

CHAPTER SEVEN:

CAMPAIGN ADVERTISING AND ISSUE ADVOCACY

For decades, advertising sponsored by individuals or groups other than candidates, political parties, or political action committees (“PACs”) has been a powerful force in candidate campaigns, especially in federal elections. Over that period, the constitutional constraints on the regulation of such advertising have changed dramatically—and they are still in flux. This chapter provides an overview of that shifting legal landscape, including discussions of two critical Supreme Court cases: *McConnell v. FEC*,¹ which opened the door to more meaningful regulation, and *FEC v. Wisconsin Right to Life, Inc. (“WRTL II”)*,² decided just four years later, which recognized an exception to *McConnell*’s holding.

Before the decision in *McConnell*, many lower courts had ruled that regulation of advertising was constitutionally permissible only with respect to ads that expressly advocated the election or defeat of a clearly identified candidate. Moreover, most of those courts concluded that such “express advocacy” required the use of “magic words”—terms such as “vote for” or “vote against” or their synonyms. Ads without magic words were treated as “issue advocacy” (advocacy of a position on an issue of public policy) exempt from regulation, regardless of their intent or effect.

Because it was child’s play to create campaign ads without magic words, the rulings opened a giant “sham issue ad” loophole in federal campaign finance law. Although the Federal Election Campaign Act prohibited corporations and unions from spending treasury funds on federal elections, millions of dollars of corporate and union funds poured through the loophole into sham issue ads supporting or opposing presidential and congressional candidates. To make matters worse, the loophole allowed the ad sponsors to escape federal reporting requirements, leaving the public in the dark about the financing of the ads. *McConnell* closed the sham issue ad loophole by making it clear “that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled.”³

The *McConnell* case involved challenges to provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that regulated “electioneering communications”—broadcast advertisements that referred clearly to federal candidate, targeted his or her constituents, and ran 30 days before a primary or 60 days before a general election. BCRA included a source ban (corporations and unions were barred from spending general treasury funds on such ads) and disclosure requirements that informed the public who actually was paying for the ads. *McConnell* upheld the source restriction and reporting

1 540 U.S. 93 (2003).

2 127 S. Ct. 2652 (2007).

3 *Id.* at 205.

requirements for electioneering communications, while preserving federal regulation of express advocacy.

Four years later, however, the Supreme Court pulled back on the expansive language of *McConnell* and tightened the constitutional constraints on the regulation of political advertisements. *WRTL II* found that the ban on using corporate treasury funds for “electioneering communications” was unconstitutional as applied to the plaintiff, a corporation, because the plaintiff’s ads were not express advocacy or its “functional equivalent.” Although the holding technically applies only to the particular ads reviewed in *WRTL II*, the ruling has had and will have a broader impact. Already, the Federal Election Commission (“FEC”) has approved a new rule carving out an exemption to BCRA’s restriction on corporate electioneering communications and setting out indicia of the “functional equivalent” of express advocacy.

This chapter discusses the tests for regulation of campaign advertising: BCRA’s time frame test, the “magic words test,” and the “reasonable person” test. This chapter also addresses the relation of each test to regulations that impose reporting and disclosure requirements and to limits on corporate and union expenditures. Chapter Six addresses limits on corporate and union campaign-related contributions and expenditures, generally, and Chapter Eight discusses the reporting and disclaimer requirements applicable to campaign ads in more detail.

I. “ELECTIONEERING COMMUNICATIONS” UNDER BCRA: THE TIME-FRAME TEST

BCRA coined a new term—“electioneering communications”—for a category of campaign advertising that would be subject to regulation. As defined in BCRA, an “electioneering communication” is any “broadcast, cable, or satellite communication” that

- (I) refers to a clearly identified candidate for Federal office;
- (II) is made within:
 - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
- (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.⁴

42 U.S.C.A. § 434(f)(3)(A)(i) (Supp. 2003).

A communication is “targeted to the relevant electorate” if it “can be received by 50,000 or more persons . . . in the district or State the candidate seeks to represent.”⁵ In other words, there are four key elements of BCRA’s definition:

- the *media* that are regulated (broadcast, cable, and satellite communications);⁶
- the *reference to a clearly identified candidate*;
- the *time period* during which ads are regulated; and
- *targeting* to the jurisdiction of intended representation.

The Supreme Court upheld this definition against claims that it was vague, noting that its components “are both easily understood and objectively determinable.” *McConnell*, 540 U.S. at 103. State or local laws modeled on BCRA also should be drafted to ensure that they are not vague, although meeting this constitutional test does not require that those laws use exactly the same terms as BCRA does. Laws that include easily understood and objectively determinable variations of these four components should have no trouble surviving a *vagueness* challenge. (Other types of challenges are another matter; if state laws do not accommodate the recent exception recognized in *WRTL II*, they may be subject to constitutional attack on overbreadth grounds.)

