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THE IMPACT OF *FEC v. WISCONSIN RIGHT TO LIFE, INC.* ON STATE REGULATION OF "ELECTIONEERING COMMUNICATIONS" IN CANDIDATE ELECTIONS, INCLUDING CAMPAIGNS FOR THE BENCH

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The Brennan Center for Justice at NYU School of Law repeatedly has been asked to explain what the U.S. Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), means for *state* regulation of electioneering communications. The discussion that follows is the Center's general response to those queries. The analysis does not represent legal advice and is not tailored to the circumstances of any specific jurisdiction; anyone seeking to revise state campaign finance laws to improve regulation or to accommodate *WRTL II* should consult a lawyer for assistance. Attorneys at the Brennan Center may be reached at 212-998-6730.

I. Background

In the 1990s, there was no constitutional means of regulating the explosion of election-related advertisements aired by individuals and groups not coordinating their activities with federal candidate campaigns. Appellate courts in most jurisdictions had ruled that, unless an advertisement included "express advocacy" (usually interpreted to mean advocacy using "magic words," such as "vote for," "vote against," "support," or "oppose"), the ad was deemed to be "issue advocacy" (advocacy concerning matters of policy rather than elections) protected from regulation.[1] Ads plainly supporting or opposing candidates but avoiding magic words often were paid for by groups prohibited from making expenditures to influence federal campaigns, such as corporations and unions.[2] Because groups conducting issue advocacy also were immune from campaign

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[1] Express advocacy most often involves advocacy for or against a candidate, but it also may include advocacy for or against a ballot measure in those jurisdictions that have initiatives or other ballot measures. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003). As used throughout this memorandum, the term "issue advocacy" refers to advocacy that is genuinely about issues, not about elections of any sort.

[2] The federal government has long barred the use of corporate and union treasury funds for contributions to candidates and for electoral expenditures made independently of candidates in federal elections. Corporations and unions are permitted instead to establish separate segregated funds or political action committees—both of which are subject to contribution limits—to engage in federal electioneering. In

finance reporting requirements, the advertising sponsors often hid behind misleading names, such as "Citizens for Better Medicare" (the pharmaceutical industry) or "the Coalition—Americans Working for Real Change" (business groups opposed to organized labor). *See McConnell v. FEC*, 540 U.S. 93, 197 (2003). These ads became known as "sham issue ads" because they were widely understood to be campaign advertising exploiting a legal fiction that entitled them to be treated otherwise. *Id*. at 185.

To close the sham issue ad loophole, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"—often referred to as "McCain-Feingold"). Under BCRA, any broadcast advertisement that runs within 30 days of a primary or 60 days of a general election, refers to a clearly identified candidate, and targets the candidate's electorate is an "electioneering communication." *See* 2 U.S.C. § 434(f)(3)(A)(i) (BCRA § 201). BCRA subjects the sponsors of electioneering communications to certain disclosure requirements and prohibits corporations and unions from using their general treasury funds to pay for the ads, 2 U.S.C. §§ 441b(b)(2), 441b(c) (BCRA § 203), just as they are prohibited from using those funds to pay for independent expenditures ("express advocacy") and to make candidate contributions. The law allows corporations and unions to sponsor electioneering communications through a segregated fund or political action committee ("PAC"), the device they also may use to pay for independent expenditures and to make contributions to candidates. The Supreme Court upheld the electioneering communications provisions against a facial First Amendment challenge in *McConnell*, 540 U.S. at 189-212.

With the enactment of BCRA and the decision in *McConnell*, sham issue ads were pulled out of the regulatory shadows. In bold language, the *McConnell* Court recognized the government and public interest in more meaningful regulation of campaign advertising and made clear "that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled." 540 U.S. at 105. After BCRA, corporate spending on advertising from general treasury funds fell substantially. Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. ____ (forthcoming April 2008).

In July 2004, when the Senate was in recess but Senator Russ Feingold was up for re-election, Wisconsin Right to Life, a non-profit corporation, began running television ads urging Wisconsin voters to "Contact Senators Feingold and Kohn and tell them to oppose the filibuster [of some federal judicial nominations]." *WRTL II*, 127 S. Ct. at 2660. Wisconsin Right to Life then sued for a ruling that it could pay for its ads with treasury funds even though the ads would qualify as electioneering communications under BCRA if they were aired during the 30 days before the primary. Wisconsin Right to Life raised substantial corporate contributions and had an active PAC, but it argued that BCRA's ban on corporate electioneering communications could not constitutionally be applied to its ads because they were issue advocacy. The U.S. Supreme Court first confirmed that it would consider as-applied challenges to BCRA, *Wisconsin Right to Life*,

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addition, federal law requires that individuals and entities engaged in electoral advocacy report contributions they receive and expenditures they make.

