PARTICIPANTS:

Panel 4

BRIAN SVOBODA
MICHAEL TRISTER
JEREMIAH L. MORGAN

Panel 5

STEPHEN HOERSTING
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CHAIRMAN LENHARD: Good morning, I would like to open the hearing of the Federal Election Commission for Thursday, October 18, 2007.

This is a continuation of our hearings on the question of whether the agency should amend its regulations in light of the Supreme Court's decision in Wisconsin Right to Life.

We had a series of panels yesterday and we will continue that today.

We have total, I believe, of seven witnesses today who will occupy two different panels. The first panel will last about an hour and a half and we will then break for lunch and reconvene with the second panel this afternoon.

Each of the witnesses will have five minutes for an opening statement. We have a light display system on the table in
front of you to aid you in management of that
time.

The green light will appear and
will remain on for most of your time and will
start flashing when there is one minute left.

The yellow light will come on when
there is 30 seconds left and the red light
comes on when your time has expired.

After that we will open it up to
questions from the Commission. The
commissioners simply can seek recognition
from me and we will not go in any particular
order and the commissioners can have follow-
up questions as they wish.

In addition, the general counsel
and the staff director's representative will
also have an opportunity to ask questions if
they would like.

We had provided an opportunity for
opening statements yesterday and had one. I
assume none of the commissioners want to make
opening statements again today, in light of
yesterday's testimony? Hearing none, then we will go to our first panel.

Welcome, gentlemen. Our first panel this morning consists Brian Svoboda who has ably come instead of Bob Bauer and is appearing on behalf of the Democrat Congressional Campaign Committee.

Mr. Svoboda, I don't know if you know it or not, the Commission met earlier and by a vote five to zero have decided that you should read Mr. Bauer's blog this morning, a bit of prose in the tradition of Mr. Keats, so if you could do that for us, that would be excellent.

Just kidding. We have Jeremiah Morgan here on behalf of the Free Speech Coalition, so welcome.

And Michael Trister who is here on behalf of the Alliance for Justice.

We generally follow the alphabetical order in order of our speakers. Unless you have arranged among yourselves
differently that would involve Mr. Morgan
going first, Mr. Svoboda going second and Mr. Trister going third.

Hearing no mention of an alternative plan, Mr. Morgan, please proceed at your leisure.

MR. MORGAN:  Good morning, Chairman Lenhard and members of the Commission.

My name is Jeremiah Morgan. I am an attorney with the law firm of William J. Olsen, P.C. and I am appearing today on behalf of both the Free Speech Coalition and Free Speech Defense and Education Fund.

Thank you allowing me the opportunity to testify on the proposed regulations.

The Free Speech Coalition was founded in 1993 as a group of ideologically-diverse nonprofit organizations, primarily Internal Revenue Code Section 501(c)4 organizations, and the companies that work for them.
Its purpose is to protect such organizations' First Amendment rights through the reduction or elimination of excessive regulatory burdens on those rights.

The Free Speech Defense and Education Fund was established in 1996 and is a section 501(c)3 education and litigation sister organization of FSC. We filed written comments on behalf of both organizations on October 1, 2007.

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

In this rulemaking proceeding, the Commission should pick up where Chief Justice Roberts left off in WRTL II.

In the final paragraph of the Chief Justice's opinion, he said, "When it comes to defining what speech qualifies as a
functional equivalent of express advocacy
subject to the electioneering communications
act, the issue we do have to decide, we give
the benefit of the doubt to speech, not
censorship."

The regulations proposed by the
Commission do not appear to follow suit.
They do not give the benefit of the doubt to
the rights guaranteed by the First Amendment.

The Commission's jurisdiction is
limited to the regulation of federal
elections, and yet the Commission is being
asked by some in Congress and some who will
testify here today to protect incumbents from
criticism or pressure from their
constituents.

That should no longer be possible
as the Supreme Court in WRTL II blew a hole
in Congress's attempt to give each
congressman and senator a preelection
trademark on the use of their names.

Alternative 1's exemption would
unconstitutionally maintain the reporting
requirement for issue advertisements such as
WRTL's.

While the NPRM maintains that the
Commission "could construe" WRTL II as not
affecting the reporting requirements for
electioneering communications, such a reading
is not only illogical, but unconstitutional.

The Commission cannot demand
reporting without a nexus to federal
elections. If it cannot regulate certain
electioneering communications, it obviously
cannot require reports on those expenditures.

The same is true for disclaimer
requirements. Likewise, Alternative 2 is
unconstitutionally structured to exempt issue
ads from its definition of "electioneering
communications." This is backwards.

The WRTL II court's opinion not
allow WRTL's ads as an exemption to BCRA
Section 203. Instead, the court defined an
ad that is "the functional equivalent of
express advocacy only if the ad is
susceptible of no reasonable interpretation
other than as an appeal to vote for or
against a specific candidate."
The NPRM converts this into an
exemption "if the communication is
susceptible of a reasonable interpretation
other than as an appeal to vote for or
against a specific candidate."
The converse of a statement is not
the same as a statement, and when in doubt,
stick with the court's configuration.
Actually, neither alternative
proposed in this NPRM would adequately
incorporate the principles of the Supreme
Court's decision in WRTL II.
The two proposals appear to be
based on the presumption that the
constitutional difficulties can be remedied
by creating an exemption in the faulty
regulations.
This has the effect of shifting the
burden of proof to those engaging in political speech that they are covered by the exemptions or within the safe harbors.

The Supreme Court in WRTL II affirmed that ads such as WRTL's are political speech. Thus, the application of BCRA Section 203 is subject to strict scrutiny, and therefore the Commission has the burden to prove that a particular ad is a prohibited electioneering communication.

Commission regulations should not be written so that an organization has to prove that it exempt.

Lastly, with respect to the NPRM's interest in "basic background information" clause of the Supreme Court decision, the NPRM treats that decision with selective creativity, which appears to show a lack of respect for the actual text of the opinion.

The Chief Justice said, "Courts need not ignore basic background information that may be necessary to put an ad in
The Commission could avoid entirely any consideration of "basic background information" if it heeded the court's other admonitions.

The court said, for example, "that the proper standard... must entail the minimal if any discovery." There generally should be no discovery or inquiry into the sort of contextual factors highlighted by the FEC.

Finally, "the need to consider such background should not become an excuse for discovery, for a broader inquiry of the sort we have just noted raises First Amendment concerns." And yet none of these relevant portions of the Chief Justice's opinion were even discussed by the NPRM.

Sadly in discussing "basic background information," the NPRM manipulates the court's language to maximize its own role and to minimize the sphere of political
speech.

Hopefully the Commission will reject both alternatives and adopt one which honors the language of the First Amendment as Chief Justice Roberts did at the close of his WRTL II opinion.

Thank you.

CHAIRMAN LENHARD: Mr. Svoboda?

MR. SVOBODA: Thank you, Mr. Chairman. Bob Bower sends his apologies to the Commission. I am told that he is not writing more poems as we speak, but was called away on urgent client business.

Like as I might to read his poem, unlike him I have no poetic skills.

So, instead I am here on behalf of the Democratic Congressional Campaign Committee.

We have a slightly different perspective than Mr. Morgan at least does on the matter and the task before the Commission.
Mr. Morgan asked the Commission to "pick up where Chief Justice Roberts left off," and proceed to lend further effect of the Supreme Court's decision, but the Commission has a different job than Chief Justice Roberts did.

His job was and remains to interpret and enforce the statute that Congress wrote and to lend the statute the maximum possible effect.

It has to construe the statute obviously to avoid constitutional difficulties, but it is left at the end of the day with the principal task of fidelity to what it was that Congress passed and there is real peril for the Commission the more it attempts to do on this front in this rulemaking, especially in the small amount of time in which you have to act before the presidential elections.

As we mentioned in our comments, the Commission is always, as an
administrative agency, on the weakest possible ground in court litigation when positions it's advancing are not the result of an interpretation of the statute or an interpretation of the terms of the statute, but rather the Commission's predictions about what a court might do, or what a court could do, or what a court should do. Any one of the eight of us here talking this morning might have an opinion about what WRTL II means and what Chief Justice Roberts meant and what a court might say in the future and each one of the eight of us would enjoy the same level of deference from the district court if the Commission gets sued, as I expect it probably will by somebody in some fashion, which is none. So the Commission has to be very cautious and very sparing in how it approaches this task at least at this moment and that is why we urge the Commission to adopt a minimalist, if you will, version of
Alternative 1 before the Commission.

Obviously it needs to conform its regulations to what it was that the Supreme Court did this past June, but it needs to do so very carefully because there are developments that none of us as yet are going to be able to completely foresee.

And we are especially mindful of this with regard to the disclosure requirements, an issue that was not before the Court in WRTL II, and an issue where if you read McConnell and you read the court opinions that it's not clear that the same method of legal review and the same standard applies.

For example in the McConnell case the Supreme Court made it clear that there was a difference between banning speech on the one hand and requiring disclosure of activities related to that speech on the other.

And certainly when faced with a
statute that on its face unambiguously
requires that disclosure the Commission is
simply not able to say that that doesn't
matter. We don't think that can
constitutionally be upheld.

It might try that, but that
position is going to be vulnerable upon
review.

So the Commission needs to be very
careful about drawing inferences from the
WRTL case and making predictions about what
the courts might do and particularly in this
short time frame, and I hate to say, given
who I represent, but a conservative course of
action I think is going to serve the
Commission best here.

And that brings me to the second
point we raised in our comments, which is the
definition of express advocacy and whether
the Commission ought to open up 100.22 and
give it a second look under the circumstances
of WRTL.
Our position for much the same reasons is that the Commission should not. The Commission was not considering in WRTL II what is or is not express advocacy and whether 100.22 is constitutional or wasn't constitutional.

It claimed to be reviewing the regulation of something else entirely, the functional equivalent of express advocacy.

A car is a car, but the functional equivalent of a car is not a car. It might be some completely different sort of vehicle that goes faster, or goes slower. It has different attributes and the Commission needs to be mindful of that.

Clearly Congress didn't think that they were regulating express advocacy when they wrote Title II of BCRA and clearly they thought they were regulating something else.

It is important to note and here I will conclude my comments, that to revise 100.22 at this point has the effect to create
havoc well beyond the corporate and union
interests that are here today seeking review
of the WRTL case.

For example, party committees and
PACs issue communications every day in
reliance on the Commission's current
definition of express advocacy.

I mean, for example, we are going
to have a different president of the United
States in January 2009, whoever that may be,
and knock wood it will be a Democrat, and my
client is apt to be issuing communications
that will be referring to that person and
probably referring to them quite positively
and probably flunking the PASO standard.

Is that express advocacy of that
individual? In most of the contexts in which
we do that, plainly not, but that is an
example of how the Commission, if it acts too
quickly, too precipitously on this front can
cause issues for others in the regulated
community that it need not and should not
Thank you for your time.

CHAIRMAN LENHARD: Thank you. Mr. Trister?

MR. TRISTER: Thank you, Mr. Chairman. I would like to start by weighing in on this issue of alternative wonders and Alternative 2 particularly and how it bears on the reporting requirements.

I tend to agree with those like Mr. Svoboda who have argued that the Roberts opinion does not resolve the issue.

If it did, if it was unequivocal even though the issue was not raised, if the reasoning and the language of the opinion was so absolutely clear on the question, then you'd have to follow it, but I don't think you can fairly argue that position.

Not only was the issue not raised, it was not discussed and as a number of the comments point out there is a serious question about what the standard of review is
for constitutional purposes and whether it is
even the same standard as was being applied
in that case. And so on.

I think it simply is not fair
really to construe the case as having
resolved the question and left the Commission
really with no choice. But that I think only
puts the question before you of what do you
then do? What is your choice?

This is where I have to part
company with Mr. Svoboda. Frankly, the
conservative approach that he says he is
arguing for is in fact Alternative 2. Let me
say why.

Basically the court has left you in
a position where they have created a new
category of speech which was not before
Congress when it wrote its reporting
requirements.

That's the fact. We don't know and
it's really impossible to know for us how
Congress would have decided this question.
Yet it does raise important constitutional questions. It strikes me that the real question then is what does this agency do without any guidance by Congress on these difficult questions.

One of the key questions will be has Congress decided that it wants reporting in this area, this very narrow category of speech which really did not exist, and secondly, what kind of reporting does it want? And it strikes me that those are questions that should be answered by Congress in the first instance and not by the court.

Given that position, the correct institutional position for the Commission is to adopt Alternative 2 and basically say to Congress, if you want reporting in this area, legislate, tell us what you want. Answer the difficult questions.

Do you want reporting of this particular type of speech, this narrow category of speech which is constitutionally
protected at least in some of its ramifications.

Do you want reporting so that if there are going to be challenges, as Mr. Svoboda says, then we will at least know that Congress had made the decision that there are interests at stake that require reporting in this area and it has also addressed the question of how that reporting should take place.

The reporting requirements that exist that were written as part of BCRA were written in the context essentially of individuals and unincorporated entities being able to do electioneering communications.

They were not written for corporations, nonprofit corporations, for-profit corporations, and unions, who are the ones that now have this category of speech opened up to them.

So it strikes me that the conservative approach here, institutionally,
is for the Commission to essentially send
this back to Congress.

I realize there are time limits involved, but from the standpoint of
Congress, at least, this is a fairly new issue.

The court acted in June. We are sitting here in October and they've got plenty of time to address this question when and if they want to and I think an appropriate approach in that context is Alternative 2 which leaves it to Congress to resolve.

A second point I would like to move on to now came from my reading of the comments that were filed. And it has to do with this question of what is a safe harbor.

I read the proposal in the NPRM as presenting first a general rule which tracks the Roberts opinion and then creates two safe harbors.

I assumed, and our comments
proceeded from the assumption, that the way
that would work is that if you fell within
one of the two safe harbors then you were per
se protected.

If you did not, then the inquiry
switches back to the general rule.

I had thought that that was fairly
clear and some of the comments certainly
follow that approach. What worries me is
that there were some comments that were
submitted which suggest that the safe harbor
is sort of the end-all of the discussion --
that in effect if you don't fit within the
safe harbor for grassroots lobbying, then
that's it. There is no further inquiry.