BCRA contained two sets of provisions pertaining to electioneering communications, only one of which is still fully in effect. First, it prohibited corporations and unions from using general treasury funds to pay for communications that qualified as electioneering communications. Second, expenditures on electioneering communications of at least \$10,000 in a calendar year triggered a range of important reporting and disclaimer requirements.

WRTL II changed the scope of the funding restriction. In *WRTL II*, the Supreme Court refused to apply BCRA’s ban on corporate funding of electioneering communications to a series of ads that did not constitute the “functional equivalent” of express advocacy, finding that the statute was overbroad as applied to those ads. 127 S. Ct. at 2659. The decision, and the FEC rule that came in its wake, suggest that a corporate or union ad that meets the definition of an electioneering communication may be prohibited only if it contains the functional equivalent of express advocacy—that is, it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S. Ct. at 2667; 11 C.F.R. § 114.15(a). The decision did not consider,

5 *Id.* § 434(f)(3)(C).

6 In *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the D.C. Circuit invalidated an FEC regulation defining “electioneering communications” to include only communications that had been disseminated through these media for a fee. The court held that this limitation was contrary to the text of BCRA.

let alone invalidate, the statutory definition of an “electioneering communication” or disclosure requirements for such communications, whatever their source.

The new FEC rule helps to explain which electioneering communications are subject to BCRA’s funding restriction. In relevant part, *id.* § 114.15(b), the rule provides that a corporate or union electioneering communication is *not* subject to the funding ban when the communication:

- (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Does not take a position on any candidate’s or officeholder’s character, qualifications, or fitness for office; and
- (3) Either:
 - (i) Focuses on a legislative, executive or judicial matter or issue; and
 - (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or
 - (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
 - (ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.⁷

The new regulations also provide that the FEC will consider on a case-by-case basis whether, on balance, a communication that does not qualify for the safe harbor is the functional equivalent of express advocacy, by considering whether the ad has “indicia of express advocacy” and is susceptible to a reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate. *Id.* The FEC explains in section 114.15(c):

- (1) A communication includes indicia of express advocacy if it:
 - (i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or
 - (ii) Takes a position on any candidate’s or officeholder’s character, qualifications, or fitness for office.

⁷ The FEC has posted examples of exempt communications at http://www.fec.gov/pages/bcra/rulemakings/ECs_WRTL_Exemption_Examples.shtml.

- (2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:
 - (i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
 - (ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
 - (iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.
- (3) In interpreting a communication under paragraph (a), any doubt will be resolved in favor of permitting the communication.

TIPS:

Tip: Be sure that each component of an “electioneering communication” definition is easily understood and objectively determinable. It should be clear whether or not any particular ad is governed by the definition. It may be necessary to provide subsidiary definitions for some of the terms used in the basic definition, as BCRA does for the phrase “targeted to the relevant electorate.”

Tip: The facts about campaign advertising in a state or locality should support the need for regulation. In *McConnell*, there was an extensive factual record as well as expert testimony to show that the vast majority of broadcast, cable, and satellite ads referring to a candidate, and targeted at the relevant electorate within the statutory time period, were aired for an electioneering purpose. In *WRTL II*, the Supreme Court questioned whether regulation could be justified by reference to the ads’ purpose or effect. To support new state or local laws governing electioneering communications, it will be helpful to have evidence showing that the advertising subject to the proposed regulations includes express advocacy or its functional equivalent.

Tip: Tailor regulation to the advertising media actually used for the races covered, but take care not to over-regulate. In many state races, broadcast ads play a minor role compared with leaflets, mailers, and voter guides. If these less expensive means of campaigning are regulated, there should be a reasonable cost threshold that triggers regulation, so as not unduly to burden individuals or groups who only casually communicate about an

election. People should be able to mobilize their friends without fear that they may be violating the law.

Tip: Consider adopting the FEC's rule for any ban on corporate or union funding of electioneering communications. As *WRTL II* demonstrated, a blanket prohibition on corporate and union funding of electioneering communications modeled on BCRA's definition is likely to run into constitutional problems. Following the FEC's rule—or a similar model based on local experience—is likely to be the safest practice. Note, however, that if your state does not prohibit corporate (or union) contributions or independent expenditures, it makes little practical or constitutional sense to prohibit corporate (or union) spending on electioneering communications.

Tip: Disclosure requirements modeled on BCRA still may be required for all electioneering communications. The Supreme Court is currently very hostile to campaign finance regulation, but *McConnell* upheld BCRA's disclosure requirements 8-to-1. Some members of the Court would have to reverse themselves in less than five years to carve an exception in to the disclosure requirements. Moreover, the Court has upheld disclosure requirements pertaining to the financing of lobbying and ballot measures, which need not involve express advocacy.

Tip: BCRA contains some exceptions from its definition of an "electioneering communication," which also should be included in state and local versions. Specifically, BCRA exempts most news stories, commentary, and editorials; communications that are already regulated as expenditures or independent expenditures; certain candidate debates; and most other communications for which the FEC creates an exception.

