](http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf) (using PASO directly in a grassroots lobbying exemption would undercut the goal of avoiding any "subjective test" in favor of a "bright line test"); Letter from Laurence E. Gold and Michael B. Trister to Mai T. Dinh at 13 (Aug. 29, 2002) (AFL-CIO); Letter from Glen Shor to Mai T. Dinh at 9 (Aug. 21, 2002) (Campaign and Media Legal Center) (arguing that PASO language eliminates necessary "bright-line guidance" and is only suitable for "informing inherently electioneering entities (i.e., parties and candidates)"); Letter from Donald J. Simon to Mai T. Dinh at 11 (Aug. 22, 2002) (Common Cause & Democracy 21); Comments of Independent Sector on the Proposed Rules Regarding Electioneering Communications (Notice 2002-13) at 4 (attached to Letter from Sara Melendez to Mai T. Dihn (Aug. 21, 2002)).

232. *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (PASO not vague as to political parties); *id.* at 184 (PASO not vague as to incumbent state or local politicians or candidates).

233. Transcript of Oral Argument at 51, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581).

## CONCLUSION

The central question in creating a test is whether an ad focuses on incumbents in their role as legislators (or executive officials) or in their role as candidates. The *WRTL II* district court identified this key question with its “link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office.”<sup>234</sup> The petitioners proposing the Broad Spectrum Rule also analyzed *McConnell* in their rulemaking petition and concluded that “*McConnell* suggests . . . that a particular ‘electioneering communication’ is the ‘functional equivalent of express advocacy,’ and, therefore, constitutionally subject to regulation, if it both pertains to an individual’s candidacy or an election and seeks to persuade a voter to make a particular voting decision with respect to that candidate.”<sup>235</sup>

When incumbent legislators choose to both run for reelection and remain in session during peak legislative seasons, they wear both hats, as do incumbent executives who seek reelection. Genuine grassroots lobbying focuses on incumbent politicians in their official capacity, not as candidates, by focusing on asking constituents to contact these officials about current matters relating to official duties. And the PBA Ad Test readily distinguishes “genuine” from “sham” issue ads in the grassroots lobbying context.

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234. *WRTL II*, 466 F. Supp. 2d 195, 209 (D.D.C. 2006).

235. Jan Witold Baran, Robert F. Bauer, Laurence E. Gold, Margaret E. McCormick & John Pomerantz, Petition for Rulemaking: Electioneering Communication and Grassroots Lobbying Exemption at 3 (Feb. 16, 2006), available at [http://www.fec.gov/pdf/nprm/lobbying/orig\\_petition.pdf](http://www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf).

APPENDIX

2007]

DISTINGUISHING “GENUINE” FROM “SHAM”

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## ADVERTISEMENT

## PBA Ad (Feingold Kohl Abortion 60 Ad)

This ad was recognized by *McConnell* defense expert Kenneth M. Goldstein as a “genuine issue ad”.<sup>236</sup>

America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.<sup>237</sup>

## Barker Ad

This ad was recognized by *McConnell* defense expert David Magleby as a “genuine issue ad” and was cited and quoted in Judge Leon's *McConnell* opinion as a “representative example” of a “genuine issue ad”.<sup>238</sup>

Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed last year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative \_\_\_\_\_ at xxx-xxx-xxxx and tell him to

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236. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 312 (D.D.C. 2003) (Henderson, J., concurring in part, dissenting in part); *id.* at 748 (Kollar-Kotelly, J.), 905 (Leon, J.).

237. *Id.* at 312 (Henderson, J., concurring in part, dissenting in part).

238. *Id.* at 795, 914-15 (Leon, J.).

vote no on Fast Track. Tell him we're still paying attention. And Fast Track is *still* a bad idea.<sup>239</sup>

### Yellowtail Ad

This ad was cited by the Supreme Court in *McConnell* as an example of a sham issue ad, "clearly intended to influence the election":<sup>240</sup>

'Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.' 5 1998 Senate Report 6305 (minority views).<sup>241</sup>

### WRTL's 2004 Wedding Ad

In *WRTL II*, the district court held the electioneering communication unconstitutional as applied to this radio ad that WRTL wanted to continue broadcasting into the electioneering prohibition period in 2004.<sup>242</sup>

Audio: *We hear church bells up and under . . .*

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over . . .