I don't recall the specifics of
this, but there were several sets of comments
which seemed to make that assumption and that
worries me, so I would urge that if you're
going to have safe harbors that you make it
clear that the safe harbor is just that, a
safe harbor.
I do a lot of tax work. We have lots of safe harbors in terms of tax work.

It's an opportunity. If you fit within it, that is the end of the discussion, but if you don't fit within it, there is still the general rule to be applied.

It is especially important because of the issue of burden of proof. We think that the court made it absolutely clear that the burden of proof in this instance and on these questions is on the Commission.

If the Commission wants to prohibit or penalize a group for having made a communication which violates Section 203, the burden is on the Commission to show that it can do it constitutionally.

CHAIRMAN LENHARD: If I can just jump in, I think the little red light is sadly indicating your time is up.

MR. TRISTER: I am sure I will have a chance to continue.

CHAIRMAN LENHARD: On your last
point, we had some discussion of this
yesterday. Your sense of what safe harbors
were to achieve is the sense of the
Commission as to what the safe harbors were
to achieve and we have noted a number
commenters had some confusion on it and
certainly we will try to clarify that in
whatever the final rule is.

Now we will open the hearing to
questions and comments from the Commission.

Vice Chairman Mason.

VICE CHAIRMAN MASON: Mr. Morgan, I
appreciate your comments, I appreciate where
you are coming from, and I am always asking
people in general to comment before the
Commission and have people who reflect the
views you represent comment, but I have a
problem.

Today is October 18. One of the
parties has just set the date for the Iowa
caucuses for January 5th which means that the
statutory time frames relevant to this issue
that we are dealing with go into the effect
on December 6th.

That is 46 days from now. We have
to do something and we don't have the choice
of saying that we are not going to do it or
we don't understand.

You have presented some cogent
criticisms of the approaches, but we don't
have the choice of going back to the drawing
board.

What we thought we were trying to
do was fill in some of the spaces and give
people something that they could work with.
Otherwise your clients are going to be out
there wanting to run ads and you will be
looking at the Supreme Court decision and
making your own interpretations.

Mr. Svoboda pointed out, how much
defereence is that going to get? And what
kind of risk? And how does the Commission?
Believe you me, we didn't pass the law. We
didn't file the lawsuit. We didn't write the
opinion. We didn't really ask for a lot of this and clearly from the Commission's enforcement perspective, whether we like policy or not it, is a whole lot easier to enforce the blanket rule.

You mention a federal candidate on a broadcast, boom, you're out of there. I am just left a little bit disappointed that you would not give us something to work with from the perspective of somebody who is out there representing people and presumably would want some further guidance.

If you haven't put anything out already, I don't know what there is, but I wanted to note that and urge you the next time to think about the predicament the Commission is in.

Because we don't have the choice of postponing the enforcement of the statute. So try give us something to work with.

If you have a way, for instance,
and I will let you respond if you want to, of putting in the regulatory language the test of giving the benefit of the doubt to speech, what would it look like?

MR. MORGAN: Well, fortunately I don't have to write the regulations. I don't envy your position at all, your job, your task.

But as the proposed regulations are drafted, the ones that are here, we are still going to be looking at the language and the decision in WRTL II.

CHAIRMAN LENHARD: If I could follow up on that. I don't know if you have read it, and I was just flipping through the pages to recall, but my recollection is the AFL-CIO presented an alternative test rather than amending either 129, or 114, but they had a simpler and in some ways a more elegant test and I wanted to see if you either recall that or you can actually submit comments later as to whether that would resolve some
of the concerns you were raising as to
whether we had cleaved close enough to
constitutional lines there.

        MR. MORGAN: Yes, I didn't analyze
it that closely.

        CHAIRMAN LENHARD: Mr. Trister
seems to recall it, though.

        MR. TRISTER: No, not on that
specifically. But more relevant to this, I
think one of the points we make in our
comments is that we feel that the language
which you proposed for the general rule is
not consistent with the Roberts opinion
because it seems to shift the burden of proof
away from the Commission to the speaker.

        And we have proposed language. It
is in our comments. It is not a major
change. It is simply a change in a few
words, actually. That is something you can
decide one way or the other if you agree with
us or not, but I do think on that narrow
point --
VICE CHAIRMAN MASON: Yes, I appreciate that and I wanted to follow up on that as well.

I understand the burden of proof issue. Obviously the language can suggest that. I don't think there was any attempt by the staff who drafted this and the commissioners who were reviewing it to shift the burden through.

And I think that might better be stated, if it needs to be stated, somewhere else.

In other words the test is one thing and who bears the burden of making the showing is really a separate issue. You could write the test the same way and yet place the burden on one side or the other.

So I am a little puzzled by the addition or the deletion of the negative. You know, "no other reasonable interpretation" I think is maybe being over read. I'd like to suggest that.

But what I want to ask is what that
means if, for instance, we say the Commission bears the burden, so if we get a complaint we would ask the Commission staff to go out and look at a particular communication and analyze it to see whether there is any other reasonable interpretation or whether it's no other reason either way.

But what does that mean? Does that mean the staff attorney in looking at it says, "Gee, it looks like express advocacy to me. I can't think of anything else."

In other words how do we prove a negative in that sense and in the real world of how these things are going out how are we going to avoid?

I mean, we can sort of try to guess and surmise, but our list may not be complete and in that sense that is why you cannot prove a negative.

What is it you really mean when you're talking about the burden is on us to show there is no other reasonable
MR. TRISTER: I think it means a couple of things. One is, you know, in the case law there is a distinction between the burden of proof or the burden of persuasion and the burden of production, both of which are sometimes called the burden of proof.

We are clearly talking about the burden of persuasion here. That is to say, if there is a close call, if it is not entirely clear, but there are reasons articulated and it's possible to read it one way or two days or three case ways, that the court is essentially saying, then you protect speech. That the burden of proof is on you, that the burden of persuasion, as it were, is on the Commission.

That means at least in close cases that the balance, as Justice Roberts said in lots of colorful ways, "tips towards the speaker." It at least means that.

VICE CHAIRMAN MASON: Yes, but doesn't that
mean, in the real world, when we go to court
in essence we go in, and say, if we think we
have a speech that violates this, there is no
other reasonable interpretation? And we may
discuss some things about the speech that
leads to us that conclusion, that it mentions
candidates, that it mentions voting, and
whatever factors are in there, but in the
real world isn't the response that you are
going to write on behalf of your client or
whoever it is who is representing them, well,
in fact, there was a bill up at that time?
While I understand the legal matter
of the burden of persuasion, I'm just
wondering how we actually write that in the
operative test as opposed to stating who has
the burden.
Because that is where you suggested
that we rewrite the operative test for the
purpose of allocating the burden. I am not
sure those two are precise fits.
MR. TRISTER: Right. I think that
the initial stage for the Commission will be
a complaint that is pending and the speaker
will be asked to respond to that and I think
that the burden of proof again comes into
play at that point.

There may be situations in which
the Commission is going to simply say, we're
not even going to request a response. We're
going to set up a procedure.

We actually suggested that there
might be some expedited procedure, given the
fact that the burden is on the Commission to
prove these, in which you may basically be
able to let people off the hook very, very
quickly because of the burden at that stage
so we do not have to deal with it.

Secondly, I think it's going to
affect the discovery and the information
which comes out of the enforcement people in
terms of what they are demanding and what
they are asking for.

And that's one reason we asked in
addition to that slight change to reflect the burden, and again we suggested specific language, we asked that you include some of the warnings, if you will, that Justice Roberts put into his opinion about the test does not require affect or intent, for example.

We would like to see that as a message to enforcement to basically be saying to the enforcement staff, don't be asking about intent. Don't be asking about these various kinds of things. Don't be asking about context.

We would like to see language along that line as well.

It comes into play at that stage in terms of how you have to respond, what you have to respond to, and indeed, whether you respond to a complaint.

And at that point, if a group decides not to respond, that doesn't mean they lose the case. That doesn't mean that
you go forward with an investigation. I think the burden means that. That's another way in which the burden kicks in.

As somebody who represents a lot of respondents in a lot of cases I first look at it at that stage of the process. This is in many ways where these questions of burden really play out in important ways, in terms of what can be asked.

If you do open an investigation, are you going to ask us all these questions about context and all the kinds of things that the court rejected and said were not relevant.

We would like to see a regulation which makes it clear that those issues are not relevant throughout the enforcement process. That is also part of what we were striving for in our proposed language.

CHAIRMAN LENHARD: Commissioner Weintraub.

MS. WEINTRAUB: My views on
enforcement are probably the least relevant of anybody on this panel since I won't be here by the time these enforcement cases come around.

My personal view, just to respond on my part, is that most of these would fall out at the RTB stage, that we wouldn't get into discovery, that we would be making a determination based on the complaint.

I guess there could be circumstances if we don't actually have the text, where we might have to get the text in order to make that determination, but the kind of context that I hear the court talking about is the sort of thing that kind of know anyway.

Oh, there's a comparative ad between these two candidates who I happen to know are running against each other. Why else would they be discussed in the same ad? Without predicting whether that in and of itself would be an important factor, it's
just the sort of stuff that you know off the top of your head.

But I would assume that it would be for the most part a determination based on what is in the complaint.

Now, having said that, I will just tell you that in my experience I think it is usually helpful when people respond to complaints, and when they don't -- I have seldom seen anybody hurt themselves by responding to a complaint, but I frequently have seen situations where we end up saying, we just don't know about this, so we end up moving to RTB and then asking some questions.

So my advice to you as a practitioner is, yes, please respond.

MR. TRISTER: I don't think I have ever not responded.

MS. WEINTRAUB: Yes, but let me ask you guys a question, because I think I'm probably somewhere in between Brian and Mike in that I would like to do as little as
possible. I am in what Allison Hayward
called the humble regulator mode here and I
hear what you're saying about not upsetting
the applecart and not creating uncertainty.

That is important, but I also agree
with some of what Michael was saying about
what did Congress mean? Did Congress intend
that these groups have to do disclosure?

The comment that was most
persuasive to me on this point was the one
the labor unions filed, because it seems to
me you would not even get very useful
information out of making a labor union
disclose the names of all its members,
anybody who has paid membership dues in the
last year, if they were to file something
with the FEC.

Even Don Simon could not come up
yesterday with any policy reason of why you
would want that kind of disclosure.

By the way, I gave take home tests
yesterday, so if you want to think about this
and then submit comments later that's fine too.

Now is there some way that we could preserve the disclosure piece of it, because I think it's still on the books and we kind of have an obligation to do that, and yet, define donation perhaps in some way to exclude union dues, and my sense is it's kind of an over the top disclosure, and yet not open the door to, you know, Republicans for Clean Air or others of those sort of organizations that are always described as shady or shadowy because we do not know who the donors are behind them?

That's the sort of disclosure that I think Congress actually has historically been concerned about. Is there some way to catch one and not the other?

MR. SVOBODA: Commissioner, there might be. I was thinking about the issue of Congress and what they may have thought of when going back to the legislative history,
and if you look back far enough there is
maybe one moment when the bill was on the
floor of the Senate when it looked like this
issue might come up.

It was before the Wellstone
amendment was passed. There was a moment
when it was contemplated that certain types
of corporations or certain types of
incorporated 527s might sponsor
electioneering communications and the way
Congress proposed out at that point was a
segregated account provision.

In other words, the option that was
presented, which is the basic option that
remains in the statute for electioneering
communications sponsors, is, and we recognize
disclosure of a large number of shareholders
or a large number of members is going to be
burdensome for some organizations, so can we
present an option to limit that, whereby the
electioneering communications are paid out of
a segregated account and the funds from that
account that trigger the thresholds of the statute, which actually are relatively high relative to independent expenditure definitions.

I don't know whether they relate in terms of people paying union dues on an annual basis so I will leave that up to Mike, but you can limit your disclosure by following that step.

Now is that something that Congress would have necessarily envisioned or intended for this particular situation? I don't think any of us could say that.

But is it an indication of at least the direction in which Congress was thinking when it wanted to provide opportunities to limit disclosure? Perhaps so.

MS. WEINTRAUB: So is your answer basically, if the unions want to avoid disclosing their members, they can just make the EC out of their separate segregated fund?

MR. SVOBODA: That is one possible
option based on how Congress thought about this to the extent they were thinking about this.

CHAIRMAN LENHARD: Mr. Trister also suggested that 501(c) organizations that were not 501(c)(5) organizations, labor unions, that we rely on line one of the IRS form 990. So can you describe for us what gets put on line 1?

MR. TRISTER: Line 1 of the form 990, which is the annual tax return which all 501(c)s file, is essentially gifts, grants, and contributions. It is not interest. It is not investment income which is reported out separately. It is not what is called program serve as revenue which is if you go out and you sell your services of one kind or another. That is reported on line 2. And it is not rents. It is not all the things of that kind.

What we were getting into and
really is an issue which is not so important
for the unions, but more for the 501(c)(4)s
and the (c)(3)s that are involved, is the
distinction between a general support grant,
a grant that is given to an organization and
they do what they want with it as long as
they are within their tax exempt purposes,
and what the tax people call an "earmarked
grant" or a special project grant, a grant
that is designated for a specific purpose.

What we were attempting to raise in
our comments was the notion that general
support grants, even though they are reported
on line 1, that they should not be reported
as a donation, that they shouldn't be
included within the definition of donation
for at least this purpose.

That's a question really which did
not exist until Wisconsin Right of Life
essentially put this to these new kinds of
entities. I don't think you had to worry
about that terribly much.
But now I think it's a critical question and the reason we think that that is a reasonable distinction, is first of all that the reporting requirement is so broad.

The reporting requirement requires that you report anybody who gave $1,000 at any time over the current fiscal year or the previous fiscal year. And to draw a connection between the person who gives $1,000, or $2,000, for broadcast ads -- and remember, we are talking of big expenditures here -- over a 22 month period essentially and suggest to the public that they had something to do with funding that ad, seems to me to be misleading the public.

It seems to me to be unfair to the donors and particularly if they did not earmark it. If they gave it whenever they gave it and said, "Here's $1,000 and I want to you run an ad," then they ought to report that.

But if they give them $1,000 and
say, "Here's $1,000. I like your organization. Keep up the good work," which is essentially a general support grant, then it is unfair and it misleading to the public to suggest that that person was connected to the ad in some way, that they paid for the ad.

What we argue is that the distinction ought to be made between earmarked and non-earmarked. That is exactly what Congress did on reporting IE's.