LEGAL ANALYSIS:

Regulation of independent campaign advertising began in 1974, with the amendment of FECA. One section of FECA imposed a \$1,000 limit on expenditures "relative to a clearly identified candidate." 18 U.S.C. § 608(e)(1) (quoted in *Buckley v. Valeo*, 424 U.S. 1, 193 (1976)). Another section of FECA imposed reporting requirements for persons who made independent expenditures of more than \$100 "for the purpose of . . . influencing" a federal election. 2 U.S.C. §§ 431(e), 434(e) (quoted in *Buckley*, 424 U.S. at 145, 160). The Court in *Buckley* concluded that these regulations presented potential problems of both vagueness and overbreadth.

Under First Amendment "vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague campaign finance provision might "chill" some political speakers who have no electioneering purpose but are afraid that the provision nevertheless governs their speech. The *Buckley* Court found that the provisions of FECA that applied to expenditures "relative to a clearly identified candidate" and "for the purpose of . . . influencing" an election were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech. See 424 U.S. at 40-44, 78-80.

The overbreadth doctrine in First Amendment jurisprudence is concerned with regulation that may be precise but covers a substantial amount of constitutionally protected speech. In *Buckley*, the Court worried that a regulation governing any expenditure made “for the purpose of influencing” a federal election or that is “relative to a clearly identified candidate” could have substantial application to protected speech. *See id.* In order to avoid these vagueness and overbreadth problems, the *Buckley* Court held that the government’s regulatory power under FECA would be construed to reach only funds used for communications that “include explicit words of advocacy of the election or defeat” of a clearly identified candidate. *Id.* at 43. In a footnote, the Court explained that its construction of FECA would limit the reach of the statute “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *Id.* at 44 n.52. Those examples eventually gave rise to the “magic words” test for advertising that could constitutionally be subject to campaign finance restrictions.⁸

What the Supreme Court made clear in *McConnell* is that the narrowing construction of FECA “was the product of statutory interpretation rather than a constitutional command.” 540 U.S. at 192. Although FECA was constitutionally infirm, Congress could cure that infirmity with a new law that was neither vague nor overbroad, even if the new law did not “toe the same express advocacy line” as that defined in *Buckley*. *Id.* That is precisely what Congress did with BCRA.

Congress cured FECA’s vagueness problem by setting forth a new “bright-line” test for electioneering communications in BCRA. The four components of that test raised none of the concerns about imprecision that drove the Court to create the express advocacy standard for FECA. Moreover, the *McConnell* Court rejected the idea “that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.” *Id.* at 193. The constitutional objections that led the *Buckley* Court to limit FECA’s reach to express advocacy were “simply inapposite” in the case of BCRA. *Id.* at 194.

Before *McConnell*, several courts considered—and invalidated—state laws or regulations using BCRA’s approach to campaign advertising. *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000) (striking down a provision requiring reporting of expenditures of \$500 or more for “mass media activities” that include the name or likeness of a candidate and occur within 30 days of an election); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (enjoining a regulation that barred corporations and unions from using general treasury funds to pay for communications containing the name or likeness of a candidate within 45 days of an election); *Right to Life of Michigan, Inc. v. Miller*,

⁸ Expenditures that include “magic words” and are made by entities other than candidates are generally regulated as “independent expenditures.” The magic words test is discussed more fully below in Section II, and independent expenditures are discussed in Chapter 6.

23 F. Supp. 2d 766, 771 (W.D. Mich. 1998) (same); *West Virginians for Life v. Smith*, 960 F. Supp. 1036, 1039-41 (S.D. W. Va. 1996) (invalidating a law that presumed an electioneering purpose when a voter guide, scorecard, or other written analysis of a candidate's position was disseminated within 60 days of an election). These cases are no longer good law under *McConnell*.

Four years after *McConnell*, in *WRTL II*, the Supreme Court considered an overbreadth challenge to BCRA's corporate funding ban, as applied to a series of television ads in Wisconsin. The ads opposed the Senate filibuster of certain federal judicial nominations and urged voters to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." 127 S. Ct. at 2660. Notably, the Senate was in recess at the time, and Senator Feingold (but not Kohl) was up for re-election. The ads were sponsored by Wisconsin Right to Life, a non-profit advocacy corporation that received significant funding from for-profit corporations.

By a vote of 5-to-4, the Supreme Court held that BCRA could not be applied to the ads at issue even though they met all four components of the electioneering communications definition. The Court divided in three ways. Three Justices argued that *McConnell* should be overturned, that BCRA's corporate ban on electioneering communication was unconstitutional, and that the other long-time bans on corporate campaign spending were unconstitutional. *See* 127 S. Ct. at 2674-87 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment). The four dissenters argued that BCRA should be upheld and that the ads were basically indistinguishable from the kind of advertising that the *McConnell* Court had provided as the "paradigmatic example" of advertising subject to the corporate spending prohibition. *See* 127 S. Ct. at 2698-99 (Souter, J., joined by Breyer, Ginsburg, and Stevens, JJ., dissenting). Finally, in an opinion written by Chief Justice Roberts and joined only by Justice Alito,⁹ a plurality of the Court held that BCRA's ban on corporate funding of electioneering communications could not be applied to Wisconsin Right to Life's ads because they were not express advocacy or its "functional equivalent." The Roberts opinion did not reach the question whether *McConnell* should be overruled.