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: [BeFair.org](http://BeFair.org). That's [BeFair.org](http://BeFair.org)

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239. *Id.* at 795, 915 (Leon, J.) (emphasis added). *See also id.* at 915-18 (five other "representative examples of genuine issue ads").

240. *McConnell v. FEC*, 540 U.S. 93, 193 & n.78 (2003).

241. *Id.* at 193 n.78.

242. *WRTL II*, 466 F. Supp. 2d 195, 210 (D.D.C. 2006).

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Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.<sup>243</sup>

**WRTL’s 2004 Loan Ad**

In *WRTL II*, the district court held the electioneering communication unconstitutional as applied to this radio ad that WRTL wanted to broadcast in 2004:<sup>244</sup>

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We’ve reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .

COUPLE: Yes, yes . . . we’re listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .

VOICE-OVER: Sometimes it’s just not fair to delay an important decision.

But in Washington it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates aren’t getting a chance to serve.

It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.<sup>245</sup>

**WRTL’s 2004 Waiting Ad**

In *WRTL II*, the district court held the electioneering communication unconstitutional as applied to this television ad that WRTL wanted to broadcast in 2004:<sup>246</sup>

VOICE-OVER: There are a lot of judicial nominees out there who can’t go to work. Their careers are put on hold because a group of Senators is filibustering-blocking qualified nominees from a simple “yes” or “no” vote.

It’s politics at work and it’s causing gridlock.

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243. *Id.* at 200 n.3.

244. *Id.* at 210.

245. *Id.* at 200 n.4.

246. *Id.* at 210.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

WRTL REPRESENTATIVE VOICE-OVER: Wisconsin Right to Life is responsible for the content of this advertising.

The script describes the visual aspect of the advertisement as follows:

We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:

He reads the morning paper

He polishes his shoes

He checks for mail, which hasn't arrived

He scans through his Rolodex

He reads his Palm Pilot manual

He pays bills.

At the end of the ad, the website "www.BeFair.org" is displayed, and a four-second disclaimer reads "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertisement, not authorized by any candidate or candidate's committee."<sup>247</sup>

### WRTL's 2006 Filibuster Radio Ad

In January 2006, WRTL ran this "Filibuster Radio Ad: 60" opposing a threatened filibuster of now-Justice Samuel Alito (note this was not run during a prohibition period and so was not an electioneering communication):<sup>248</sup>

Some Senators are at it again. Threatening to filibuster qualified judicial nominees. This time, the stakes are even higher. They want to use the filibuster to block a vote on the nomination of Judge Samuel Alito for the U.S. Supreme Court. Judge Alito has received the highest qualification rating for judicial nominees and deserves a simple "yes" or "no" vote to prevent gridlock in our judicial system. Contact Senators Feingold and Kohl at 202-224-3121 and tell them to oppose the filibuster of Judge Samuel Alito for the U.S. Supreme Court. That's 202-224-3121. Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.<sup>249</sup>

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247. *Id.* at 200 n.5

248. Second Aff. of Barbara L. Lyons at 1, *WRTL II*, 466 F. Supp. 2d 195 (No. 04-1260).

249. *Id.*

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DISTINGUISHING “GENUINE” FROM “SHAM”

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### WRTL’s CCPA Ad

WRTL sought a preliminary injunction during the 2006 prohibition period as part of its ongoing *WRTL* litigation to permit it to run this “Child Custody Protection Act Ad: 60 Seconds,” but a preliminary injunction was denied, and the district court in the *WRTL II* opinion chose to rule only on the three 2004 anti-filibuster ads:<sup>250</sup>

Listen up, parents. Wisconsin requires parental consent before your minor daughter can have an abortion. But, she can be taken to Illinois for an abortion that is kept secret from you. Imagine, your daughter can be taken *across state lines* for a major surgical procedure without your knowledge or consent. The U.S. Senate recently passed a bill to protect parents from secret abortions. Fortunately, Senator Kohl voted *for* the rights of parents. But, sadly, Senator Feingold did not. Your help is urgently needed because some Senators are holding up further action on the bill. Please call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions. That’s 202-224-3121. Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.<sup>251</sup>

### CCLM’S 2004 Crossroads Ad

CCLM sought judicial protection to run this ad, but a preliminary injunction was denied and the case dismissed for mootness:

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges - by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that’s 202-224-3121. Thank you for making your voice heard. Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.<sup>252</sup>

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250. See *WRTL II*, 466 F. Supp. 2d at 203 n.15 (mentioning CCPA Ad).