The language of the statute says, "You do not report all donations. You report donations that" -- I cannot remember the exact words, but they are in our comments -- but it basically says that were given for the purpose of the ad. It seemed to us that it is reasonable to follow the same approach in this context for a number of reasons.

One is, if you look at the legislative history, Congress essentially said, we are extending the IE reporting to
ECs. That is all they thought they were doing. They didn't write it that way, and if they had been more careful we wouldn't have this issue, but they basically said, we are trying to extend IE reporting to EC reporting.

When the Commission defended that reporting in McConnell it said the same thing and we quote parts of your brief and the McConnell opinion treats it the same way.

There is a footnote in the McConnell opinion where they say, what's the big deal about this EC reporting? It's just like we already have for IE's.

It seemed to me that it was reasonable to approach the reporting on EC's in the same way. The key distinction is between a grant or a gift that's given just to an organization for any purpose and leaves it to the organization to decide how to spend is not something that needs to be reported. But something that does need to be reported
is something which the tax lawyers call
earmarked for that particular purpose, to
support the grant, to support the ad, and
that's the distinction which we tried.

MR. SVOBODA: I agree with the
concern that Mr. Trister is laying out and
don't doubt that particularly with unions
there's a very difficult situation that the
Commission is going to have to resolve, but
the Commission has to be very, very careful
about the manner in which it revolves it,
particularly when it gets past those
situations. Because the identifies of donors
or organizations that sponsor electioneering
communications are a subject of urgent
political interest for the candidates who are
affected by those ads.

A candidate might have an
organization running an ad in their district
that goes up Friday night, 15 days before
election, and no way of knowing who the
donors are, and the donors, even if they
haven't necessarily earmarked their funds for
these communications, the identify of the
donors may be very, very essential to the
political response.

Let's assume for the moment there
is nothing else legally that could be done
about the ad. Let's assume the Commission
cannot go to court and get an injunction to
stop them. Let's assume further that the ad
is probably going to stay up. So the burden
on the candidate is going to be to have some
sort of a political response and the identity
of the donors is going to be critical to
that.

For example, for John McCain in
2004 the fact that Republicans for Clean Air
was sponsored by or the biggest donors to
those organizations was somebody from his
principal opponent's home state, neither of
whom had a particular record of caring about
clean air, was immensely important to how
those ads were assessed, viewed, and
ultimately discounted in the free media.

Clearly the Commission needs to do something to address the particular anomaly that this case has created, but it needs to be very careful about how to do that.

You do not want a situation, for example, where a Sam Wyly might send his check to Republicans for Clean Air, and say, this is a general grant to the organization to be spent at your sole discretion.

MS. WEINTRAUB: You have put your finger on the exact problem that I have, which is it's fine for most of the members of the Alliance for Justice which are ongoing organizations and have other things they are doing besides running ECs and it's fine for labor unions for the same reason, because they do other things, but an organization like Republicans for Clean Air pops up and its only purpose is to put out communications and otherwise try and get involved to the extent they can in the election so they don't
have to earmark anything because that's all
the organization is doing in the first place.

MR. TRISTER: Remember, if they are
in fact a political committee then they are
going to have to report all of that, so that
may in fact pick up some of these groups set
up just for the purpose of running ECs in a
particular election.

Given the way the Commission has
been enforcing that, in terms of how they
raise the money and so on, this money doesn't
just show up out of nowhere.

It's very possible that some these
groups that you're concerned about will in
fact be political committees and should be
registered as such and should be reporting as
such which means reporting all their donors.

It does not make that distinction.

MR. SVOBODA: Although more
realistically the Commission will decide
three years later that they should have been
a political committee while our candidates
are going to crocheting classes.

MR. TRISTER: But it's not a
problem of your making. If Congress had
written a reporting rule which was limited
and narrow then I think you'd have a
different kind of question.

The problem we have is that on the
one hand, as Mr. Svoboda is worried, and
you're concerned about somebody who gives
$100,000 or $200,000 two weeks before the
election, but we've got a reporting
requirement which picks up anybody who gives
$1,000 or more over a 22-month period. It
could be January of the calendar year before,
somebody writes a check for $1,000 to the
group.

You didn't write that rule, but
that's the rule and that's the reporting
we're going to have to do unless you make
that distinction.

So to some extent I think you are
between a rock and a hard place on this issue
and I don't envy you that.

But I think you've got to be aware, just as Mr. Svoboda wants you to be aware of this situation where somebody comes in and writes a big check, and says, "By the way."

To some extent it is factual and you do get into exactly these kinds of questions in lots different areas that you enforce.

Was there an earmarking? Was there something? That is a factual inquiry. If you really think, although they never said the word "earmark," that it was in fact understood, you've got the investigatory authority to look into that situation and the facts may well push you in that way in a particular reporting situation.

VICE CHAIRMAN MASON: Wouldn't that require exactly the kind of discovery that you told us we should not engage in?

MR. TRISTER: No, no, this is on a reporting question. This is on a question of
what has to be reported. This is not whether you can run an ad or not.

CHAIRMAN LENHARD: But that just pushes the problem one step back, right?
Because if there is no reporting and somebody files something saying these people should have reported donors, then we begin to go down the discovery path.

I guess my question is more to Mr. Svoboda. Do your concerns fall away if the test turns on whether the funds were the product of a solicitation to run these sorts of ads? An approach we've started taking in determining whether people solicited contributions or funds for use in federal elections.

MR. SVOBODA: Taking the most extreme set of circumstances we might face like Republicans for Clean Air running ads that they are arguing are WRTL-qualified, I am not sure it does, only because of the circumstances in which the funds are raised.
There may be an organization set up by one guy who decides that he is going to fund it. There may be no solicitation. Solicitation may be in his head and then the question is what is the proper level of disclosure?

And in that situation our clients need some level of disclosure. Again, it is essential to their political response to the ad.

VICE CHAIRMAN MASON: I want to hone in on that question. As I understand it from going back to Buckley, the purposes of disclosure, paraphrasing, informing the public about a candidate's supporters or opponents, preventing corruption or aiding law enforcement, and what you said in your written comments was that this was essential to strategic decision making. And you said something related here today.

First a comment. We have to realize that there is an element here of a
potential threat to someone who is
criticizing an officeholder.

I understand what you're saying
from your client's perspective, but from the
perspective of the clients of the people
sitting on the either side of you, the fact
that an incumbent officeholder wants to know,
who is behind this attack on me, that's a
threatening question.

That is why all of a sudden we are
into this First Amendment protected area. So
I want you to define a little better why the
necessity to make a political response
related to the identity of the speaker or the
necessity to make strategic decisions is a
valid purpose for acquiring disclosure.

MR. SVOBODA: It relates back,
Commissioner, to the prong you cited about
knowledge of who a candidate's supporters or
opponents are.

This is ground that the Supreme
Court plowed in the McConnell case, when they
reviewed whether the disclosure requirements
could be applied generally.

I think there was the presumption
by the court certainly as there was by
Congress that people who were sponsoring ads
within the 30 and 60 day windows were apt to
be supporters of a candidate. And they
assessed in turn the concern you raised, and
a very valid concern, which is in what
circumstances does the forced identification
of a donor creates circumstances for that
donor that might be injurious to his or her
own interests?

They went back, for example, to
NAACP vs. Alabama which was the core
authority that they were reviewing and
assessing the question and they concluded
that it provided no bar to disclosure in that
instance.

There was a difference, for
example, between being somebody in 2007
making a donation to a political organization
sponsoring advertisements with the possibility that there might be people who disapprove or approve of that transaction and being a member of the NAACP in Alabama where people were afraid even to meet with Thurgood Marshall to discuss whether to participate in these lawsuits or not and where there were threats of retribution or even in some instances violence.

That is what led the court in McConnell to determine that the disclosure requirements were constitutional and we haven't seen anything in WRTL II that disturbs that analysis.

They didn't talk about it. They did not speak disapprovingly about it and, as I said in my opening statement, the constitutional analysis for whether a corporation or a union could be prohibited from making electioneering communications is a different analysis from whether some information about the identity of the
financial supporters, the principal financial
supporters, could be placed on the public
record.

      CHAIRMAN LENHARD: Commissioner von
Spakovsky.

      MR. von SPAKOVSKY: I keep hearing
this and Brian, you just repeated it, that
they didn't deal with disclosure requirement,
but there's language in the case at page
2672, in which Justice Roberts says, "but to
justify regulation of WRTL's ads this
interest must be stretched yet another step
to ads that are not the functional equivalent
of express advocacy. Enough is enough.
Issue ads like WRTL's are by no means
equivalent to contributions and the quid pro
quo corruption interests cannot justify
regulating that."

      The justice is saying that one of
the reasons laid out for the substantial
government interest in the Buckley case,
which is the corruption interest, that that
doesn't justify regulating it. And he
doesn't say anywhere in there that any of the
other two reasons, which the Vice Chairman
talked about that they laid out in Buckley,
justify regulating them. And yet, everyone
seems to be saying to us, well, you should
ignore his language where he says that they
can't justify regulating WRTL's ads.

            Yes, you shouldn't regulate them in
terms of prohibiting them, but yes, you
should regulate them in terms of requiring
them to make contributions.

            I have a hard time understanding
that dichotomy when you have the Chief
Justice saying that they cannot justify
regulating issue ads.

            I want to ask you about that, but I
also want to ask you, you're, on behalf of
your clients, saying that we should require
disclosure, something that we would have to
extend to that.

            They have been prohibited from
making these kinds of communications, so there has never been any disclosure. So we would, in adopting Alternative 1, not only have to now allow them to do genuine issue ads, but we also have to extend the disclosure requirements to them.

I don't quite understand how it is that we would have the authority to do that and not also, for example, if we have the authority to require disclosure of contributions that are used to do genuine issue ads that are broadcast on TV, or satellites, does that also mean that we have the authority to require contributions that are used to produce genuine issue ads in newspapers?

Or when Wisconsin Right to Life, or maybe the Alliance for Justice, if they are going to spend money to fly in their members and they are going to go in and lobby congressmen and senators on a particular issue for something that they have run a TV
ad on, or for something where they have run a newspaper ad on, do we have the authority in this statute code to require disclosure of those contributions?

I don't understand how we can differentiate. Because if we have the ability to require disclosure of broadcast ads that are genuine issue ads -- and I am not talking about political ads -- if we have the authority, then why should we not extend it to disclosure of all of their other issue activities?

MR. SVOBODA: First, Commissioner, you had me at "enough is enough." I was with you there.

The answer to that is you have to look at architect of the statute that Congress passed. The real question is what can the Commission do now in response to WRTL II.

You have a statute that is written to define electioneering communications
without a WRTL exception, as yet, that
requires their disclosure regardless of the
character of the sponsor.

If you want to get real dirty and
theoretical about it, I mean theoretically a
corporation that was illegally spending
treasury funds on electioneering
communications nonetheless would be subject
to the disclosure requirements of Section
201.

It would be an independent basis of
liability in the complaint that you would
have initiated against them in federal
district court. So that requirement is
there.

The question is, given that the
requirement is there and the Congress has put
it there, and I think we can all stipulate
that there is at least raised in all of our
minds some doubt in some circumstances about
its application, what is the Commission's
proper response to that situation?
What the Commission is faced with, frankly, right now is a choice between the statute which its bound by the statute and the administrative law to interpret and enforce, and the footnote in Chief Justice Roberts's opinion which the Commission might take or might not take to read a particular way.

And I guess my answer to that is the Commission has got to go with the statute.

If the Commission goes with Chief Justice Roberts's footnote, then, as we talked about earlier, the Commission is in a very weak situation in the litigation posture in court.

Another court might say, well, that's not what Chief Justice Roberts meant. Chief Justice Roberts might say that's not what I meant.

And in any event however, their opinion of that statute or of that opinion
and how it should be interpreted is going to be superior to yours or ours.

So I guess my answer to the question really boils down to the statute actually does require that disclosure and it is the Commission's obligation to see to it.

MR. von SPAKOVSKY: Where does it require disclosure of independent groups and individuals for non-electoral activities?

I mean, are you saying that you disagree that the Wisconsin Right to Life decision said that the Wisconsin Right to Life ads were non-electoral ads?

MR. SVOBODA: No, I don't disagree.

MR. von SPAKOVSKY: Then where in the statute does it say that independent groups and individuals have to report on electoral activity?

Anybody who engages in independent activity, an individual, for example, who sets out and puts up an ad, you know, buys a billboard and puts up an ad, they only have
to register with us and report that if the ad
is an election message, an attempt to
influence the election.

If they put up an ad about an
issue, they don't have to register with us.
They don't have to report their activity.
Where in here do we have the authority to
require disclosure of non-electoral
activities?

MR. SVOBODA: Section 201 of BCRA
until I guess July 29 of this year, or
whenever WRTL II came out, they definitely
had to disclose.

We can argue about whether they
should have or should not have as a matter of
constitutional law or as a matter of
prudential legislative judgment, but that's
in fact what the statute in most instances
said.

The question is, given what the
court said in WRTL II, are you still bound to
enforce those disclosure requirements in the
statute? And I think you probably are.

Somebody may yet challenge them. I think that is actually one of the top ten reasons why you're probably going to get sued in the next twelve months because I think somebody is going to challenge it and say that they shouldn't be applied to us.

And they may win or they may lose. But the question is what you do today in the absence of --

MS. WEINTRAUB: Somebody with the initials JB, maybe?

MR. von SPAKOVSKY: May I follow up?

CHAIRMAN LENHARD: Please.

MR. von SPAKOVSKY: Let's talk about Buckley again, the three requirements that they gave for justifying disclosure requirements.

One was the corruption argument.

Well, I think Justice Roberts's statement that it's not corruption throws that out.
The third reason they gave for justifying disclosure is to serve as an essential means of gathering the data necessary to protect violations of funding limitations. There are no funding limitations.

If a donor wants to give $1 million to the Alliance for Justice and a corporation wants to give them $1 million to run ads to convince Congress not to pass a particular piece of legislation, that is not a violation of the law. The $2,300 limit doesn't apply. So obviously that provision doesn't apply.

That only leaves the one that the Supreme Court said about providing the electorate with information as to where political money comes from that is spent by the candidate, but since the court has said this is not an electoral message, it is an issue ad, the third justification for disclosure again goes out the window.