Technically, *WRTL II* held only that BCRA cannot be applied to bar corporate funding of the specific ads at issue in that case. But, effectively, the decision means that corporations and unions cannot constitutionally be prohibited from using treasury funds to pay for advertisements simply because the ads meet BCRA's definition of electioneering communications. The FEC recognized this implication in its recently-approved rule, which relies on *WRTL II* to carve out an exemption from BCRA's restriction on corporate electioneering communications. *WRTL II* did not challenge BCRA's disclosure requirements, which remain applicable to *all* electioneering communications.

9 Because there was no majority opinion, and Chief Justice Roberts' opinion provides the narrowest rationale for the outcome, it functions as the opinion of the Court. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

WRTL II limited BCRA's funding restrictions to ads that were express advocacy or "the functional equivalent" of express advocacy. According to the Court, an ad is "the functional equivalent of express advocacy" only if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667.¹⁰ The Court's application of its "no reasonable interpretation test" to the Wisconsin Right to Life ads establishes a framework for determining whether an ad is the "functional equivalent of express advocacy" and thus, subject to BCRA's funding restrictions. Describing the ads at issue and why they are not covered, the Court wrote:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 2667.¹¹ The plurality described its test as being "objective, focusing on the substance of the communication rather than the amorphous considerations of intent and effect." *Id.* at 2666.

The Court's stark rejection of any consideration of "intent" or "intent and effect" is worth noting further. The Court contended that any "intent-based test would chill core political speech by opening the door to a trial . . . on the theory that the speaker actually intended to affect an election." *Id.* at 2665-66. In addition, a test based on the effect of speech " 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers,' " *id.* at 2666 (quoting *Buckley*, 424 U.S. at 43), and thus would "unquestionably chill a substantial amount of political speech," 127 S. Ct. at 2666. It

10 This "no reasonable interpretation" test is essentially the same as the "back-up" definition for electioneering in BCRA, which was intended to identify which ads could be regulated if the primary electioneering communications definition was found unconstitutional. Had *McConnell* held that § 203 was unconstitutional, this "reasonable person" test would have taken its place. See *WRTL II*, 127 S. Ct. at 2703-04 (Souter, J., dissenting). In addition, the new test is very similar to the test for express advocacy adopted in *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), upon which BCRA's "back-up definition" was based. Chief Justice Roberts did not address the similarities. The impact of the *WRTL II* decision on *Furgatch* and other potential tests for electoral advocacy is discussed more fully in Section III.

11 The Court provided further guidance in distinguishing the Wisconsin Right to Life ads from the hypothetical attack ad discussed in *McConnell* that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think[.]'" *McConnell*, 540 U.S. at 127, noting that the ads here did not condemn Senator Feingold's position on the issue but articulated the group's position and "exhort[ed] constituents to contact Senators Feingold and Kohl to advance that position." *WRTL II*, 127 S. Ct. at 2667 n.6.

is this analysis that leads observers to wonder whether the Court is poised to reverse its decision in *McConnell*; the empirical record supporting BCRA's definition of electioneering communications reflected a test for the perceived intent of the ads.

In the only case yet to apply *WRTL II* to a challenged communication, a three-judge court reviewed a claim that “Hillary: The Movie” should not be subject to BCRA's prohibition on corporate electioneering communications because the movie allegedly does not contain the functional equivalent of express advocacy. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278-79 (D.D.C. Jan. 15) (three-judge court), *appeal dismissed for want of jurisdiction*, -- S. Ct. --, 2008 WL 754301 (March 24, 2008). The court rejected outright the plaintiffs' claim that “any speech that does not expressly say how the viewer should vote” is *not* the functional equivalent of express advocacy. Instead, the court applied the analysis from *WRTL II* with reference to the new FEC rule to find that the movie “does not focus on legislative issues,” “references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office,” and, thus, was certainly the functional equivalent of express advocacy. *Id.* at 279-80 (citing *WRTL II*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(b)). It thus appears that the new test still will preclude corporate funding of some electioneering communications that do not include magic words.

II. MAGIC WORDS

It is important to understand what role magic words now play in campaign finance law. *McConnell* held that, with a sufficiently precise definition of the advertising subject to regulation, it is permissible to regulate campaign ads that do not use magic words, and *WRTL II* has not repudiated that holding. Of course, it also is permissible to regulate ads that *do* use magic words, and such regulations are effective year-round for both source limits and disclosure requirements (as contrasted with electioneering communications, which appear only in a brief pre-election period). In addition, communications using magic words trigger other federal requirements, such the formation of a political committee subject to contribution limits. The magic words test can supplement a test modeled on BCRA (or other definitions, discussed in section III below).