251. Third Aff. of Barbara L. Lyons at Exhibit D, *WRTL II*, 466 F. Supp. 2d 195 (No. 04-1260).

252. See Jurisdictional Statement at 1 n.1, *Christian Civic League of Me., Inc. v. FEC* (U.S. Supreme Court No. 06-589).

## TESTS

WRTL's Test in *WRTL I* Oral Argument

At the oral argument in *WRTL I*, James Bopp, Jr. offered the following test for identifying a genuine issue ad employed for grassroots lobbying:

I think that you would look at, one whether the . . . ad discusses a current legislative issue; two, whether or not it made any reference to the legislator beyond lobbying him or her about that specific issue. So there should not be any references to the election or the candidacy of the incumbent or any of those type of references. And if you had that, you would have a bona fide, genuine effort to lobby.<sup>253</sup>

WRTL's Test in *WRTL I* Briefing

In briefing *WRTL I*, WRTL set out the following guidelines for identifying a genuine issue ad employed for grassroots lobbying:

[T]he IRS definition of "grass roots lobbying communication" . . . is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof " and has three "required elements": (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation." 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). Since a general grassroots lobbying exception should apply to both legislative and executive branch actions, this should be made clear in any rule. Further, to prevent any risk of an attempt to influence an election, a grassroots lobbying communication should not mention the pending election, the incumbent politician's candidacy, or the identity of any challenger. This would provide a workable definition for grassroots lobbying and avoid *McConnell's* concerns about "sham issue ads."<sup>254</sup>

## WRTL's "Details" Concerning Its 2004 Ads (not a test)

In its *WRTL I* briefing WRTL set out the following "details" concerning its ads, which were stated not as a test but as demonstrating that (under any proper test) these ads had sufficient indicia of a genuine issue ad that the electioneering communication prohibition was unconstitutional as applied to them:

The details of WRTL's broadcast ads indicate that they were authentic grassroots lobbying and not electioneering. As to *topic*, they concerned

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253. Transcript of Oral Argument at 21, *WRTL I*, 546 U.S. 410 (2006) (No. 04-1581).

254. Reply Brief for Appellants at 18-19, *WRTL I*, 546 U.S. 410 (No. 04-1581).

only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly-identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any political party, to the candidate’s record or position on any issue, to the candidate’s character, qualifications, or fitness for office, or to the candidate’s election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate. In addition, they could have been run only with money from a “segregated bank account” under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief. Record 30:9-10 (AVC ¶¶ 38-50). The ads were broadcast independent of any candidate or political party. Record 30:10 (AVC ¶ 50) (see 11 C.F.R. § 109.20(a)). These details demonstrate that, under any reasonable test, the ads were genuine grassroots lobbying.<sup>255</sup>

### WRTL II District Court Test

The district court in *WRTL II* set out a general test for distinguishing “genuine” from “sham” that may be distilled as follows: (1) examine the text and images of the electioneering communication itself<sup>256</sup> and (2) ask whether there is a “link” between the communication’s contents and the fitness of the identified candidate for office.<sup>257</sup>

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255. Brief for Appellant at 4 n.4, *WRTL I*, 546 U.S. 410 (emphasis in original).

256. 466 F. Supp. 2d at 205. The Court indicated that in determining whether an ad is functionally equivalent to express advocacy it would examine whether it, “at a minimum”:

(1) 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; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

*Id.* at 207.

257. *Id.* at 209.

### FEC Rules Proposed for Comment

In its 2002 rulemaking on electioneering communications, the FEC solicited comments on the following four alternatives:

*Alternative 3-A:* (6) Is devoted exclusively to urging support for or opposition to particular pending legislative or executive matters, where the communication only requests recipients to contact a specific Member of Congress or public official, without promoting, supporting, attacking or opposing the candidate, or indicating the candidate's past or current position on the legislation;

*Alternative 3-B:* (6) Concerns only a pending legislative or executive matter, and the only reference to a Federal candidate is a brief suggestion that he or she be contacted and urged to take a particular position on the matter, and there is no reference to the candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting;