So how could what we do be
MR. SVOBODA: Maybe Mr. Trister can speak to that after I have. My answer to that would be, you laid out the brief for the petitioner that I would write if I were representing the Alliance for Justice in seeking an injunction against the application of Section 201.

But it is a conclusion, and while I think it is an argument that could be made, while it is an argument that you will face, it is not I think a sufficient basis for the Commission at this point, with the opinion having reviewed what it did and done what it did, to say, we are going to set aside and ignore the entire section of the regulations that was not under review in WRTL and in contravention of congressional intent.

That's the problem. The problem is that the agency that takes this position now and writes it into its rules now is vulnerable to a challenge that it is acting
in contravention to the plain language of the statute which requires it.

Then the agency has got troubles if these rules are being challenged unless somebody else seeks an injunction and gets an order enjoining the enforcement of Section 201.

CHAIRMAN LENHARD: Let me touch on another argument which you raised earlier on the same theme that we should approach this, our task, humbly and conservatively or whatever the term or phrase was.

You have said in both your papers and in your opening statement that there was an interest in stability of the rules as we go into the electoral cycle and the word you used to describe this, I think in your opening, is we have to look for these changes to occur and you were talking specifically at that point about either amending or repealing 100.22(b).

But I wanted to see if you could
elaborate a little bit on why what we might
do could be so disruptive. There were a
number who have said that it would be fine
for the groups that are advocating for these
changes, but other kinds of committees are
going to end up really betwixt and between
the decision making as they go into the
election.

I do not entirely understand why
that is true, but certainly as it goes to
100.22(b) it would seem that their lives
would be dramatically easier and simpler to
sort through.

So I wanted to see if you could
elaborate for us why these changes would lead
to such disruptions or chaotic results.

MR. SVOBODA: We wrote it
specifically with regard to 100.22(b) and
it's something that party committees and
political committees have to be attentive to
in the course of their activities.

It's something where people needing
100.22(b), particularly after the experience
of the past several months where some of the
enforcement matters that you have closed out
and some of the other guidance, and in
particular with regard to McConnell, people
tend to have pretty good sense of what they
think 100.22(b) means.

I think a lawyer reviewing an ad
can tell the client with some measure of
certainty whether it will pass or flunk
100.22(b).

CHAIRMAN LENHARD: That is so
heartening.

MR. SVOBODA: Yes, a rare and
blessed event.

MR. TRISTER: As somebody who
failed in that regard, I'm not so sure.

MR. SVOBODA: In any event, we have
a rule that is on the books and we're used to
reviewing with the client. And if that rule
changes it is one more rule that is going to
change and it will be piled upon many, many
other rules that have changed and
collection limits that are being indexed,
and coordination rules that are perhaps about
to change for the third time, where it's just
information that's difficult for the
regulated community to process.

If you wonder how it works actually
in a practical matter, then let me give you a
real world example of how it would work.

From time to time the party
committees send e-mails to supporters asking
them to make contributions to them. From
time to time they send direct mail to
supporters asking them for contributions to
them.

And let's say, for example, there
is a Democratic president in 2009.

Let's say further that on November
8, 2008, they filed their MPC form 2 to be a
candidate for re-election in 2012. So they
are a clearly identified candidate.

And let's assume further that my
clients are apt to be talking to the White House Office of Political Affairs every so often or the president's representatives of the DNC every so often, because they are attentive to their interests and that is the sort of dialogue that occurs before candidates.

So we're proposing to make a public communication that is referring to a clearly identified candidate and under the rules, as they sit now, knock wood they don't change again in the next twelve months, we have to avoid making a coordinated communication under 109.21. So we look at the content.

Does it republish campaign materials? No. We are not going to do that.

Is it going to be electioneering communication? Unless you do something really strange in this rulemaking, we are not going to do that.

Is it going to expressly advocate a candidate's election or defeat? Well, that
depends on what the definition of express advocacy means.

Right now I know how to answer that question. I look to 100.22(a) and (b), but if you rewrite 100.122(b), then my answer to that question might be different.

And so the guidance I have to give to my Internet providers when they send e-mail on a bulk mail basis, paid communications, that is going to change.

My advice to the direct mail house when they send the snail mail is going to have to change and it's going to be just one more thing that's going to have to change over a period of now, you know, seven years where seemingly everything has changed.

And so that's why our plea, if you will, is if the Commission is facing a modular problem, however difficult it is to solve here and now with regard to a class of communications that my clients in fact do not sponsor, faced with that problem, we would
very much like a solution limited to that problem and not otherwise to intrude on the manner in which we would otherwise do business.

MR. TRISTER: I am not sure I understand the concerns about changing the rules of the game. First of all, in terms of 100.22(b), the status of that regulation even now as we sit here is a bit unclear. There are two courts and two circuits that have enjoined you from enforcing it and you never done anything to remove those injunctions. So there is, at least for those of us who are advising people in those circuits, certain uncertainty, at least, about the application of 100.22(b) to our clients in those jurisdictions. Secondly, it is only recently -- by which I mean the last two, three, four years at most -- that the Commission has started to apply 100.22(b) at all.
Until then I am remembering the Keen case and some of the other cases in which the Commission was split right down the middle in a series of cases about whether 100.22(b) was applicable or not.

So the notion that this is all clear and we all know what the rules are and now they are going to change on us doesn't ring true to me.

What I do think has happened with respect to express advocacy is that the Commission now has a situation in which the Supreme Court is pushing electioneering communications much more in the direction of looking like ECs under 100.22(b). Whether there are differences or not between express advocacy under 100.22(b) and the Supreme Court's test for electioneering communications we can discuss and debate and so on, but they are clearly moving much closer together.

And it seems to me that raises a
variety of problems which the Commission
needs to resolve, like, how do you report?
You may have a communication that you report
as 48-hour reporting as IE's or do you report
as EC's and the 24-hour reporting?

So there are a variety of questions
that I think are now put to the Commission as
a result of this and where it leads us, and
of course we argued this in our comments, is
essentially the only distinction that makes
sense and is raised very clearly as a
statutory matter, ECs are magic words. And
Justice Roberts' opinion uses that just as
McConnell did and just as all the other cases
that are recent Supreme Court cases.

And I think that issue has to be
revisited, whether as a statutory matter,
whether there is room for a 100.22(b) as
distinct from the magic words test for IE's.

We agree with Brian in one respect
which is I think that's biting off too much
for this ruling. Those issues were touched
on in the NPRM, but trying to decide those
issues by December 3rd, or whatever your date
is going to be, strikes me as really biting
off much too much.

But we urge the Commission to get
into those issues because I think we are all
going to face them.

The brew has been mixed up again by
the court in terms of what fits where and we
do need answers to those questions. I just
don't see how you can do it in this
rulemaking.

CHAIRMAN LENHARD: Commissioner von
Spakovsky.

MR. von SPAKOFSKY: Mr. Trister, in
your comments you said that the safe harbor
is so narrowly written that it would in most
cases simply shift the focus of the inquiry
back to the general rule.

By that I take it you think that
the factors are unrepresentative of most
actual issue ads?
MR. TRISTER: Well, yes. That comment is based on what I said right at the beginning, which is my assumption is that if you don't fit within the safe harbor then you go off into the general rule.

The safe harbor, it seems to me, serves a very important purpose both for the Commission and for the regulated community, but it will not serve that purpose if it is so detailed and so difficult to satisfy that nobody can satisfy it or almost nobody can satisfy it.

If it's going to be a true safe harbor then it needs to be clear and relatively simple, and an example would be the notion of "pending," for example. We argue that "pending" shouldn't be in there. You can find support or at least some language in the Roberts opinion for that, but as a safe harbor if you're going to put in "pending" you will just narrow the scope of who can rely on the application of
the safe harbor in ways that are difficult.

So that we argue and urge you not
to include "pending" as one of the elements.

We have argued to some extent each
one of the prongs in our comments in trying
to argue for a safe harbor that will truly be
a useful safe harbor, a safe harbor that
benefits the Commission and benefits us by
allowing us to apply it easily, and "pending"
is one example.

Another issue that comes up, and I
know Commissioner Weintraub raised this
specifically in her opening comments, is this
issue of condemnation.

Can you talk about a candidate's
record in some way? The voting record and
the positions they have taken at all?

If you say, no, you can't discuss
them at all, the safe harbor is not going to
be very useful because there are many, many
legitimate -- everybody would agree -- issue
ads that condemn, speak about and criticize
people's votes.

You have Congress yesterday deciding on whether or not to vote and override the president's veto on SCHIP. People are running ads, clearly legislative ads saying, these members of Congress when the issue was before them six weeks ago voted against SCHIP. Context.

So you're telling them what their position is and you're telling them you don't like it. So you're criticizing them. Are you condemning them? Maybe, maybe not. But you are at least criticizing them and you may even be criticizing them strongly and that is clearly a legitimate lobbying ad.

So if you say you can't talk about positions and records and prior positions, if you take them out of the safe harbor, the safe harbor just becomes a nice thing in the regulation, but your cases and our cases will not be involved.

So we argue that shouldn't be in
there and that you should be in the safe harbor even if you talk about a person's record, and so on.

Now there will be some cases that may make you squeamish about approving if you allow that, but that's the nature of a safe harbor.

The nature of a safe harbor is that it allows some things because of the administrative convenience, because of the need for clear rules that allow people to operate, that you would allow people to pick up something which maybe if you reach the question of the general rule you might conclude otherwise, but I think that's the nature of a safe harbor and I think it's a very important way to operate.

MR. von SPAKOVSKY: Let me ask you another question about the safe harbor language.

When you talk about the main number one prong which right now reads "exclusively
discusses a pending legislative or executive matter at issue."

Now, we have had some commenters say, well, that in itself is too limiting because you say legislative or executive matters. In the example that was given, and I forget who it was that said it, but you need to add judicial in there because for example people ran ads after the Supreme Court issued its decision in the Kilo case urging federal legislation to reverse that decision.

There are others who have said that instead of saying, "discusses a judicial, legislative, or executive matter," it ought to just say, "discusses a public policy matter or issue."

If you had the choice between those two or a combination of that, what do you think would be best for the safe harbor?

MR. TRISTER: You have to pick up public issues of some kind and that goes in
part to my comments on "pending." If you
eliminate the notion of "pending legislation"
and "pending executive" then you are almost
there anyway.

But the fact that an issue may or
may not be pending, you may be wanting to get
candidates to take a position on some issue
and you may do it in a way which is
completely non-directive. You may simply say
as an organization, and C3's do this all the
time and they are covered by these rules, is
to say, "We care about Social Security
reform. Ask your candidates. Ask Candidate
X and Candidate Y where they stand on that."

Nobody can suggest that that is
express advocacy, that that is the functional
equivalent of express advocacy, but is it a
"pending legislative" matter? Maybe it is.
Maybe it is not.

It's clearly an important economic
issue in this country and I think you have to
be able to do that.
Now, whether you do it within the safe harbor or you do it within the general rule, I think becomes a question for the Commission in terms of how it wants to administer the statute.

We would argue for allowing that under safe harbor because it gives us more certainty and more ability to know in advance what we can do.

CHAIRMAN LENHARD: The problem we obviously struggled with in drafting this, and as I look to the comments it becomes apparent, is to the degree that you expand, and expand the safe harbor, one can find oneself with a safe harbor that is broader than the rule, where ads are protected under the safe harbor even though they can reasonably be construed as nothing other than a call to vote for or against, and that obviously was the bounds we were struggling with.

Commissioner Weintraub.
MS. WEINTRAUB: Following up on what you were just saying, Mr. Chairman.

There was something that you said, Michael, that was very interesting. You seem to think that it would be okay for us to write a safe harbor that could in some circumstances be broader than the rule itself and that was not our view of it in drafting this and certainly it was not my view.

And in fact I don't think that would be an appropriate view to take of it. The safe harbor should be for the things that are safe, that we know this is okay and then we can put in some examples and that will give people a little bit more guidance.

By the way, yesterday we asked a number of witnesses who had not done so in their written comments if they would submit supplemental comments that opine on the particular seven ads that we put in our NPRM, and I think, Brian, you're off the hook on this because I already asked Mark and you are
on the same set of comments.

I suspect I know what your answer would be, Mr. Morgan, but feel free. I am not 100 percent sure I know where your answers would be, Michael, but I would be interested in hearing because we did see some diversity on that where, on the Ganske ad in particular, Marc Elias thought it was not even close to something that ought to be covered and Paul Ryan sat there and looked us in the face, and said, absolutely, there is no other reasonable interpretation other than an urging to vote for or against.

So I thought, gee, I guess one of them is not reasonable and I will have to figure out which one.

But I think that the safe harbor has to be narrower than the rule. And on the particular example you brought up, I find it hard to believe that you would have one qualm, whether it is in the safe harbor or not, that on reading the Roberts test and
knowing that that is the general rule, the umbrella rule that we would be putting in, I just find it hard to believe that you would actually tell your client that there is some doubt about the ad that you described, "ask Candidate X and Candidate Y what their positions are on Social Security reform," or on whatever the issue is.

Would you hesitate for one second to think that we might say that that was express advocacy or an electioneering communication?

MR. TRISTER: No.

MS. WEINTRAUB: No. So you don't need it in a safe harbor.

MR. TRISTER: No, I don't need that one in safe harbor, but there are issues of the kind we are talking about like when you get into issues about condemnation and you ask us to make distinctions between condemnation and strong criticism and weak criticism and any criticism.
MS. WEINTRAUB: I'm not asking you
to do that. I am trying to make sense of
this footnote in the Chief Justice's opinion
which seems to distinguish ads that condemn
from ads that do not and I'd be happy to have
some --

MR. TRISTER: I think too much has
been made of that particular footnote.
First of all, there is no Jane Doe
ad. There never was a Jane Doe ad. And we
all need to remember that.

What was in McConnell, it was a
hypothetical, and it said, if you say "vote
against Jane Doe," that's express advocacy.
If you instead condemn Jane Doe's record on a
particular issue, then it is not.

And that was it. That was the
extent of the discussion in McConnell. It
never gets into the key question, which is,
what does it mean to condemn? And it takes
that as a given.

Justice Roberts's footnote is
responding to a point. It was essentially saying, we don't have to get into that in this case. This is an "as applied challenge" of an ad that doesn't condemn and it doesn't even talk about their record. So he was basically saying, we don't have to get into that in that case.