Inc. v. FEC, 546 U.S. 410 (2006) ("*WRTL I*"), and then ruled that BCRA's funding ban could not constitutionally be applied to the ads in question because they were not the "functional equivalent of express advocacy," *WRTL II*, 127 S. Ct. at 2667.

II. Question Presented

What is the significance of *WRTL II* for state regulation of political advertising, including state analogues to BCRA's provisions concerning "electioneering communications"?

III. Short Answer

Technically, *WRTL II* applies only to the particular ads reviewed in that case, but its holding is widely recognized to have a broader impact. Indeed, the Federal Election Commission ("FEC") recently approved a new rule carving out an exemption from BCRA's restriction on corporate and union electioneering communications, based on the *WRTL II* decision. *See* 11 C.F.R. § 114.15. States that ban corporate and union electioneering communications during the pre-election period should exempt communications that are not the "functional equivalent of express advocacy." The new FEC rule, discussed below, provides helpful guidelines for implementing this standard.

WRTL II did not consider, let alone invalidate, the application of disclosure requirements to electioneering communications, and the FEC rule did not change those requirements.[3] A recent decision by a three-judge district court also confirmed the continuing validity of disclosure requirements for all electioneering communications. *Citizens United v. FEC*, No. 07-0220, 2008 WL 134226 (D.D.C. Jan. 15, 2008) (three-judge court) (per curiam), *appeal filed*, No. 07-953 (U.S. Jan. 22, 2008).[4] The Supreme Court may well agree to review *Citizens United*, and if it does so, the pending review will introduce some uncertainty about the durability of the panel's decision. Nevertheless, the *McConnell* Court decided 8-1 that BCRA's disclosure requirements were facially constitutional, so a reversal in *Citizens United* would require at least two Justices to limit a ruling they made only five years ago.[5]

Since 2002, at least 14 states enacted laws adapting the federal definition of electioneering communications to their own regulatory regime. Only five of those states

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[3] BCRA requires all individuals and entities spending more than $10,000 on electioneering communications to file reports naming every funder, donor, or shareholder that contributes $1,000 or more "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date." In addition, once the threshold of $10,000 is reached, each expenditure of $200 or more must be disclosed within 24 hours. Contracts to make such expenditures also must be disclosed. 2 U.S.C. § 434(f)(2), (5) (BCRA § 201).

[4] The Supreme Court is expected to consider whether to accept the appeal at its February 15, 2008, conference.

[5] The Court upheld the corporate funding ban 5-4, with Justice O'Connor joining the majority. She was no longer on the Court when it decided *WRTL II*.

bar corporations from making electioneering communications, so the direct impact of *WRTL II* on state regulatory regimes may not be that great. The longer-term effect of the decision and the likely drift of the Roberts Court are more difficult to predict.

IV. Analysis

By a vote of 5-4, the *WRTL II* Court held that BCRA's prohibition of corporate electioneering communications could not be applied to the ads at issue. The Court divided three ways. Three Justices argued that *McConnell* should be overturned, that BCRA's corporate ban on electioneering communications 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 & Thomas, JJ., concurring in part and concurring in judgment). The four dissenters argued that BCRA remained constitutional and that the ads were basically indistinguishable from the kind of advertising that the *McConnell* Court had explicitly held subject to the corporate spending prohibition. *See* 127 S. Ct. at 2687 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). The opinion of the Court, written by Chief Justice Roberts and joined only by Justice Alito,[6] held that BCRA's electioneering communications provision could not constitutionally be applied to bar 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.

The critical issues for analysis, particularly in reference to state and local laws, after *WRTL II* are: (1) the viability of restrictions on the corporate and union funding of electoral advertising that is not express advocacy, and (2) the continued vitality of laws requiring disclosure of these advertisements. We discuss these issues below.

A. Funding Restrictions

On its face, *WRTL II* holds only that BCRA's corporate funding ban may not be applied to bar the Wisconsin Right to Life ads at issue in the case. But the decision effectively held that corporations and unions may not constitutionally be prohibited from using treasury funds to pay for advertisements simply because they meet BCRA's definition of electioneering communications. *Id.* at 2667. The ads must do more for the funding prohibition to apply. The Court's ruling limited BCRA's funding restrictions to ads that were express advocacy or its "functional equivalent."

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.[7] The Court's application of this test

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[6] 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.