*Alternative 3-C:* (6)(i) Does not include express advocacy; (ii) Refers to a specific piece of legislation or legislative proposal, either by formal name, popular name or bill number; or refers to a general public policy issue capable of redress by legislation or executive action; and (iii) Contains a phone number, toll free number, mail address, or electronic mail address, internet home page or other world wide web address for the person or entity that the ad urges the viewer or listener to contact;

*Alternative 3-D:* (6) Urges support of or opposition to any legislation, resolution, institutional action, or any policy proposal and only refers to contacting a clearly identified candidate who is an incumbent legislator to urge such legislator to support or oppose the matter, without referring to any of the legislator's past or present positions; or

(7) Refers to a clearly identified Federal candidate in a public communication by a candidate for State or local office, individual holding State or local office, or an association or similar group of candidates for State or local office or of individuals holding State or local office, if such mention of a Federal candidate is merely incidental to the candidacy of one or more individuals for State or local office.<sup>258</sup>

### Prime Sponsors Rule

In the 2002 FEC rulemaking on electioneering communications, the BCRA prime sponsors (Sen. McCain, Sen. Feingold, Rep. Shays, Rep. Meehan, et al.) proposed the following rule for an exemption as being within the FEC's authority and properly distinguishing genuine from sham grassroots lobbying:

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258. Electioneering Communication, 67 Fed. Reg. 51131, 51145 (Aug. 7, 2002).

The term “electioneering communication” does not include any communication that:

\*\*\*\*

(x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication’s only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; (iii) the communication refers to the candidate only by use of the term “Your Congressman,” “Your Senator,” “Your Member of Congress” or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate’s record or position on any issue; (ii) the candidate’s character, qualifications or fitness for office; or (iii) the candidate’s election or candidacy.<sup>259</sup>

### CRP Rule

In the 2002 FEC rulemaking on electioneering communications, the Center for Responsive Politics (Lawrence Noble, Executive Director) proposed the following rule for an exemption as being within the FEC’s authority and properly distinguishing genuine from sham grassroots lobbying:

(c) *Electioneering communication* does not include any communication that:

\* \* \*

(6) (i) Contains the following elements:

(A) The communication is devoted exclusively to a pending legislative or executive branch matter;

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259. *Detailed Comments of BCRA Sponsors Sen. John McCain, Sen. Russ Feingold, Rep. Christopher Shays, Rep. Marty Meehan, Sen. Olympia Snowe, and Sen. James Jeffords* at 10 (2002), available at [http://www.fec.gov/pdf/nprm/electioneering\\_comm/comments/us\\_cong\\_members.pdf](http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf) (attached to Letter from Sen. John McCain, et. al. to Ms. Mai T. Dinh, Associate Legal Counsel, of the FEC. The Campaign and Media Legal Center joined in proposing this rule, (see Letter from Glen Shor, Associate Legal Counsel, Campaign and Legal Media Center, to Mai T. Dinh, Assistant General Counsel, FEC, at 10-11 (Aug. 21, 2002) (Trevor Potter was named therein as General Counsel)), as did Common Cause and Democracy 21 (see Letter from Donald J. Simon, General Counsel, Common Cause and Democracy, to Mai T. Dinh, Assistant General Counsel, FEC, at 12 (Aug. 22, 2002) (adding that “this proposed exception properly balances the competing concerns” and avoids “sham communications”)).

- (B) The communication's only reference to a clearly identified Federal candidate is a statement urging the public to contact that Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter; and
- (ii) Does not contain any of the following elements:
  - (A) Any reference to any political party, including the candidate's political party;
  - (B) Any reference to the candidate's record or position on any issue; or
  - (C) Any reference to the candidate's character, qualifications or fitness for office or to the candidate's election or candidacy.<sup>260</sup>

### Commissioner Thomas Rule

In the 2002 FEC rulemaking on electioneering communications, FEC Commissioner Scott Thomas proposed the following rule for an exemption as being within the FEC's authority and properly distinguishing genuine from sham grassroots lobbying:

Meets the following criteria:

- (i) Is devoted exclusively to a particular pending legislative or executive branch matter:
- (ii) Only refers to a clearly identified Federal candidate in urging the public to contact that Federal candidate to persuade him or her to take a particular position on the pending legislative or executive branch matter; and
- (iii) Does not contain . . . [a]ny reference to a political party or to the political persuasion of the clearly identified candidate [or] . . . the candidate's record or position on any issue[,] . . . character, qualifications, or fitness for office, or to an election, voters or the voting public, or anyone's candidacy.<sup>261</sup>

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260. Letter from Lawrence Noble, Executive Director, Center for Responsive Politics, and Paul Sanford, Director, FEC Watch, to Mai T. Dinh, Assistant General Counsel, FEC (Aug. 21, 2002), *available at* <http://www.fecwatch.org/law/regulations/pdfs/electcommcomments.pdf> (the quotation is from the attached "Comments of FEC Watch and the Center for Responsive Politics" at 5-6).