I don't think you can read into that footnote a notion that either Justice Roberts, or the court as a whole, would say that any ad which refers to a candidate's record or position on an issue is not protected.

I don't think you can find that in that footnote, particularly given its history and what it is.

You are faced with having to make a decision here about how far you are going to do it. It is not up to us.

When you say, can the safe harbor be broader than the basic rule, I think it's a question of any rule you write as a safe
harbor is going to have language, it's going
to have elements, it's going to have
terminology, and any one of those I think one
could dream up a hypothetical that would
violate the general rule or might violate the
general rule.

    It's in the nature of writing
regulations, really, that you're going to
come up with rules and someone might argue
and maybe that ends up with no safe harbor,
you don't have safe harbor or we just go with
the general rule.

    But I think the notion of safe
harbors is a very valuable approach to giving
certainty and you should go as far as you
feel comfortable going in that regard.

MS. WEINTRAUB: I probably do not
feel as comfortable going as far as you do.
But I want to see if Brian has any guidance
for me on Jane Doe.

MR. SVOBODA: Michael's point is
good one. It's not a real ad. And I think
the point about the footnote is correct. It is important to note that when Chief Justice Roberts was making that point, it was a way of tacitly trying to limit the scope or at least limiting the impression of people reading the opinion of the scope of what he wanted people to think the court was actually doing.

The question being that since that was a subject into which the court did not feel the need to go with that opinion, is it a subject into which the Commission needs to go in this rulemaking when its sole purpose for being here is to conform its regulations to the court's decision? So it weighs further towards a careful approach by the Commission, I think.

MS. WEINTRAUB: Let me ask particularly you, Michael, one question. I hear what you are saying about pending issues versus current issues versus legislative and executive issues versus the public policy
issues, but if we do not say something about
the issues, is it worth actually having
anything in the safe harbor that says that
there has to be an issue in the ad?

Wouldn't there always be an issue
in the ad? It might be sort of a back door
way of getting at an ad that is purely an
attack on character, qualifications, and
fitness for office, but if we have that in
there anyway that it cannot be that and all
we are going to say is there has to be some
issue in the ad, does that add anything?

Does that give you any more guidance?

MR. TRISTER: I'm trying to think
of an example that would not fall within the
character of fitness, et cetera prong, that
might still fit within a broader issue prong.

I wonder about voter guides -- I'm
thinking out loud here -- where you're
comparing two or more candidates' positions
on issues. They would not fall under the
other one. I'm not sure actually.
The other question is about a fund raising ad, maybe, that said, "Give us a lot of money," and then it said something suggesting character. I don't know. I'm just not sure.

CHAIRMAN LENHARD: Commissioner Walther.

MR. WALThER: Just in keeping with the issue of discovery, it seems to me if we are talking about a pending issue, I agree, you're talking about discovery, you're talking about condemnation, you're talking about discovery and the idea behind the safe harbor is to make it a quick and dirty analysis of where you want to go and if you want to go beyond that you then have to weigh the risk. Is it outside the safe harbor, but do you still think it is something we can do? It seems to me if you want to have a safe harbor like you say, it needs to be restrictive enough so you know you are not falling outside it.
On the issue aspect, I'm not sure where that line could reasonably be drawn because I am not sure that there should be a restriction on anybody who is saying darn near anything that they want. They can kind of pick their issues, it seems to me. It doesn't have to be a pending issue. It may be something they want to create or it is something they are thinking about that nobody else is thinking about and would never become an issue, but they want to say something about it.

MR. TRISTER: You want it to become an issue.

MR. WALTHER: You want it to become an issue, so in that regard, do you have any suggestions on the ambit of what might be said in a safe harbor on the issue matter?

MR. TRISTER: Your question goes beyond that. Clearly the pending element is too narrow.

Whether you need it at all I am
just not sure, actually. It does in some ways serve to set up a contrast between the first prong and the fourth prong and in that sense it may be, if you say, well, you cannot do character fitness in such and such, and then somebody says, then what can you do, you're going to say, talk about issues.

That is what your response is going to be and so I'm not troubled by it being in the prong. Whether it adds very much, I'm not sure. I'm really not sure.

CHAIRMAN LENHARD: Vice Chairman Mason.

VICE CHAIRMAN MASON: I wanted to remind us of why we are in this quandary. Mr. Bopp's brief to the Supreme Court posed a standard and focuses on a current legislative branch matter -- he didn't throw in the executive branch -- 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, does not mention any election,
candidacy, political party, or challenger --
and that's the issue by the way that brings
in the question of when you're comparing two
candidates for the same office, you just
mentioned the challenger, you may not
describe him as such, or the official's
character, qualifications, or fitness for
office.

That is what Mr. Bopp said ought to be the standard.

And then Justice Roberts, when he said, you know, this context stuff is out,
except, he says, we can look at context such as whether an ad 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.

This is why we are in that quandary. And I just want to point out, we didn't make this stuff up. This was not the fevered imaginings of some bureaucrats who
want to clamp down on speech. This is the raw material that we were given by the plaintiff and the court here. And it was not of our choosing.

Now, I want to switch gears a little bit, Mr. Svoboda, on this issue of disclosure. Your clients when they are disclosing particular behind donors, behind what the committees spend, use the earmarking rule.

And Mr. Trister had referred to an earmarking rule in the Internal Revenue Service code, and the sort of the rubric of using tools we already have, that people are already familiar with, why wouldn't we use our existing earmarking rule to determine when a person making an electioneering communication has to disclose somebody who has donated for that purpose?

MR. SVOBODA: There might very well be a basis for doing that if you look by analogy, for example, to the independent
expenditure rules and how you treat them there, and you do have the opinion in McConnell where they try to point out that the level of disclosure being called for by Section 201 was narrower in a way than what you're calling for the independent expenditure disclosure so that may weigh towards that.

Further, as we talked about earlier, Congress did when it first wrote Section 201 try to give certain types of organizations the option of basically limiting their disclosure by basically limiting disclosure to the universe of people who were giving to the account from which the ad would be paid. Again, that was first drafted before there was a Wellstone amendment.

VICE CHAIRMAN MASON: I understand that, and the trouble is that sort of runs the other way, because that gives you the choice of either disclosing everybody or disclosing
some people who give to a particular account.

I was asking sort of the flip side as we already have this earmarking rule out there and it's applied in a variety of contexts, so why wouldn't we use that to determine when the organization paying for an electioneering communication has to disclose beyond its own funds who else may have funded.

MR. SVOBODA: The only reason I might see where that might be a problem is because of the separate account structure that Congress proposed as an alternative to complete organization-wide disclosure.

In other words there is a way to conclude, based on the statute, that Congress imagined one method by which you might limit disclosure but that would be it. And that in way is broader than simply an earmarking standard, for the reason we talked about a moment ago with the Sam Wyly hypothetical, you know, with the check saying, "This is
being provided for use at your sole
discretion" without any indicia of
earmarking, but under circumstances where in
effect it is the sole funds, if you will,
behind the ad.

So that I guess might be the only
reason why you might have difficulty doing it
and it is because the statute generally
provides for that sort of broad disclosure
and provides the segregated account as the
indicia way out of it and not an earmarking
way out of it.

CHAIRMAN LENHARD: That argument
leads me to the opposite conclusion, which is
the earmarking provision would seem to be
analogous provision if you didn't use a
segregated account, to the degree that
Congress created the segregated account model
whereby you could take funds specifically
designated for that and put that in the
account.

The earmarking adoption, the
earmarking rule, would achieve that identical result if you simply used your general treasury account. And it would also seem to be bolstered by your argument for stability of rules and that this is already something that people are used to using and therefore it would be less difficult to implement.

MR. TRISTER: On the segregated account I was going to make the same point, but in addition as a practical matter for both unions and for many 501(c) organizations the money is coming out of the general treasury.

They don't have that kind of money, they can't raise individual money, they have to use their general support money.

And so for tax reasons then they already set up segregated funds, 527, not political committees, but 527 accounts, and they transfer the money over to that for tax reasons, but they report that as a single contribution from the organization.
If you allow that, then that's fine, but that doesn't do much for disclosure if you require that the money that came into the treasury you still have to report in the same way, then you are back to where you started.

So I think that as a practical matter, these organizations have to use treasury money and the question is how much or what kind of treasury money are they going to have to report?

As you heard earlier, the earmarking line is the line that is both in the statute for IEs and is a workable if not perfect line to draw in that regard.

CHAIRMAN LENHARD: Any further questions? Are there questions from counsel or from staff members?

I would like to end a little bit where we began because at the very beginning Mr. Morgan in your opening statement one of the first things you said was that there is a
national inclination on the part of organizations when they lose litigation to try to minimize their losses and set up a regulatory rulemaking process, and certainly from my conversations among the commissioners individually when we have met in private to discuss this and I think is reflected by the conversation here, that is not a concern of ours whatsoever.

Instead, what we are struggling with is how we reconcile our statutory duties with a constitutional guidance from the Supreme Court in a range of different decisions over multiple decades not all of which neatly fit together.

It is that struggle which has animated our thinking so far and will animate our final resolution of this issue.

So with that I am going to recess our proceedings until 1:00, at which point we will reconvene with our afternoon panel.

Thank you very much.
(Recess)

CHAIRMAN LENHARD: Good afternoon,
I would like to reconvene the Federal
Election Commission's meeting of October 18,
2007.
We are conducting a hearing on the
implications of the Supreme Court's Wisconsin
Right to Life decision.
We have reached our afternoon panel
today and we have four people who have come
to testify before us.
We have Stephen Hoersting from the
Center for Competitive Politics, John
Sullivan from the Service Employees
International Union, Heidi Abegg representing
the American Taxpayers Association, and
Michael Boos from Citizens United.
Welcome all.
The procedure we have been
following here has been to permit each of you
a five-minute opening statement. There is a
light display box in front of you.
The green light will be on at the beginning of your comments and with one minute left the green light will begin to flash and with 30 seconds left the yellow light come on and the red light appears at the point at which your five minutes have expired.

After that we will turn to questions from the commissioners. We are not following any particular order up here. Commissioners will simply seek recognition and ask questions and may ask follow up questions as well, which has produced a very good dialogue with our previous panels.

In terms of your presentation we have generally followed the practice having our speakers present their opening statements alphabetically, which means, Ms. Abegg, you will be the first to go, followed by Mr. Boos, Mr. Hoersting and unfortunately, Mr. Sullivan, you will be the last, although that may be to your advantage in the end. And so,
unless you have worked out an arrangement among yourselves otherwise, that is how we suggest proceeding.

Certainly also, just to be clear, general counsel and staff will be free to ask questions as we continue with these proceedings.

All this having been said, Ms. Abegg, please proceed at your convenience.

MS. ABEgg: Thank you, Mr. Chairman, Mr. Vice Chairman, and members of the commission.

I appreciate the opportunity to testify today on behalf of both the American Taxpayers Alliance and Americans for Limited Government.

As noted in the written comments, both ATA and ALG are Section 501(c)(4) organizations. Both organizations educate the public and take positions on issues that generate strong and often adverse reactions from the government and the public.
Donors to both organizations highly value the ability to contribute to an organization that espouses positions and advocates change on controversial issues while remaining free from disclosure with its attendant risk of threats, harassment, and reprisal from those who disagree with its position on issues.

ATA and ALG submit that there are two principles that the Commission should have in mind when promulgating final regulations.

One, my clients want to stress that attacking or condemning ideas or issues is not the same thing as commenting on or attacking a candidate.

Issues and candidates are not so intertwined and synonymous that an attack on one per se becomes an attack on the other.

Without the ability to condemn an officeholder's position on an issue citizens lose the right to hold their officials
accountable for their actions.

The good old days of Congress adjourning long before an election seem to be over. Thus citizens need to be able to condemn their officeholders precisely when they are taking votes that affect them, even if it is shortly before an election.

As the Supreme Court has stated, in a representative democracy such as this these 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.

Two, the Commission should be as mindful of the right to privacy as it is of the public's right to know, through disclosure.

How is an exempt electioneering communication ad any different than an anonymous pamphleteer speaking using a megaphone?
There has been little talk about McIntyre, NAACP vs. Alabama, and other cases upholding the right to privacy and one's political associations and beliefs. While it may be easy for the Commission to simply say "disclose," it turns Wisconsin Right to Life into a hollow victory for many nonprofits.

Many donors to my clients value their anonymity and will not give if they know that their identities will be disclosed because they have been subjected in the past to reprisal and other manifestations of public hostility, and like in the cases I just cited, there is no compelling interest here requiring disclosure.

Disclosure here has been likened to disclosure under the lobbying statute, but the interests are different.

The Supreme Court upheld the reporting requirements under the Federal Regulation of Lobbying Act in US vs. Harris.
The court said that the compelling interest
was to maintain the integrity of a basic
governmental process and to allow Congress
the power of self protection.

I think that both Harris and
Buckley can be read to distinguish reporting
requirements from those directly involved in
or impacting the governmental processes as
opposed to regulating those who are
indirectly attempting to change the climate
of public opinion.

Even when a federal regulation on
public policy advocacy involves merely
disclosure and not a prohibition on speech,
the regulation undergoes rigorous
constitutional scrutiny because, as the
Buckley court recognized, the deterrent
effects on the exercise of First Amendment
rights may arise as an unintended but
inevitable result of the government's conduct
in requiring disclosure.

The strict test established in
NAACP vs. Alabama is necessary because compelled disclosure has the potential for substantially infringing First Amendment rights, but there has to be governmental interest sufficiently important to outweigh the possibility of infringement.

Additionally, there has been a long standing tradition in our democracy of anonymous public speech.

There is no important or compelling government interest here in requiring disclosure of communications that the Supreme Court has said are not express advocacy or its functional equivalent.

The types of ads which the Supreme Court has stated are not electioneering communications, do not have a substantial connection to the governmental interest in lobbying regulation recognized by the Harris court, the governmental interest in preventing corruption and its appearance recognized by the Buckley court, or the
governmental interest in regulating electoral
speech recognized by the McConnell court.

Thank you.

MR. BOOS: Chairman Lenhard,

members of the Commission, my name is Michael
Boos and I am the vice president and general
counsel of Citizens United, a conservative
grassroots advocacy organization with more
than 250,000 members.