[7] This "no reasonable interpretation" test is very close to the back-up definition for electioneering communications in BCRA, which would have gone into effect had *McConnell* held the time-delimited test unconstitutional. *See WRTL II*, 127 S. Ct. at 2703-04 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). In addition, the new test is essentially the same as the Ninth Circuit's test for express

establishes a framework for determining whether an ad is the "functional equivalent of express advocacy." 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.[8] The plurality described its test as being "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *WRTL II*, 127 S. Ct. 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 would be chilling because it "'puts the speaker … wholly at the mercy of the varied understanding of his hearers.'" *Id.* at 2666 (citing *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam)).

In the only case yet to apply *WRTL II* to a challenged communication, a three-judge panel reviewed a claim that the film "Hillary: The Movie" should not be subject to BCRA's prohibition on the use of corporate treasury funds to pay for electioneering communications. *Citizens United*, No. 07-0220, 2008 WL 134226, at *4. The court rejected the plaintiff's claim that "any speech that does not expressly say how a viewer should vote" is *not* the functional equivalent of express advocacy. *Id.* at *3. Instead, the court applied *WRTL II* with reference to the new FEC rule, finding that the movie "does not focus on legislative issues," "references the election and Senator Clinton's candidacy, and . . . takes a position on her character, qualifications, and fitness for office," and then concluded that the movie was the functional equivalent of express advocacy. *Id.* (citing *WRTL II* and 11 C.F.R. § 114.15(b)). The *Citizens United* decision confirms that the new

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advocacy in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), upon which BCRA's back-up definition was based. Chief Justice Roberts does not address the similarities. Both *McConnell*, 540 U.S. at 105, and *WRTL II* thus throw into question the decision in *The Governor Gray Davis Comm. v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (Cal. Ct. App. 2002) (relying on several pre-*McConnell* federal appellate court decisions from other circuits to impose a "magic words" test for express advocacy)

[8] 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.

test is broader than the "magic words" test and will require that some electioneering that does not include magic words be paid for through a PAC.

B. Disclosure Requirements

In *WRTL II*, the plaintiff did not challenge the definition of electioneering communications or the disclosure requirements they trigger, and the Court reached neither of those issues. Thus, nothing in *WRTL II* undermines *McConnell's* clear holding that BCRA's reporting requirements are constitutional. *See Citizens United*, 2008 WL 134226, *4 (concluding that *WRTL II* neither narrowed the definition of "electioneering communications" nor altered *McConnell*'s broad approval of electioneering communications disclosure).

The *McConnell* Court expressly upheld BCRA's electioneering communications reporting provisions by a vote of 8-1 because "they do not prevent anyone from speaking." 540 U.S. at 201 (*quoting McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)). Like the Court in *Buckley*, 424 U.S. 1, the *McConnell* Court concluded that government interests were sufficiently strong to support disclosure of electioneering communications. Those interests, *McConnell* held—"providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." 540 U.S. at 196. The Court commented:

> Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). . . . Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. . . . Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell, 540 U.S. at 196-97 (*quoting McConnell*, 251 F. Supp. 2d at 237).

Justice Kennedy, joined by Justice Scalia and then-Chief Justice Rehnquist, concurred in this portion of the *McConnell* opinion, writing that he "agreed with the Court's judgment upholding the disclosure provisions contained in § 201 of Title II, with one exception."[9] *Id.* at 321. Justice Kennedy stated that the disclosure requirement "does

[9] The one exception is the requirement in § 201 of BCRA for "advance disclosure" of executory contracts covering airtime for electioneering communications to be run in the future. *See McConnell*, 540 U.S. at 321.

substantially relate" to the governmental interest in providing the electorate with information, which "assures its constitutionality." *Id.* Importantly, there is no discussion in *WRTL II's* plurality opinion or even in Justice Scalia's concurrence, which was joined by Justice Kennedy, that undermines their support for disclosure in *McConnell*.

Undoubtedly, *WRTL II* used expansive language in striking down the ban on the use of corporate and union treasury funds for electioneering communications—and requiring that only ads that used "express advocacy" or its "functional equivalent" could be subject to the ban. Its analysis cannot be pushed further, however, to support an argument that the constitutionality of the disclosure requirements depends on the use of "express advocacy" or its "functional equivalent." Not only was this disclosure requirement for electioneering communications upheld in *McConnell*, and neither challenged nor addressed in *WRTL II*, but also the Supreme Court and lower federal courts have spoken approvingly of disclosure of other kinds of political speech.