261. Memorandum from Scott E. Thomas, FEC Commissioner, FEC, to the Federal Election Commission 2 (Sept. 25, 2002), *available at* <http://www.fec.gov/agenda/agendas2002/mtgdocs02-68a.pdf> (Agenda Document No. 02-68-A).

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DISTINGUISHING “GENUINE” FROM “SHAM”

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### Broad Coalition Rule

This rule was proposed in early 2006 by counsel representing a broad-spectrum coalition,<sup>262</sup> and as stated by the FEC in Notice 2006-4 sought an expedited rulemaking

to revise 11 CFR 100.29(c) to exempt from the definition of “electioneering communication” certain “grassroots lobbying” communications that reflect all of the following principles: 1. The “clearly identified federal candidate” is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate’s position or record on the matter, it does so only by quoting the candidate’s own public statements or reciting the candidate’s official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate’s candidacy, or a political party; and 6. The communication does not refer to the candidate’s character, qualifications or fitness for office.<sup>263</sup>

### Commissioner von Spakovsky Rule

Before the electioneering communication prohibition period preceding the 2006 general election, FEC Commissioner Hans A. von Spakovsky proposed the following “Interim Final Rule Exempting Grassroots Lobbying Communications From the Definition of ‘Electioneering Communication’”:

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(c) The following communications are exempt from the definition of *electioneering communication*. Any communication that:

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(6) Is a grassroots lobbying communication. For purposes of this section, a grassroots lobbying communication is any communication that:

- (i) References a clearly identified candidate for Federal office, but refers to that candidate only in his or her capacity as an incumbent public officeholder, does not reference that per-

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262. Jan Witold Baran, Robert F. Bauer, Laurence E. Gold, Margaret E. McCormick & John Pomeranz, *Petition for Rulemaking: Electioneering Communication and Grassroots Lobbying Exemption* at 3 (Feb. 16, 2006), available at [http://www.fec.gov/pdf/nprm/lobbying/orig\\_petition.pdf](http://www.fec.gov/pdf/nprm/lobbying/orig_petition.pdf).

263. Federal Election Commission Rulemaking Petition, 71 Fed. Reg. 13557 (March 16, 2006).

- son's character, qualifications, or fitness for office, and does not refer to any Federal election or a political party;
- (ii) Has as its subject matter a public policy issue under consideration by Congress or the Executive Branch;
  - (iii) Urges the incumbent public officeholder to take a particular position or action with respect to the public policy issue referenced in subsection (ii) above, or urges the general public to contact the incumbent public officeholder for the purpose of encouraging such position or action with respect to the public policy issue referenced in subsection (ii) above;
  - (iv) Does not promote, support, attack, or oppose any candidate for the office sought by the incumbent public officeholder referenced in subsection (i) above; and
  - (v) References the position or record of the incumbent public officeholder on the public policy issue referenced in subsection (ii) above only by quoting that officeholder's own public statements or reciting that officeholder's official actions, such as a vote. A communication that does not discuss the position or record of the incumbent public officeholder on the public policy issue referenced in subsection (ii) above, but satisfies subsections (i), (ii), (iii), and (iv) is also a grassroots lobbying communication.
  - (vi) Paragraph (c)(6) of this section shall not apply to any activities or communications after September 30, 2007.<sup>264</sup>

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264. Memorandum from Hans A. von Spakovsky, FEC Commissioner, to the Federal Election Commission 45-46 (Aug. 3, 2006), *available at* <http://www.fec.gov/agenda/2006/mtgdoc06-53.pdf> (Agenda Document No. 06-53 regarding the proposed Interim Rule Exempting Grassroots Lobbying Communications From the Definition of "Electioneering Communication").