Citizens United is a major producer
and distributor of documentary films. We
have spent in excess of $1 million annually
to produce and market documentary films to
our members and the public at large.

Our films deal primarily with
contemporary public affairs issues and often
include footage, interviews, and other
references to public officials and
candidates.

Since the issuance of advisory
opinion 2004-30 Citizens United has actively
urged the Commission to adopt a rule
exempting advertising for movies, books, plays, and similar works from the definition of electioneering communications. We have consistently sought recognition for these ads under the news media exemption because the underlying works fall within the scope of that exemption, but we were mindful that movie advertising might fall under more than one exemption category.

Thus I am here today to urge the Commission to adopt Alternative 2. We believe Alternative 2 is fully consistent with Chief Justice Roberts’s controlling opinion in Wisconsin Right to Life II and the Commission’s authority to promulgate rules implementing the underlying statute.

On the other hand, we view Alternative 1 as falling well short of the Supreme Court’s instructions. The Chief Justice’s opinion is far reaching. It focuses on the absence of a compelling justification for regulating ads that do not
contain express advocacy or its functional

equivalent.

Alternative 1 does not cure this
infirmitity because it is still leaves intact
the burdensome disclosure and reporting
scheme that applies to electioneering
communications.

Alternative 2, however, cures the
infirmitity because it exempts qualifying ads
from the regulatory scheme altogether.

While Wisconsin Right to Life II
dealt directly with grassroots advertising,
the decision has significant implications for
other types of ads as well, including
broadcast ads for products or services such
as documentary films.

We know that because, number one,
the Chief Justice stated explicitly in
footnote 10 of his opinion that the court was
applying the same analysis to Wisconsin Right
to Life's ads that it would have applied had
the group been a commercial entity.
And two, in the context of campaign finance regulation the court has consistently applied strict scrutiny analysis to regulations of speech by commercial advertisers.

Thus, in our view the Commission is correct to include the proposed exemption for ads for products and services within the scope of the pending rulemaking.

Wisconsin Right to Life II also has implications for some of the Commission's other rules, especially those defining express advocacy.

Many of us in the regulated community have long believed that the definition of expressly advocating is far too broad to withstand First Amendment scrutiny and the Chief Justice's opinion confirms our position.

Express advocacy requires the use of so-called magic words which expressly call for the election or defeat of a candidate.
Contextual considerations are irrelevant to the analysis. Citizens United therefore calls on the Commission to modify its definition of expressly advocating by deleting those parts of the definition that look beyond the four corners of the words and phrases used in the communication.

In the past the Commission has resisted requests that it define terminology, "promote, support, attack or oppose," which has come to be known by the acronym PASO.

In light of the decision in Wisconsin Right to Life II, we urge the Commission to revisit that issue and adopt a rule that defines PASO as a communication that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate.

Finally, although we strongly support Alternative 2, we cannot support the proposed safe harbors that would apply irrespective of which alternative is adopted.
As drafted, they are far too narrow to be of any significant benefit to the regulated community. We are especially concerned with the ordinary course of business prong that would cover ads for products and services, but we also have strong reservations over the third and fourth prongs of the safe harbor test as well.

With respect to the ordinary course of business standard, it is an inherently subjective standard. It is one that we run afoul of with respect to advisory opinion 2004-30. It is one that stopped us from being able to run legitimate ads for our film, Celsius 4111.

Our concern is that that standard is inherently subjective and can easily be manipulated to obtain a desired result.

And second, such a standard is inconsistent with the Chief Justice's admonition that the lawfulness of an advertisement cannot turn on factors outside
Once again, I thank you for the opportunity to speak before the Commission on these important issues and I look forward to answering any questions that you might care to ask.

MR. HOERSTING: Chairman Lenhard, Vice Chairman Mason, and commissioners.

Thank you for the opportunity to testify on your electioneering communications hearing.

Before I begin, let me commend the staff for what I just have to know is a very difficult NPRM. I looked at that thing and I can only imagine the number of hours that went into that, so it's really impressive.

My colleagues on this panel say that Chief Justice Roberts was more amending a definition than construing a prohibition. They also say that once we concede that the ad in question is a genuine issue ad there is no governmental interest or a jurisprudential
basis for compelling its
disclosure.

They also say that it would be
absurd to have organizations Congress never
intended to run ECs all of a sudden have to
start reporting their electioneering
communications, and of course, my colleagues
are absolutely right on each of those points.

But, correct as they are, it would
be untenable for the Commission to invoke its
administrative authority to stay application
of Section 201, a facially valid provision,
without some organization asserting the
application of 201 violates the rights of
speech and association.

It would be unseemly for that
question to be litigated in the posture of an
agency defending its administrative
prerogatives -- I say this respectfully --
with no factual background of a speaker who
is actually chilled.

The Commission should therefore
hold its nose and apply Section 201 to issue advocates even as doing so is a back door to some of the grassroots lobbying disclosure measures Congress recently rejected.

For the record, I am very much against those measures and if you Google me you will find that out.

The word "contributes," by the way, in Section 201 sub part (f) should guide the Commission in crafting disclosure requirements even if disclosure comes down harder on nonprofit organizations whose ads are funded by contributors than it would for for-profit corporations.

Hopefully, some organization will sue you for applying Section 201 to their speech activities and we can once and for all resolve what could have been a companion issue in WRTL II.

I don't say that lightly. I know the chill is real and I know that suing the government is very expensive and difficult.
Expenditures and electioneering communications are mutually exclusive concepts in federal campaign law for the most part. So it is imperative, as you have heard before, that the Commission not conflate express advocacy with its functional equivalent.

Therefore, the Commission should repeal its definition of express advocacy at 100.22(b) and remove references to reasonableness in part (a). Some may suggest I am urging restraint in one area and activism in another. Not at all. The unity in my testimony is the case or controversy doctrine.

Section 202 remains facially valid, it was not challenged in WRTL II, and similarly revisiting the gloss on core FECA terms like "expenditure" or "political committee" was not before the court in McConnell.

In fact the McConnell court said
that the gloss on FECA is and remains the
gloss of Buckley even if that gloss is not
constitutionally required for new
congressional enactments and even if that
gloss struck the McConnell court as
functionally meaningless.

The line of cases from Buckley,
MCFL, through McConnell shows that express
advocacy is and always was a magic words
test.

This issue is res judicata and
repealing 100.22(b) is an administrative
decision that almost no district judge would
overturn.

By the way, the McConnell court
itself --

CHAIRMAN LENHARD: And to the
degree that such a judge exists they are
probably in the D.C. Circuit.

MR. HOERSTING: Precisely. A
footnote. The McConnell court itself
recognized, then denigrated the magic words
strictures of express advocacy to justify Congress's needs for electioneering communications.

So reasonableness is out with regard to express advocacy. Unfortunately, it remains for its functional equivalent.

The Chief Justice's use of the term charges you at some point in the analysis chain to make a hard judgment call about which ads are in and which ads are out. I regret that is the case but it is.

In that event, please confine your analysis to the text of the ad, as the opinion mentions, and if at all possible recognize that "the tie goes to the speaker," as you have heard several times this week.

By the way, a couple of other issues. A non-exhaustive list of examples in safe harbors is a good thing in our opinion.

And I believe that while none of the sample ads mentioned in the NPRM are express advocacy, the Yellowtail ad and the Keen ads
are the functional equivalents.
I look forward to taking your
questions. Thank you.

CHAIRMAN LENHARD: Thank you very
much. Mr. Sullivan?

MR. SULLIVAN: Mr. Chairman,
members of the Commission, I am a participant
in a joint project along with counsel for the
AFL, NEA and ASFCME in presenting comments to
you on this issue.

All of our organization are very
active in the area of issue advocacy. We
spend a tremendous amount of resources on
federal legislative activity and on state
legislative activity. We also spend a
tremendous amount of our members' voluntary
contributions on political activities, so the
issues raised in these rulemakings are
critical to us and our members.

Yesterday the chairman commented
that Mr. Bopp observed in his presentation
that he filed a lawsuit to get an exemption
from the electioneering communications ban
for a group of ads and ended up getting a
redefinition of electioneering
communications.

We would submit that the court did
not simply redefine what constitutes
electioneering communications, but rather it
redefined or perhaps clarified the
constitutional limits on the Commission's
ability to limit or, in the court's view,
criminalize speech.

Last year a number of the
commenters in this rulemaking, including the
unions who are a part of this joint comment,
filed a petition with the Commission seeking
a rule crafting a narrower exception for
their grassroots lobbying efforts from the
Commission's regulations concerning
electioneering communications.

We have returned to the Commission
not to ask again for that exception, but to
argue that the controlling opinion in
Wisconsin Right to Life II requires the Commission to revise its regulations in light of the redefinition of the boundaries limiting the Commission's power to ban and punish speech.

Such provisions not only require examination of the electioneering communications regulations, which is the subject of this proceedings, but must also include the definition of express advocacy itself as well as other regulations which have a direct impact on speech, including the Commission's coordinated communication regulations and allocation regulations.

As the last speaker I have the advantage of relying upon the presentations of numerous commenters who have outlined the issues and share our belief that the decision in Wisconsin Right to Life II changes in a fundamental way how the Commission must recognize and accommodate protected speech.

Let me just take a few moments
however to reiterate points made in Larry Gold's and Jessica Robinson's presentations.

Larry Gold emphasized that the Commission should adopt Option 2 as an approach which best accommodates the decision in Wisconsin Right to Life with the existing regulatory regime on electioneering communications.

Larry also discussed the potential application of Option 1 to labor unions, particularly with respect to the reporting and disclosure requirements.

Now he began from the analysis that it's important to make a distinction between a donation and dues. And this is a very important point for unions.

Members pay dues to unions not to finance electioneering communications, but to finance and support the full range of activities that the union engages in, from collected bargaining representation, to servicing members, to engaging in advocacy.
both with their employers and with state and
local officials around the country.

And it would be, if not
counterproductive, at least serving no
particular purpose to report or disclose the
names of people who did in fact not
contribute to the financing of a particular
electioneering communication.

And I think several commenters
talked about the lack of a public policy
benefit for having a list of members whose
dues were used or may have been used to
finance these communications.

Jessica in her comments talked
about the proposed safe harbor and expressed
our concerns both with respect to the
narrowness of the safe harbor, but also with
respect to our concern that an individual or
group failing to meet the requirements of the
safe harbor may suffer from a presumption
that their speech is in fact not protected.

She argued and I think the
Commission acknowledges that when you don't need the safe harbor the Commission is then obligated to demonstrate that the communication in question is susceptible of no reasonable interpretation other than as appeal to vote for or against a specific candidate.

Now, in response to that, I think it was Chairman Lenhard who raised the troubling question of how do you prove a negative? And in fact the constitutional safeguard itself is framed in the negative.

And the question really is, who better to put the burden on? The speaker, who may be forced to tailor the scope of their communication because of a fear of going over a line, or the Commission, which has the burden to demonstrate that in fact the speech in question falls outside the protections of the First Amendment?

I see that my time has expired but I will be happy to answer any questions.
CHAIRMAN LENHARD: Questions?

Commissioner von Spakovsky.

MR. von SPAKOVSKY: Mr. Hoersting,
you said that we should do Alternative 1 and
require disclosure because the disclosure
provision is on the books and was not
affected by the decision and disclosure
requirements have been upheld in the
McConnell case.

But didn't the McConnell case
uphold the disclosure requirements for ads
which were the functional equivalent of
express advocacy and therefore when the
Supreme Court now in a subsequent decision
has said that issue ads are not the
functional equivalent of express advocacy,
isn't that a clear indication to us that the
disclosure requirements do not apply?

MR. HOERSTING: The first two
predicates of your question are absolutely
ture.

Yes, the McConnell court said that
ads can be subject to disclosure to the
extent that they are the functional
equivalent. That's what I take to be the
opinion, anyway.

But in terms of the next case -- and I think there has to be a next case -- it
is my opinion, I'll just speak frankly,
you're going to be sued by somebody. And I
think it is better that you not go in as an
administrative agency defending its
administrative authority in the posture of
this case.

I think it is against a reformer
who would urge you to be even be more
regulatory or against potential plaintiffs on
the Hill, former sponsors of the legislation,
who would urge you to go even further.

I think it is important that the
case have an actual plaintiff who is saying
"I am chilled in my rights of speech and
association," and that's a far better basis
for the case to go forward.
Under administrative procedures you have a very high burden and immediately a judge is going to say, especially an unfriendly one, "Wait a second. I thought the McConnell court said that 201 is facially valid, so under administrative authority why are you carving this out? Because of some future 'as applied' challenge, you are prognosticating?"

The first line in WRTL II is "Section 203 says." And then here is another interesting point. After WRTL II you have from plaintiff, Wisconsin Right to Life, same counsel, Mr. James Bopp, who settled WRTL III and also settled Christian Civic League of Maine, and my understanding of those opinions, but I do not have them entirely committed to memory, he said the prohibition is unconstitutional, that the prohibition is unconstitutional in both of those cases.

So that's my take on this and that is my position on this. I won't waste much
breath on this, but do I think there is any constitutional basis for compelling disclosure of genuine issue advocacy? No, not for a minute. That is why I work for CCP.

CHAIRMAN LENHARD: Other thoughts, questions? Commissioner von Spakovsky.

MR. von SPAKOVSKY: Mr. Boos, to go from constitutional theories down to practicalities for you.

When you're looking at the language that we have set out in NPRM for this business of commercial exemption which would apply to what Citizen United does, you made it pretty clear that you think the second prong, which is "made in the ordinary course of business," needs to come out because that did not fit your organization when it was first putting together these documentaries.

But on the third prong about not mentioning any election candidacy, political party, et cetera, how do you think that needs
to be changed?

My understanding is that that also would be a problem for you, because of the fact that you might produce a documentary or a film that does mention candidates or has information about candidates.

Does that just need to come out entirely, in your opinion, or is there a way of changing that language to bring the kind of work that your organization does within the safe harbor?

MR. BOOS: Actually our organizational position is that safe harbors would be unnecessary if the appropriate action were to be taken to redefine express advocacy and to define PASO. Because the way we look at it, safe harbors really do not provide anyone with much of anything.

As they are currently constituted only the ads that are most obviously not electioneering communications would fall within the safe harbor.
Well, they're obvious to begin with, even without the safe harbor. We think that that particular provision that prohibits the mention of elections or political parties, et cetera, that ought to come out completely.