TIPS:

Tip: Define advertising subject to regulation to include BOTH electioneering communications modeled on BCRA's definition AND ads using magic words. As in BCRA, these complementary tests for regulated advertising can be introduced in separate definitions of “independent expenditures” and “electioneering communications.” By including both tests, a state or locality can regulate ads with magic words year-round, while capturing ads without magic words (but with the functional equivalent of express advocacy) in the more limited periods before elections.

Tip: Be very careful when using FECA's original provisions as models for new laws. *Buckley* found that language in FECA pertaining to independent expenditures was vague and

overbroad. The Court sought to cure these problems by creating the now-discredited “magic words” test. Some state laws that contained language modeled on FECA also were struck down.¹² Reformers should learn from Congress’s mistake in FECA, not repeat it.

LEGAL ANALYSIS:

Before the Supreme Court decided *McConnell*, most courts treated challenges to campaign finance restrictions on advertising as disputes about how to differentiate between “issue advocacy” and “express advocacy.” Although the federal courts of appeals disagreed about the meaning of “express advocacy,” the vast majority refused to go beyond the “magic words” approach. The First, Fourth, Fifth, and Eighth Circuits explicitly adopted the magic words test, see *Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (invalidating federal regulation defining express advocacy to include more than magic words); *Chamber of Commerce v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2000) (finding magic word requirement in attempt to regulate judicial electioneering ads under Mississippi law); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (granting preliminary injunction against definition of “express advocacy” in state law that went beyond magic words); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (per curiam) (invalidating federal regulation), while the Second and Tenth Circuits invalidated state laws seeking to regulate speech other than express advocacy, but without ruling that express advocacy requires magic words, see *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193-95 (10th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000). Only the Ninth Circuit explicitly rejected the magic words test for express advocacy. See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

In sum, Justice Thomas only slightly overstated the impact of *McConnell* when he wrote: “The Court, . . . by concluding that the ‘express advocacy’ limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one).” 540 U.S. at 278 n.11 (Thomas, J. dissenting). States throughout the country are now free to regulate campaign advertising that does not contain magic words, as long as the test used to identify which ads fall within the scope of state campaign finance provisions is neither vague nor overbroad.¹³ To avoid overbreadth, it is crucial that state laws incorporate

12 See, e.g., *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-66 (5th Cir. 2006), cert. denied 127 S. Ct. 938 (2007) (holding that the Louisiana Campaign Finance Disclosure Act definition of “independent expenditure,” which closely tracked the FECA definition, was constitutional only when limited as in *Buckley* to communications that expressly advocate the election or defeat of a clearly identified candidate).

13 The importance of avoiding vagueness and overbreadth, especially in jurisdictions hostile to campaign finance law, cannot be overstated. Only five weeks after the decision in *McConnell*, the Sixth Circuit revived the magic words test and applied it to a ban on electioneering

the test introduced by *WRTL II*, but it is important to remember that the Supreme Court has not limited regulation only to ads with magic words.

III. THE “REASONABLE PERSON” TEST AND THE USE OF CONTEXT

In 1987, the Ninth Circuit held that a “reasonable person” test was a practical and constitutional alternative to the magic words test for express advocacy. *Furgatch*, 807 F.2d at 864. Reviewing a series of newspaper advertisements that criticized Jimmy Carter’s reelection campaign and urged “Don’t Let Him Do It,” the court adopted a test under which a message would be construed as express advocacy “when read as a whole, with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *Id.* at 864. In the years that followed, most courts rejected the *Furgatch* approach and reaffirmed the narrow “magic words” test for express advocacy, although several courts (mostly within the Ninth Circuit) followed *Furgatch* in analyzing campaign-related advocacy. *McConnell* did not address a reasonable person test, but it freed states to regulate campaign-related advocacy that did not include magic words.

In *WRTL II*, the Court turned to a reasonable person test to describe when an advertisement is the “functional equivalent” of express advocacy. An advertisement that meets the definition of an electioneering communication under BCRA is the “functional equivalent” of express advocacy if it is “susceptible of no reasonable interpretation other than as appeal to vote for or against a specific candidate.” 127 S. Ct. at 2667. *WRTL II* thus provides considerable support for the argument that regulations using at least that form of a “reasonable person” test are constitutional. It is not clear, however, whether advertisements that are the functional equivalent of express advocacy but that do not qualify as “electioneering communications” may be subject to a source ban or other restrictions.