For instance, in cases involving ballot measures, the Supreme Court has noted the "prophylactic effect of requiring that the source of communication be disclosed." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected."). Even as it has invalidated limits on contributions to or expenditures by groups financing such measures, the Court has recognized the importance of the state's "informational interest." *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("[T]here is no risk that the … voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known.").

Similarly, in the context of lobbying, the Court has permitted mandatory disclosure of "direct communications with members of Congress on pending or proposed federal legislation" and efforts related to "an artificially stimulated letter campaign" to influence legislators. *United States v. Harriss*, 347 U.S. 612 (1954) (considering the Federal Regulation of Lobbying Act and upholding a narrowed application of the Act). The Court held that there was a state interest in allowing legislators to evaluate lobbying pressures by providing at least some "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Id.* at 625.

This broad First Amendment support for disclosure reinforces the constitutionality of disclosure requirements imposed on those who pay for electioneering communications, even when those communications do not include express advocacy but are more generally treated as "grassroots lobbying" or "issue advocacy." Certainly in the days just before an election, there is a strong public interest in making public who is paying for broadcast advertisements that name a candidate and seek to influence the public on issues relating to the candidate—even if they do not expressly advocate the candidate's election or defeat. The public interest is arguably heightened when the entity paying for the advertisement is otherwise forbidden from funding campaign-related activity (such as corporations).

The holding in the recent *Citizens United* case re-affirms this analysis. The plaintiff there challenged the application of BCRA's reporting and disclaimer requirements to a set of broadcast advertisements planned to promote "Hillary: The Movie" during the upcoming election season. The court held that the advertisements were not subject to the prohibition on corporate spending for express advocacy and its functional equivalent because they "did not advocate Senator Clinton's election or defeat; instead they proposed a commercial transaction—buy the DVD of *The Movie*." *Citizens United*, 2008 WL 134226, *4 (citations omitted). But the court rejected the plaintiff's claim that *WRTL II* effectively changed the definition of electioneering communications so that only express advocacy or its functional equivalent would be subject to BCRA's disclosure requirements. *Id.* The court averred that "the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today," noting that, in the past, the Supreme Court had written approvingly of broad disclosure requirements. *Id.*

C. Practical Considerations for Electioneering Regulation After *WRTL II*

We have noted that reporting requirements triggered by a definition of electioneering communications tracking BCRA are not affected by *WRTL II*, and there are important reasons for continued disclosure of these communications. The 14 states that have mandated such disclosure therefore should be in no hurry to amend those provisions.[10] Moreover, states that do not require disclosure of BCRA-type electioneering communications may wish to consider expanding their reporting requirements.

The five states that followed BCRA in banning corporate or union funding of electioneering communications may, however, wish to modify those provisions.[11] The new FEC rule allows corporate and union advertisers to use treasury funds for an electioneering communication, unless the "communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a). It then establishes a "safe harbor" from the funding prohibition for any corporate or union electioneering communication that:

> (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
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> (2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

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[10] *See* Alaska Stat. § 15.13.400.5; Ariz. Rev. Stat. Ann. § 16-901.01(A)(2); Cal. Gov't Code § 85310; Const. Colo. art. XXVIII § 2(7); Conn. Gen. Stat. Ann. § 9-601b; Fla. Stat. Ann. § 106.11(18); Haw. Rev. Stat. § 11-207.6; Idaho Code § 67-6630; 10 Ill. Comp. Stat. § 5/9; Me. Rev. Stat. Ann. Tit. 21-A, § 1019-B; N.C. Gen. Stat. § 163-278; Ohio Rev. Code Ann. § 3517.1011; Okla. Stat. Tit. 74, Ch. 62, § 257:1-1-1; Wash. Rev. Code § 42.17; W. Va. Code § 3-8-1.

[11] *See* Alaska Stat. § 13.074(f); Colo. art XXVIII §6(2); Conn. Gen. Stat. Ann. § 9-613; N.C. Gen Stat. § 163-278.82; Ohio Rev. Code Ann. § 3517.1011(H); Okla. Stat. Tit. 74, Ch. 62, § 257:10-1-2.

> (3) Either:
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> > (i) Focuses on a legislative, executive or judicial matter or issue; and
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> > > (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
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> > (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.

11 C.F.R. § 114.15(b) 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 susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate, by considering whether the ad has "indicia of express advocacy" and is susceptible to interpretation other than as such an appeal. *Id.* at § 114.15(c). The FEC explains:

> (1) A communication includes indicia of express advocacy if it:
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> > (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.
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> (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:
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> > (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.