If you were to adopt the safe harbor you are only looking at perhaps the first prong of the safe harbor as being something that would be acceptable and that would essentially be that it would be exclusively devoted to advertising the product or the service.

That is not much of a definition of safe harbor either and we think that if that is the only definition that you are left with, you might as well have no definition whatsoever, with respect to a safe harbor.

It is just unnecessary we think if, one, you define express advocacy to only encompass magic words. You define "functional equivalent" as basically being
that language that is not susceptible of any
other reasonable interpretation except aimed
at influencing an election.

Independent expenditures fall under
express advocacy standard.

Electioneering communications
encompass the functional equivalent of
express advocacy, and when you have that
standard there and when you set it there at
that point, it then becomes clear that if
you're advertising a product or service and
that product or service might be a book about
a political candidate, that that ad is in
fact not an electioneering communication.

Let me give you a good example. If
you recall during the last election cycle
Michael Moore had these advertisements for
Fahrenheit 911 that really made President Bush
look ridiculous when he was on the golf
course.

I am concerned that under the safe
harbor standards that have been set forth
here that ad would be illegal or at least it would not fall within the safe harbor, even though it was a legitimate ad that convinced a lot of people to go see his movie.

I mean, it performed the task at hand, which was to get people to see the movie. It may have had some effects on the election, but you can't look at the cause and effects standards because the Supreme Court has said you can't look at that.

By the same token, we had some advertisements for Celsius 411 that really had some very bland references in our ads to President Bush and Senator Kerry.

The two of them were speaking on how they would react to terrorist attacks on the United States, and the distinction between their statements was very subtle.

One said they would be proactive and one said they would be reactive. We had those two statements in our ads as initially put together. We had to take them out
because they made references to the candidates, period.

And so trying to draw those distinctions is very, very difficult and I don't think it is possible to set forth a safe harbor.

We think under a legitimate rule that our ads would have been permissible back in 2004, Michael Moore's ads would have been permissible back in 2004, and if you redefine PASO, or if you actually define PASO with the definition set forth in the Supreme Court's ruling of the functional equivalent of express advocacy and then narrow that definition of express advocacy, you have taken care of the problem with respect to the need for safe harbors.

VICE CHAIRMAN MASON: I wanted to follow up on the safe harbors as well. And first, just to note, Ms. Abegg, in your testimony I appreciate that you brought out the series of questions about character qualifications and
fitness for office.

It seems to have bothered you, all those questions. Is that right?

MS. ABEGG: It did, and probably because I can imagine my clients calling me with exactly those questions. "Why can't we say that?" Because a lot of them want to criticize or praise an officeholder.

VICE CHAIRMAN MASON: Well, it bothered me too, and I am the one who wrote those questions and suggested they be put in the NPRM because I thought those questions were implicated if we were talking about character qualifications and fitness for office. It was exactly that kind of thing.

And I read this morning from the brief of your former boss, Mr. Bopp, where he proposed that standard to the court and where the court repeated that back in its opinion.

So, just one point about this is that this standard wasn't invented by us. It wasn't proposed by us, but rather it was
proposed by Mr. Bopp and was adopted or at least was incorporated in the language of the opinion, and that, frankly, is why we have the problem that we have.

Now given that, that we would look at things like that for the safe harbor, I understand Mr. Boos's position on the safe harbor, but you and Mr. Sullivan both criticize the safe harbor as being too narrow.

And I wonder if either of you have a suggestion about a way it could be rewritten to make it useful.

MS. ABEGG: The suggestion that I made in our comments was just to make sure that it was clear to the regulated community that those safe harbor provisions are not exclusive.

They still meet the safe harbor even if your ad doesn't fall within that, and I didn't think the language in the proposed draft was strong enough or made that clear.
CHAIRMAN LENHARD: You were not alone in that. It was certainly our intention that we would have an overarching rule and then there would be within that rule a safe harbor which would provide a greater degree of clarity as to how we were interpreting that rule.

And obviously we were not clear enough, but that was analytically how we were approaching the problem, but we will try to fix that.

MS. ABEGG: Because I realize there is no way probably to draft a safe harbor that incorporates all of those concerns I listed in my comments.

CHAIRMAN LENHARD: The other side of the coin, as I mentioned a little earlier today with the other panel, was that we didn't want to end up with a safe harbor that was broader than the rule in certain circumstances where there were communications
that met the safe harbor, but also could be interpreted only as a call to vote for or against a candidate. That would obviously produce a nonsensical result, and so we have had to struggle our through those choices.

MR. SULLIVAN: I sort of began the process of thinking about a response to the proposed rulemaking, particularly on the issue of safe harbor, wondering, well, doesn't a safe harbor in a sense turn the court's analysis on its head? Does a safe harbor say, okay, you can speak if you satisfy these requirements?

I was wondering, just as a point of departure for the Commission, whether or not it served a better purpose to have the Commission identify those factors it would consider in terms of whether it was protected or not protected?

Ultimately the Commission has the burden of demonstrating that the speech in question is not protected and therefore
subject to its regulations. And in making
that analysis it can legitimately look at
certain factors and in our comments we tried
to outline what those factors were.

So rather than articulating a safe
harbor, which imposes the burden upon the
speaker, we thought that the best approach
would be to outline those factors in which
the board could consider in making a
determination regarding the speech, whether
or not we outlined them in our comments.

But the concept of the safe harbor
I think itself raised some concerns. In
looking at the actual safe harbor articulated
by the Commission in its notice we felt that
it was entirely too restrictive in terms of
the kinds of speech that we believe is
protected by the court's decision.

VICE CHAIRMAN MASON: I have one follow-up on
the factor issue, because one of the other
things that bothers me about the opinion is
that it says at one point, "We have to avoid
the hurley-burly of factors."

It then goes on in the next paragraph and it lays out a four-prong, eleven-factor test for how we are to do this. I don't quite understand. It is either a Bright Line test or it's a multifactor balancing test and those two really are not the same.

While the desire for clarity in terms of being able to look down and tick off a list, or whatever, to advise a client, I understand. But that is a very different kind of test for an issue than a Bright Line test and I particularly am concerned or I just have a question. If we start listing factors, what does that mean?

In other words, does it mean that you have to meet all the factors or any one of them and if it is not one of those extremes then we are into one of these multifactor balancing tests that just isn't a Bright Line under anybody's standard.
So how do we reconcile that?

MR. SULLIVAN: The list of factors, I think, would not be exclusive. I would imagine through adjudications the Commission would add to those factors in going forward. So I think the listing of factors or what you are describing as factors, that the Commission will say, well, we will not base a decision that this speech is not protected on the fact that the speaker is a supporter or an opponent of the candidate. We will not base a decision on the nature of this communication based on its timing with respect to an election or a legislative session or the scheduling of a vote on that issue. We will not base a finding that it is not protected on the basis of whether the communication is a reference to a website which may itself contain express advocacy.

These are all very useful items for a person crafting a communication to consider.
So if, they say, it's okay for me to issue this communication even though the vote was held last week or that the motion or the legislation has been tabled or has been sent back to committee, I can still talk about it because the Commission has told me that the pendency of the vote is not a factor they will consider in determining whether or not this communication is subject to its rules.

And I think that's a helpful exercise and essentially that's what an advocate does when they look at a body of case law. They look at the factors. They will try advise their client.

Given that we are in the middle of a rulemaking, I think the Commission has the opportunity to sort of catalogue for the regulated community those factors it will consider and will not consider in making its determination on whether or not the speech is protected.
CHAIRMAN LENHARD: If I can follow up on that, this is a struggle for me. As I see it there are at least three choices.

One is we can simply promulgate Chief Justice Roberts's test on the regs and say no more. My sense is that some of you think that that would be the best path and lawyers can make whatever judgments they want from it and at a minimum it will convey to the outside world that we have read the Supreme Court's decision and we are aware it exists.

The second thing we can do is do one of these factor analyses, and in some cases say we will never ever in enforcement consider relevant some number of things. And that would provide some comfort for people, because they know can put those things in their ads and it won't harm them.

The other side of it is what we would consider relevant, and that's harder because there will presumably be some ads
which could include one of those factors that could be construed as something other than a call to vote for or against a candidate.

So we will have to have some vagueness in the weight, relevance and importance of it, but we would tell you, these are the kinds of things we might be thinking about as we read your ads.

But this will not provide much in the way of real clarity or comfort and you will, again, be left with sort of trying to guess where we are.

And the third choice is to provide a safe harbor where we sort of say if the ad says this we will not enforce.

Right now you can say other things and maybe we won't enforce too, but we can assure you that there is at least somewhere between four, five or six commissioners who believe that this is entirely protected speech -- not as broad as all the protected speech, but for people who want to be
completely safe, they at least know if we say
this or something like this, well, they're
off scot free, and then if they have more
risk they can say other things that their
lawyers can try to guess where the FEC is.

    And that's sort my conception of
what the safe harbor does, that it provides a
certain zone of complete protection from
enforcement.

    From what I understand, there are a
number of people here saying that it is far
better that we do the first, which is the
vaguest of articulations of what we intend to
enforce against, or the second, which
provides a little bit of clarity but not much
real clarity about what we are enforcing and
what we are not.

    Probably the worst choice for us to
do would be to choose the third choice,
unless it really came pretty close to being
as expansive a safe harbor as the rule itself
so that people really knew the outer
boundaries of what they could speak, and therefore we wouldn't really be chilling anything, because the safe harbor would be as close to the rule itself as we could get.

And I know, from having roamed the halls and trying to find four votes on so many issues over the last two years, that that is very, very hard to do, both conceptually, because it is very hard to understand how we would provide a lot of clarity in a very concrete way to what I think the Chief Justice presented as a very close to a vague test, although certainly it was constitutionally not vague, but very close to vague test of what reasonably could be construed, and because there are so many different ways speech can present itself and so many different issues, so we're just sort of struggling through.

So I just want to try to frame this and make sure that I really understand where folks are on this, that there really is, I
sense, a near consensus that we do best by
saying the least here and leaving what I
would argue is the greatest degree of
ambiguity about what kinds of cases we are
going to be pursuing in enforcement and those
that we are not.

MR. HOERSTING: Mr. Chairman, I am
willing to be the first contrarian to some
extent.

I do worry about safe harbors
becoming the default standard and that being
the starting point of any enforcement matter
or advisory opinion request. I do worry
about that.

On the other hand, I do think that
the regulated community, especially the
uninitiated, and they do exist because
thankfully they're not all in this room
because they have lives, that's a good thing,
they need examples. They need safe harbors
perhaps, but they do need as much guidance as
they can, so they can look to the rules or
perhaps the E&J and get some idea of what ads they could do.

Now, Heidi's point is well taken and it is one I share that the list should be non-exhaustive.

So, I tend to favor articulating the standard, which by way the test is as you know, "no reasonable interpretation other than," that's the test. It is not so much the 4 and then the 11.

My understanding of that is that that's the Chief Justice applying his test to a particular ad in the WRTL.

But I think you should put into the E&J the examples of every ad, the ones under Wisconsin Right to Life and the ones under Christian Civic League of Maine that you have already conceded fit under WRTL II, put those into the E&J and give as much idea of the factors you will look at.

And I am not so sure that I am for the third option, as you framed it, which is
carving out the safe harbor. I am more for
the second.

MR. BOOS: We are clearly for the
first option and clearly against the third
option as we have articulated before.

The third option has the problem,
as was articulated, of it becoming a default
rule or at least from the viewpoint of the
regulated community. People that look at
these safe harbors will say anything outside
the safe harbor, you're at risk.

And I don't know of any lawyers out
there, with the exception of possibly me, who
would offer advice to go outside the safe
harbors. I mean, I would look at the safe
harbors and I would say, these safe harbors
are just that. They're the most narrow
obvious cases.

But if you list examples, at least
examples provide a little bit of information.

But the safe harbors I just view as being
dangerous, and maybe in part because I deal
with the IRS with respect to their safe harbor provisions at times.

    Of course, they don't even go as far what is being proposed here with their safe harbors. Their safe harbors just create a presumption and they even go so far as to say, we can overcome the presumption so even if you abide by our safe harbors you still might be in trouble.

    So I am just very leery of safe harbors, maybe in part because of the experience in dealing with the Internal Revenue Service.

CHAIRMAN LENHARD: Commissioner von Spakovsky.

MR. von SPAKOFSKY: We have our problems but we are not the IRS.

Ms. Abegg, I would like to ask you a question that is related to what Mr. Hoersting said earlier.

Mr. Hoersting, if I can summarize your view, I think it's that you think from a
constitutional standpoint Alternative 2 is
best, but you are recommending Alternative 1
because you think procedurally it puts us in
the best position in litigation in the
courts.

MR. HOERSTING: That's half of what
I said. There is no question. What I am
saying is, you're staring facial validity in
the eyes and you have no "as applied
challenge" anywhere in 201. You just don't
have it.

MR. von SPAKOVSKY: I wonder if
anybody is affected in your opinion by the
line of cases that you raised.

Only a couple of people have raised
this line of cases. Most of the commenters
have said to us, well, when we're looking at
the disclosure requirements, you just need to
apply campaign finance cases, you know,

Buckley, McConnell, to the concept of
disclosure and what is required under the
statute.
And most of the commenters will go on to ignore the issue that you have brought up which is, I believe, now that the court in Wisconsin Right to Life has said these are not electoral ads, these are issue ads. Therefore you have a different line of jurisprudence that comes in, and those are the cases of the Watchtower, Belotti, et cetera. And those cases apply, I believe, to the standard of strict scrutiny because of the issues that you have raised about possible harassment and another issues.

Does that other line of jurisprudence, these other cases, apply in such a manner that they overcome the procedural and litigation issues that Mr. Hoersting raises?

MS. ABEGG: I believe so and I guess I would disagree with Stephen and I am for "the tie goes to the speaker" and not require another nonprofit to spend a lot of money bringing another lawsuit to challenge
the disclosure provisions.

The government should bear that and I would presume that that speech is not regulated.

CHAIRMAN LENHARD: I have a separate topic I want to talk about briefly which is the degree to which we can consider the context in which an ad appears. Because a couple of you, and I think it was Mr. Boos and Mr. Hoersting, although I'm not sure, who said that either context is irrelevant or that we have to limit ourselves to this text of the ad.