TIPS:

Tip: Consider using a reasonable person definition only as a supplement to the BCRA model and the magic words test, and be sure to include a clause allowing the severability of any clause found unconstitutional. *WRTL II* seems to provide a constitutional imprimatur for a reasonable person test that is drawn narrowly. However, it does so within the confines of BCRA’s electioneering communications provision, which significantly narrows the group of communications subject to the test. Standing alone, reasonable person tests may be vulnerable to vagueness challenges.

within 500 feet of a polling place. *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004) (justifying a limiting construction on the grounds that “Kentucky’s statute is vague and because the State has failed to provide any evidentiary support for regulating both express and issue advocacy”).

Tip: Follow *WRTL II* in drafting a “reasonable person” exception to a ban on corporate or union funding of electioneering communications. There is a significant difference between: (1) regulating an advertisement that a reasonable person could interpret as electioneering, and (2) regulating an advertisement that “susceptible of no reasonable interpretation other than as appeal to vote for or against a specific candidate.” The first approach sweeps in all ads that could arguably be advocacy for or against a candidate, while the latter approach sweeps in only those ads that are indisputably electioneering. The Supreme Court has endorsed only the second approach.

Tip: If you seek to employ a reasonable person test, generally, consider limiting your regulation to advertisements that appear in certain specified media, such as broadcast television or radio. Obviously you do not want to enact a statute that, on its face, regulates a letter (“any communication”) that a person may write to his mother, urging her to vote against the incumbent. You should identify the types of communications that are avoiding regulation in your locality and tailor your legislation accordingly. If the ads occur mainly on television and radio, then you may not be concerned about billboard or newspaper advertising, for example.

Tip: If you seek to employ a reasonable person test, generally, consider adopting a dollar threshold for activities that will be covered by your regulation. A dollar threshold is useful for ensuring that the law does not inhibit *de minimis* electoral communications or small and unsophisticated groups that do not engage in significant amounts of electioneering.

Tip: Provide guidance as to the extent to which the factual context may be considered when implementing a “reasonable person” test. *McConnell* upheld regulation of “electioneering communications,” the definition of which incorporates two contextual elements: timing and audience. Similarly, *Furgatch* held that proximity to the election and the advertisement’s audience could be considered in determining whether an ad could be regulated. Basic background information of the sort necessary to implement the FEC rule should present no problem. But *WRTL II* suggests that any contextual analysis that requires discovery may be constitutionally at risk.

Tip: A reasonable person approach may stand a better chance of surviving a constitutional challenge if there are no criminal penalties for violating regulations that apply to express advocacy. Courts may relax their scrutiny to some extent if a statute imposes only civil penalties.

LEGAL ANALYSIS:

The Ninth Circuit’s *Furgatch* decision and the Supreme Court’s approval of a “reasonable person” test for the “functional equivalent of express advocacy” in *WRTL II* set up a framework for considering another alternative for regulating campaign advertising. *Furgatch* involved a newspaper advertisement criticizing the Carter presidential re-election campaign for allegedly using underhanded tactics, stating: “It is an attempt to

hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT.” 807 F.2d at 858. Noting that a “magic words” definition of “express advocacy” could be easily evaded, the court adopted a test under which a message is deemed to be express advocacy “when read as a whole, and with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *Id.* at 864. *Furgatch* identified three components of its test:

First, even if it is not presented in the clearest, most explicit language, speech is “express” for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed “advocacy” if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated. Speech cannot be “express advocacy”. . . when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 864. Like *WRTL II*, the Ninth Circuit commented that an ad sponsor’s subjective intent was an unacceptable test for the ad’s electioneering content and noted that considerations of context could be “problematic.” *Id.* at 863. But the court recognized that context played an important role in interpreting the communication. *Id.* at 864. *Furgatch* considers the interplay of the overall text of the advertisement with the timing of the ad (one week before the election) and its audience.

Following the decision in *Furgatch*, the FEC codified the Ninth Circuit’s approach in a definition of “express advocacy” under FECA. See 11 CFR § 100.22.¹⁴ Under the

¹⁴ 11 CFR §100.22 states:

Expressly advocating means any communication that -- (a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!” or

- (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because --
- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

regulation, “express advocacy” is defined to include not only those communications that contain “magic words,” but also communications that “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s).” *Id.* The regulation further states that, under its approach, the electoral portion of the communication must be “unmistakable, unambiguous, and suggestive of only one meaning.” *Id.*

The FEC’s regulatory definition of “express advocacy” incorporates a “reasonable person” standard that applies in only a very narrow set of circumstances. If “magic words” are not used, the advertisement is “express advocacy” only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ as to its meaning. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of “magic words.” Despite its narrow reach, this regulation was immediately challenged as an unconstitutional encroachment on free speech, and it was invalidated by both the First and Fourth Circuits, primarily on the ground that it was unconstitutionally vague.¹⁵ See *Virginia Soc’y for Human Life*, 263 F.3d at 392; *Maine Right to Life Comm.*, 98 F.3d at 1-2.