Id. The FEC has also published a few examples of communications under 11 CFR 114.15 on its Web page. The examples are online at: http://www.fec.gov/pages/bcra/rulemakings/ECs_WRTL_Exemption_Examples.shtml

States may want to consider crafting rules that create a presumption that communications including these "indicia of express advocacy" are the functional equivalent of express advocacy and subject to a corporate funding ban on "electioneering communications." Such a regulatory regime could allow the sponsors of the communications to rebut the presumption with a showing of the elements in section 114.15(c)(2). In addition, states may consider a provision allowing the communication's sponsor to rebut the presumption with a signed statement that the communication does not support or oppose a candidate; such a statement could be submitted with the required disclosure forms.

D. The Relation of *WRTL II* to Judicial Elections

Does *WRTL II* apply to advertising in judicial elections and, if so, how? If a state's laws mimic the electioneering communications provisions in BCRA, does the exemption from the corporate and union funding ban apply to ads aired in the context of a state judicial election? The short answer is "no."

BCRA's funding restrictions (or state analogues) apply only if an ad in a judicial election is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667. The *WRTL II* plurality cited factors that showed the ads at issue in that case were not express advocacy or its functional equivalent. In contrast, the same factors also show why most—if not all—judicial campaign ads are properly considered express advocacy that could constitutionally be subject to a ban on corporate and union treasury spending.

First, two considerations persuaded the Court that the *WRTL II* ads were "consistent with that of a genuine issue ad": (a) the ads "focus[ed] on" and "[took] a position" on a "legislative issue," and (b) the ads "exhort[ed] the public to adopt that position" and "urge[d] the public to contact public officials with respect to the matter." Each of these factors is demonstrably inapplicable in the context of a judicial campaign.

> *Focus on legislative issue*: Judicial elections give a voice to voters only in the *selection* of judges. But judges, unlike legislators (or members of the executive branch), are not—and should not be—held accountable for implementing the voters' views on legal or policy issues. Judges are accountable for the delivery of fair and impartial justice, regardless of public opinion — a principle so

fundamental that the judiciary is known as the counter-majoritarian branch.[12] Thus, in a judicial campaign, legislative (or executive) policy issues are irrelevant as a matter of separation of powers and the courts' designated role in the constitutional scheme.

Exhorting the public to adopt views and contact candidates: While the First Amendment right to petition government officials for redress of grievances extends to all branches of the government, and includes the right to sue in the courts, the right is not exercised with respect to the judiciary in the same way as it is with respect to the legislative and executive branches. For example, the prohibition on *ex parte* contact with a judge by parties to a case (and those connected to them) not only helps judges decide cases based solely on the evidence and arguments presented to the court, but also preserves and promotes public confidence in the courts. In other words, while it may be perfectly appropriate to "exhort constituents to contact Senators Feingold and Kohl to advance [a] position," 127 S. Ct. at 2667 n.6, it is wholly inconsistent with the judicial function to exhort anyone to contact judges to advance any position, unless the "contact" is made through formal adversarial procedures.

Second, while the factors noted above are *absent* from judicial campaign ads, the ads typically *highlight* the precise content the Court found missing in *WRTL II*. The Court determined that the *WRTL* ads "lack[ed] indicia of express advocacy" because they did not "mention an election, candidacy, political party or challenger" or "take a position on a candidate's character, qualifications, or fitness for office." In contrast, judicial campaign ads traditionally have "focused on the candidate's qualifications, experience or temperament."[13] When judicial campaign ads stray from that focus, as they increasingly do, they typically condemn (or endorse) a judicial candidate's position on an issue—or a position attributed to the candidate—qualifying them as express advocacy under the terms of *WRTL II*.[14]

In sum, states with statutory analogues to BCRA's ban on corporate and union electioneering communications should continue to apply the prohibition in the context of judicial elections. Without exception, ads that have actually aired in judicial campaigns have commented on candidates in ways that are inconsistent with issue advocacy. Moreover, any ad that urges judicial candidates to take action on an issue or that exhorts voters to contact the candidate is so plainly inconsistent with the judicial function as to be "susceptible of no reasonable interpretation other than as an appeal to vote for or against

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[12] "Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represen[t] the Law.'" *Republican Party of Minnesota v. White*, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)).

[13] *See, e.g.*, James Sample et al, *The New Politics of Judicial Elections 2006*, at 9 (2007), *available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006.*

[14] *See supra* note 8.

a specific candidate." The compelling interest in preserving and promoting the actuality and appearance of impartial courts thus supports a *per se* rule that there simply are no genuine issue ads in the context of a campaign for judicial office.