The problem that that presents for me is that it is often impossible to understand the meaning of words without the context in which they appear.

And my sense of the court's decision is that they are not asking us to do exactly that, ignore anything other than the text of the ads, but not to draw in context other than those things which we could...
reasonably discern without intrusive
discovery.

And the example I used the other
day -- because it amused me and a small
number of other people who were in the room
at the time, but you weren't there I don't
think, so I can tell the joke again -- was
the example of the expression "Yay, Yankees."
An expression the meaning of which is very
different depending on whether you are on a
subway train going to the Bronx in September
or if you are in a parking lot in Stone
Mountain Georgia on Confederate Remembrance
Day. And the context of that speech changes
the meaning of it dramatically.

The other one I thought of, "Randy
Moss is the one," versus "Nixon is the one."
Right? Because we know something outside the
text of that speech about who Randy Moss is
and who Richard Nixon is, those two
statements have dramatically different
meaning to us.
I don't think the court would stop us from drawing some context, and yet certainly we had crossed the line in Wisconsin Right to Life in the court's mind.

My question do you is, what sort of context can we take into account? Must we truly ignore all knowledge outside of what is provided in the ads, or is our limitation more on the means by which or to the extent to which we go in search of discovering what I think the court saw as improper, which was the purpose or intent of the speaker.

It's a jump-off for anybody who'd like.

MR. BOOS: The way I like to analyze it is that I think the Commission goes too far with 100.22(b) in that it looks at too many things outside the context of the words themselves.

But I think if you look at the language of 100.22(a) that might be appropriate language, the language we are
asking that would be removed from the
definition of express advocacy, that might be
appropriate language in which to define the
functional equivalent of express advocacy
where the communication in context can have
no other reasonable meaning than to urge the
election or defeat of one or more clearly
identified candidates.

It is when you look at the
communication with reference to external
events, such as the proximity to the
election, that you really get into trouble,
because that's precisely what I think the
Chief Justice said you can't look at it at
all, are issues such as the proximity to the
election.

On the other hand if you use words
such as "Nixon's the one," that is not
express advocacy, but I think it would be the
functional equivalent of express advocacy if
it was done on an ad referring to Richard
Nixon and the election itself.
So it's a subtle difference and I think the Commission itself has had trouble distinguishing between communications that fall within the latter part of 100.22(a) and 100.22(b).

An example I like to raise is the Swift-Betts ads. Had the Swift-Betts conciliation agreement been entered into after this decision there probably would have been a lot more doubt as to whether their ads were express advocacy or not.

I don't think those ads constituted express advocacy under what was set forth in Wisconsin Right to Life. I think they were the functional equivalent and were legitimately and properly reported as electioneering communications, but I know there were other issues in that case where there may have been some express advocacy and solicitations in that manner, but that's sort of the distinction and it's not a very easy distinction to make between the language in
MR. HOERSTING: First of all, my understanding of epistemology is that truth is objective, not a relative, but it is always contextual. It just is. So I empathize with what you're saying.

And when the test is "no reasonable interpretation other than," you have put the word "reasonable" into that.

So while I think a four corners test is what you should be looking at and it is very easy to do with regard to type A express advocacy, in a four corners test you are looking for certain words.

When you're doing the "no reasonable interpretation other than" test, you are permitted look at the contextual meaning of those words which you are not permitted to do, because you are not permitted to probe intent and effect and that begins to get into types of evidence you can
and cannot entertain and this is what the

court was talking about.

It's talking about injunction mode
where the court has to very quickly determine

can these guys speak or can they not and they

are not going to pull in experts, and ask,

what do you think would be the aggregate
effect of this ad on the voting populace if

they were to hear this?

That's not the type of thing you

are allowed to determine. But I will do a

rough Furgatch analogy because I really can't

think of anything else right now.

If you say don't let him do it, and

the only reasonable meaning of that is you

have got to vote the guy out of office, then

sure, that's contextual and that is something

you can look at, but it's still, I would

submit, a four corners test.

I don't mean to make light of how
difficult it is for you to say what's in and

what's out when you are determining what
you're allowed to look at in terms of looking
at relative context, but you can't do intent
and effect and you can't ferret out what they
are really trying to do here.

CHAIRMAN LENHARD: One of the
interesting features of yesterday's panels
was when we were looking specifically at the
Ganske ad we had a witness who testified that
it was express advocacy unless in context
there was a vote that was about to happen and
then it would look more like lobbying ads to
them.

So sometimes context ends up moving
some reasonable people the other way.

Mr. Sullivan.

MR. SULLIVAN: I agree it is
logical that the Commission should be able to
look at the context in order to understand
the meaning of the words used within the four
corners of the document.

I think the context question which
raises so much concern is material events
outside of the document which address why was it said? What was the intended impact? What other events are going on in the campaign which this may relate to?

Those context questions with respect to events or outside factors, or impact, or motivation, I think are the kinds of contextual questions foreclosed by the decision.

You always need to know what the context is, I think, in order to understand the meaning of the communication, but going beyond that you go into territory that court I think intended to restrict.

CHAIRMAN LENHARD: So, to make it concrete, if we had an ad where somebody was saying that an individual was not qualified to be Commander in Chief of the United States, and we took into consideration that the person was actually running to be president of the United States, which is the same as the Commander in Chief, that sort of
context or the awareness of that sort of
case which would seem under that analysis
to be an appropriate in understanding the
meaning of those words. Am I correct in
thinking that's what you're saying?

MR. SULLIVAN: I think so.

MR. HOERSTING: Yes.

MS. ABEGG: I would agree with what
Mr. Sullivan said. My client, ATA, faced a
similar situation out in California. They
ran an ad during the energy crisis out there
and the tag line was "Grayouts from Gray
Davis" and it ended with a light bulb
clicking off. And Governor Davis argued that
that should be interpreted as advocating his
defeat by clicking the light bulb off showing
that this just meant that his energy policies
were causing everyone's power to go off.

MR. HOERSTING: That's a good

point. It strikes me that there is a

reasonable interpretation other than, for the

Gray Davis ads for sure.
MR. BOOS: The point we would just like to stress is that these latter ads that are being talked about we view as electioneering communications and not independent expenditures and that is where we would draw the distinction.

Otherwise there is no difference between an ad that qualifies as an electioneering communication. It automatically qualifies as express advocacy. You have to draw the line somewhere or else the electioneering communications rules have really no meaning whatsoever.

And so if you distinguish between the two, one is express advocacy and one is the functional equivalent, and the electioneering communications rules cover the functional equivalent, at least you have some meaning to the statute that is still on the books.

CHAIRMAN LENHARD: Commissioner von Spakovsky.
MR. von SPAKOVSKY: This question is for you, Mr. Hoersting, although I would be glad to hear from the rest of the panel what you think about this too.

When Congress was debating S-1, the Honest Leadership Open Government Act, which they recently passed, both the House and the Senate specifically defeated amendments that would have required disclosure of the donors to organizations engaged in grassroots lobbying.

Do you believe that those were defeated because Congress believed that that kind disclosure was already required by FECA? And if you think that was not the reason, if you think they defeated it for First Amendment reasons or others, is that a factor that we should take into account as the view of Congress on this issue when we are formulating this regulation?

MR. HOERSTING: First of all, I was involved in this issue to some extent and I
will refer you to a piece I wrote called
"MLK, Grassroots Lobbyist," in National
Review on-line. You will not find anyone
more hostile to grassroots lobbying
disclosure than me.

And I am very troubled by the
procedural posture in this case and where it
leads us and where things are. And I am
balancing case or controversy doctrine with
congressional intent with the other
interpretations of other Supreme Court cases
and it is very difficult.

Do I think you can infer from what
Congress did in grassroots lobbying
disclosure what it would probably do with
regard to grassroots disclosure in the
context of electioneering communications?

Despite what Marc Elias said
yesterday, that LDA and electioneering
communications are different, I do think you
can read something from that, just as you
could and did read something about Congress's
actions with regard to 527s during the 2004 rulemaking on political committee status.

You noted that Congress required that they report but not they be political committees. And I think you were right to look at that and sort of put those two statutes side by side.

But I do think there are cases in which the LDA and congressional intent is not going to match up with electioneering communications. At the end of the day do I think Congress foresaw the snafu that would happen in WRTL? No. Not for a minute, but I do believe you do have a provision that is facially valid.

You have that from the McConnell court. And you have no "as applied challenge" to it.

The question is, when that is where you are, what do you do next? That's a very difficult question for you. I'm just trying to tell you what I would do.
MR. BOOS: None of the other exemptions have a reporting requirement.

Entities that are exempt from electioneering communications under the news media exemption, for example, do not have to include the disclosure statements in their ads and they do not have to report their donors. They are permitted to run their ads because they are not electioneering communications.

And I think that when you determine that something is exempt from the definition of the electioneering communication you are determining it is not an electioneering communication and therefore ipso facto there shouldn't be any disclosure and reporting requirements with that.

I think the authority under the statute to promulgate rules exempting certain communications from electioneering communications doesn't say anything about if you exempt them they still have to report.
Now, there is a question, of course, with respect to whether certain communications under this exemption with still PASO candidates and therefore maybe don't fall under this, but if you actually define PASO I think you get past that problem.

MR. von SPAKOVSKY: So, Mr. Boos, you are saying, for the benefit of any reporters who are still here, that if we adopt Alternative 1, in order to be perfectly fair, then we should extend the disclosure requirements to media organizations also.

MR. BOOS: Oh, I think if you were to do that you would have a fire storm on your hands, but, sure. To be fair, why not?

CHAIRMAN LENHARD: Are there other questions? Vice Chairman Mason.

VICE CHAIRMAN MASON: Ms. Abegg, you talked about the privacy interests of your donors and their desire for anonymity. Could you fill us in a little bit on that? Because one
of the things that bothers me and I asked one
of the counsels for the party committees who
was here before who was sort of suggesting
that the incumbents really wanted to know who
was behind these ads.

And you have mentioned the Gray
Davis suit, but it would be useful if there
are particular examples that you're aware of.

And you may not be able to provide
names of people who felt like their personal
interests or business interests or political
interests were threatened if they were
disclosed as donors to particular
organizations.

MS. ABEGG: I have particular
examples, but I can't share them. Some of
them are businessmen who are active in the
communities or who may be active in one
political party but there is an issue that is
important to them so they want give to effect
change on that issue and they are afraid if
they do so they will face harassment or
reprisals from those in the other
organizations with which they are associated.

Some of them just don't want their
names known. They don't want any attention.
They just want to do it anonymously and go
about their way.

VICE CHAIRMAN MASON: To try and fill this in
a little bit, and I appreciate precisely the
people who would want to be anonymous who
wouldn't want to be disclosed in this context
either, but that you are aware of, vis-à-vis
your organization's people who, and perhaps
the California case, have interests before
the state government and feel like those
interests would be threatened -- they care
about the energy policy, but they feel like
their interests before the state government
would be threatened if they had their names
identified with those ads.

MS. ABEGG: Correct. It is a very
real concern. They will talk to the client
but they want counsel's reassurance that
their names are not going to be disclosed and that's before they even make the donation.

MR. HOERSTING: Mr. Vice Chairman, I can tell you I have been on phone conversations, and I cannot reveal their nature of course, but the gist is that people stopped their activities because they heard about this disclosure aspect. They simply stopped their plans, and they were pretty far along and even had the budget worked out. They said, oh, we've got to disclose? They ended their activity.

CHAIRMAN LENHARD: Could you just elaborate on exactly concretely what their concern is?

MR. HOERSTING: Yes. Well, I am not sure that I could, actually. I just know when they heard disclosure they were no longer interested in pursuing that issue that had a nexus to candidates.

It was sort of in that gray line and when they heard that disclosure would be
a possibility they just said no thank you.

I can give you two other examples if you want. And this is where disclosure is a good thing and it is required.

K Street Project. Tom Delay hauled people into his office, and said, if you want to play in our revolution, you have to play by our rules.

Another example is Sam Fox's confirmation hearing before the Senate when Senator Kerry used 527 disclosure to tee up Fox for the affiliation. It should not surprise you to know that Sam Fox did not speak much about his First Amendment rights of association in that hearing. He backed down. He called Kerry a hero and he called the work of all 527s disgraceful even though he had given $50,000 to one.

So, do I doubt for a moment there is any chill that comes from this stuff? Not for a moment. Do I think there is any basis for compelling disclosure of grassroots
lobbying activity? Not for a moment.

I just think there is a serious lack in the posture of WRTL II with regard to Section 201 and the follow-up cases, which are WRTL III and Christian Civic League of Maine, that put this Commission in a real pickle. It is a difficult decision for you and I don't undermine that for a moment.


MR. SULLIVAN: I just want to add one brief point. There is a considerable body of case law dealing with the issue of disclosing the names of individuals who are members of civil rights and labor organizations.

Clearly the classic example of an individual who identifies a member of a labor organization, particularly if they are involved in an activity which could be against their employer's interests, either
forming a labor organization or taking a position on a public policy issue that is inconsistent with their employer's interests, could and actually are subject to discipline and reprisal in the workplace.

There is a fairly well documented body of case law and experience that unions have, attempting to protect their members who were identified as members of the union or supporters of the union's goals.

CHAIRMAN LENHARD: Any other closing thoughts from the panel?

MR. BOOS: Just one brief issue that we have not discussed and that is with respect to disclosure.

What happens if you sell a bunch of DVDs to a wholesaler who is going to then resell those DVDs and you sell them for $10,000, Citizens United were to sell them for $10,000.

Is that a disclosable contribution under Alternative 1? Because it's a sale.
How do you delineate between the sales revenue and the contributions that are going to pay for the ads? Because very clearly the ads will be paid by revenues out of sales, and that is especially the case with respect to commercial entities.

CHAIRMAN LENHARD: That's a problem for us in the definition of this. Anything more? Then I guess with that we will bring this hearing to a close.

We are going to keep the record open for four days, that is, until Wednesday of next week. There are a number of questions put to panelists at various stages over the last two days and we had offered them the opportunity to respond in writing if they would like to submit additional information and obviously because the record is open, obviously anyone can submit additional information for our consideration in this matter.

With that said I bring this meeting
to a close. Thank you very much.

(Whereupon, at 3:00 p.m., the HEARING was adjourned.)

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