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**THE IMPACT OF *FEC v. WISCONSIN RIGHT TO LIFE, INC.* ON DISCLOSURE OF
“ELECTIONEERING COMMUNICATIONS” IN CANDIDATE ELECTIONS**

Before passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), campaign finance laws applied only to “express advocacy” – an advertisement for or against a candidate that used specific “magic words,” such as “vote for” or “vote against.” This test made it impossible to distinguish “sham issue ads” (ads that avoided these magic words, but were nonetheless intended to influence an election) from genuine issue ads (ads that advance a position on a public issue). There were no limits on who could buy the ads or on how they were financed, and no disclosure was required. Hundreds of millions of dollars of corporate and union treasury funds – money that could not legally be used to influence elections – poured into federal campaign ads through the “sham issue ad” loophole.

BCRA closed this loophole. It banned the use of corporate and union treasury funds for “electioneering communications” – broadcast ads aired just prior to a primary or general election that refer to a candidate and target the candidate’s constituents. BCRA also required disclosure of funding for electioneering communications. The U.S. Supreme Court upheld these provisions in *McConnell v. FEC* in 2003.

On June 25, 2007, in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL II*”), the Supreme Court held that corporations *could* pay for ads from the corporate treasury, so long as the ad was not express advocacy or its “functional equivalent.” “Express advocacy” and its “functional equivalent” were specifically defined by the Federal Election Commission in a rule in November 2007 in the wake of the decision. Key points to remember about the current state of the law are:

- **The decision in *WRTL* is limited in impact and scope.**
 - *WRTL II* was a challenge only to BCRA’s ban on the use of corporate treasury funds for the financing of electioneering communications.
 - BCRA is still good law. *WRTL II* did not overrule *McConnell* or invalidate BCRA.
 - BCRA’s definition of “electioneering communications” is still good law. *WRTL II* did not challenge the definition, and the Court did not revisit it.
- **Requirements for disclosure of electioneering communications remain valid and vital.**
 - *WRTL* did not consider BCRA’s disclosure rules, which were upheld in *McConnell* 8-1.
 - The Supreme Court consistently has upheld disclosure requirements, even when they are broader than limits on campaign ads and cover a wider range of activities. For example, the Court has upheld disclosure of finances related to ballot measures and lobbying.
 - Federal law still requires political committees to disclose donors who finance electioneering communications and the amount that the committee spends on the ads.
 - The Federal Election Commission’s new regulations implementing the *WRTL II* decision did *not* change the disclosure requirements for electioneering communications.
 - The rule clarified that ads that critique a candidates’ character or qualifications for office are suspect, while ads that merely discuss legislative issues are likely outside the ban.
 - States may require disclosure of electioneering communications. Fourteen states have laws requiring disclosure of electioneering communications.