The test for the functional equivalent of express advocacy in *WRTL II* is virtually indistinguishable from the test for express advocacy articulated in *Furgatch* and the FEC rule. The *WRTL II* plurality described its test as being “objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” 127 S. Ct. at 2666. Defending the test against Justice Scalia’s attack on its vagueness, the plurality argued that the “no reasonable interpretation” standard satisfies the “imperative for clarity in this area.” *Id.* at 2669 n.7. It also emphasized that the “magic words” test from *Buckley* was not “the constitutional standard for clarity . . . in the abstract, divorced from specific statutory language” and that as a matter of statutory construction, the magic words standard “does not dictate a constitutional test.” *Id.* But it is not wholly clear how much consideration of context is acceptable after *WRTL II*. The Supreme Court was dismissive of contextual factors that go to the “subjective intent” of the advertisers. The Court declined to consider information such as the advertiser’s website, even though the website was featured in the ad at issue. *Id.* at 2669. The Court warned against considering other activities of the advertiser or affiliated groups that opposed or supported the candidate. *Id.* The Court also was critical of efforts to draw implications about the ad from its timing in relation to the candidate’s likely vote on an issue. *Id.* The Court insisted that such contextual factors “should

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

15 The Eighth Circuit also rejected Iowa’s reasonable person approach to express advocacy in favor of the formalistic magic words test. See *Iowa Right to Life*, 187 F.3d at 969-70 (preliminarily enjoining reasonable person test employed in Iowa reporting requirements). But this case is no longer good law after *McConnell*.

seldom play a significant role in the inquiry,” but it allowed consideration of “basic background information,” 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 legislative scrutiny in the near future.’” *Id.* (citations omitted).

It also is worth noting that the Court developed *WRTL II*’s reasonable person test, with its limited consideration of contextual factors, in the context of an as-applied challenge. The bright-line test for an electioneering communication was satisfied before the Court asked whether the ad was the functional equivalent of express advocacy. It is not clear whether the Supreme Court would extend its reasonable person test for the functional equivalent of express advocacy to ads that did not qualify as electioneering communications, such as ads run more than 60 days before an election. *Cf. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, No. 07-1438, slip op. (4th Cir. May 1, 2008) (focusing on language in *McConnell* that held BCRA’s funding ban applicable only to express advocacy or its “functional equivalent,” but ruling that North Carolina’s statute was unconstitutional because it did not explicitly limit its scope to a specific period of time before an election and because the reasonable person standard could not serve as a test for such equivalence.)

Several state courts have looked favorably upon the approach first developed in *Furgatch*, codified by the FEC, and now invoked in deciding *WRTL II*’s as-applied challenge. Four of them are in the Ninth Circuit: Oregon, Washington, Arizona, and California. The Oregon Court of Appeals used *Furgatch* to uphold a definition of expenditures, which did not require “magic words” in order to trigger disclosure requirements and subject violators to civil (not criminal) penalties. *See State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10-11 (Or. App. 1999), *review denied*, 994 P.2d 132 (Ore. 2000). Under the *Crumpton* test, reporting is required for expenditures:

if the expenditure is for a publication that is in support of or opposition to a candidate under the following criteria: (1) the message, in its context, clearly and unambiguously urges the election or defeat of one or more identifiable candidates for a covered office; (2) the message, as a whole, seeks action rather than simply giving information; and (3) it is clear what action the message advocates.

Id. at 11. The *Crumpton* court endorsed the discussion of context in *Furgatch*, but notably the only element of context explicitly approved by the court was timing—“particularly whether or not [the communication] came in the midst of a contested campaign.” *Id.* The court did not explicitly analyze the “reasonable person” test and explained that it could adopt an approach that was “somewhat less restrictive” than the *Furgatch* test because the Oregon statute involved only reporting requirements (not prohibitions on expenditures) and did not impose criminal penalties for violation of those reporting requirements. *Id.* at 10-11 (adopting the emphasis on context found in *Furgatch* but excluding reference to the “reasonable person”).

Courts in the other three Ninth Circuit states agreed that express advocacy of an elec-

tion outcome did not require magic words (as long as an ad unambiguously urged an electoral outcome) but rejected the appeal to contextual factors external to the language of the advertisement. In *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 4 P.3d 808, 821, 823-24 (Wash. 2000), the second of two advertisements under consideration began with strong criticism of gubernatorial candidate Gary Locke and concluded: “And now he wants to be our governor? Gary Locke: another extreme liberal we can’t afford.” Although the ad avoided use of “magic words,” the Washington Supreme Court unhesitatingly described it as express advocacy, explaining:

With this language the second advertisement is susceptible to no other reasonable interpretation than as an exhortation to vote for or against a candidate. . . . This language in the second ad is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat candidate Gary Locke. . . . Reasonable minds could not differ as to whether the second ad calls for a vote against Locke.

Id. at 823-24; see also *Voters Education Comm. v. Public Disclosure Comm’n*, Nos. 04-2-23351-1, 04-2-03247-8 (Wash. Super. Aug. 12, 2005) (transcript of oral ruling on file with Brennan Center) (holding that under *Washington State Republican Party* and *McConnell*, ad constituted express advocacy because ad suggested that elected official engaged in a “cover-up,” which can be reasonably interpreted only as an exhortation to vote against the official). The Washington Supreme Court, however, explicitly rejected a reference to the timing of an ad as indicative of whether the ad should be considered express advocacy. “Issue advocacy thus does not become express advocacy based on timing.” *Washington State Republican Party*, 4 P.3d at 824. Of course, after *McConnell*, it is clear that governments can use timing—and other factors—to regulate some campaign-related speech that is not express advocacy, particularly, after *WRTL II*, if the regulation involves only disclosure.

The Arizona Court of Appeals adopted the same approach, rejecting the magic words test in strong terms: “[S]uch a narrow construction of the statute leaves room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words, albeit that the message and purpose of the communication may be unequivocal.” *Kromko v. City of Tucson*, 47 P.3d 1137, 1140 (Ariz. App. Div. 2002) (discussing the test in the context of advertising about ballot propositions). But the Court rejected the legitimacy of appealing to “factors surrounding the communication . . . independent of the communication itself.” *Id.* at 1141.

In California, two state appellate courts split on the constitutionality of the *Furgatch* approach. One court accepted the approach adopted in Washington, recognizing that express advocacy may be based on communications that “taken as a whole unambiguously urged” a favorable or negative vote. *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Cal. Ct. App. 2002) (considering ads in the context of a ballot measure campaign). Another court held that the First Amendment required the magic

words test. *Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 551 (Cal. Ct. App. 2002). Even after *WRTL II*, it is clear that *Schroeder* had the better reasoning.

The Wisconsin Supreme Court also observed that *Furgatch* provided “an attractive alternative” to the magic words approach and left open the question whether context (particularly time, place, and audience) could be considered in deciding whether a communication was express advocacy. *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis. 1999). Wisconsin later opted for a BCRA-type approach, which was brought down by a non-severability clause, when another provision in the statute was found unconstitutional.

Alaska provides another example of a contextual approach. The Alaska definition of “electioneering communication” is similar to the BCRA’s in that it applies only to communications made within a time limit (30 days preceding an election), but it also applies to any communication that identifies a candidate “directly or indirectly” and that identifies both an issue of political importance and the candidate’s position on that issue. AS § 15.13.400(5). The Ninth Circuit held that “direct or indirect” identification of a candidate was not vague and was within the *Furgatch* tradition of analysis. *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 783 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 261 (2006). The court also held that the definition was not overbroad as applied, observing that, where a message “refers to several issues concerning abortion, ascribes positions on those issues to the two gubernatorial candidates, and urges the listener to vote,” “[u]nder any reasonable understanding of that message, the listener is being urged to vote for or against these two candidates based on the positions described in the message.” *Id.* at 785.¹⁶

IV. THE FUTURE OF THE “ISSUE ADVOCACY” LOOPHOLE

The distinction between “issue advocacy” and “express advocacy” arose in the context of constitutional challenges to regulations of independent expenditures. Prior to the decision in *McConnell*, the distinction had also begun to infect decisions on an array of other regulatory measures. For example, one group engaged in so-called issue advocacy under the magic words test successfully challenged the applicability to them of North Carolina’s definition of “political committee,” thereby escaping compliance with all campaign finance provisions governing such committees—including administrative, organizational, and reporting requirements. See *Community Alliance for a Responsible*

¹⁶ The Alaska law also exempts from regulation all “issues communications,” which it defines as those that directly or indirectly identify a candidate, address an issue of political importance, and do not support or oppose a candidate for election. AS §§ 15.13.400(6)(C), (12). The Ninth Circuit held that this definition was not overbroad and was consistent with *Buckley*’s definition of “issue advocacy,” but that in any case, *McConnell* had held that the Constitution did not “erect[] a rigid barrier between express advocacy and so-called issue advocacy.” *Alaska Right to Life Comm. v. Miles*, 441 F.3d at 785 (quoting *McConnell*, 124 S. Ct. at 688-89), *cert. denied*, 127 S. Ct. 261 (2006).

Environment v. Leake, No. 5:00-CV-554-BO(3), slip op. at 8, 12-17 (E.D.N.C. Feb. 22, 2001) (unpublished opinion on file with the Brennan Center). A similar challenge to Florida's definition of "political committee" resulted in a narrowing construction, limiting the term's reach to groups whose major purpose was to engage in express advocacy. See *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *2-*4 (M.D. Fla. Sept. 30, 1998) (unpublished opinion), *aff'd sub nom. Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288, 1289 (11th Cir. 2001); see also *Colorado Right to Life Comm. v. Davidson*, 395 F. Supp. 2d 1001, 1019-21 (D. Colo. 2005), *aff'd*, 91 F.3d 1137 (10th Cir. 2007) (same); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) (narrowing definition of "political action committee" to reach only organizations that make contributions or expenditures for express advocacy). These decisions are open to question under *McConnell*.