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 three critical Supreme Court cases: McConnell v. FEC,\textsuperscript{1} which opened the door to more meaningful regulation; FEC v. Wisconsin Right to Life, Inc. ("WRTL II"),\textsuperscript{2} decided just four years later, which recognized an exception to McConnell’s holding; and Citizens United v. FEC,\textsuperscript{3} which eliminated longstanding bans on corporate and union political advertising.

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. After Citizens United, the government is prohibited from limiting independent expenditures by corporations or unions, which includes any express advocacy containing the above listed magic words. However, Citizens United also made clear that “magic words” were not required to trigger disclosure and disclaimer requirements.

Even before Citizens United removed the source restrictions, it was child’s play to create campaign ads without magic words in order to avoid regulation. Earlier rulings had opened a giant “sham issue ad” loophole in federal campaign finance law. Although FECA 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. 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.”\textsuperscript{4}

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

\textsuperscript{1} 540 U.S. 93 (2003).
\textsuperscript{2} 551 U.S. 449 (2007).
\textsuperscript{3} 130 S. Ct. 876 (2010).
\textsuperscript{4} Id. at 205.
the ads. *McConnell* upheld the source restriction and reporting requirements for electioneering communications, while preserving federal regulation of express advocacy.

These provisions of BCRA were challenged again in *Citizens United*, which overturned *McConnell* in part as well as struck down the source restrictions for independent expenditures in *Austin*. The Court in *Citizens United* held that corporations and unions could not be restricted from spending general treasury funds on either express advocacy or electioneering communications. The majority in *Citizens United* emphasized that it is speech, not the speaker, that is protected by the First Amendment and rejected prior case law that had subjected corporations and unions to tighter regulations than other groups.

Prior to *Citizens United*, the Supreme Court had already begun backing away from 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 applied only to the particular ads reviewed in *WRTL II*, the ruling had a broader impact. The Federal Election Commission (“FEC”) approved a rule carving out an exemption to BCRA’s restriction on corporate electioneering communications and setting out indicia of the “functional equivalent” of express advocacy.

*Citizens United* transformed the *WRTL II* and the FEC exemption to the corporate electioneering communications restrictions into the rule and completely eliminated the source restrictions on the use of corporate treasury funds on independent expenditures, including electioneering communications. *Citizens United* struck down § 203 of BCRA, meaning that corporations and unions are authorized to engage in unlimited independent expenditures, even in reference to clearly identified candidates in the periods directly before a primary or general election. Because corporations are now permitted to engage in direct advocacy of a candidate through independent expenditures, the functional equivalence test put forward in *WRTL II* is also overruled by *Citizens United* for disclaimer and disclosure requirements.

This chapter discusses the remaining regulations on electioneering communications and campaign advertising in light of *Citizens United*. 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

BCRA coined a new term—“electioneering communications”—for a category of campaign advertising that would be subject to regulation. Following *Citizens United*, the statutory definition of electioneering communications remains unchanged. But because BCRA § 203 which was codified as 2 U.S.C. § 441b is no longer in effect, the source restrictions on electioneering communications are no longer in effect. The definition still has consequences for purposes of disclaimer and disclosure requirements, which were upheld in *Citizens United*.
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. 5

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.”6

In other words, there are four key elements of BCRA’s definition:

• the media that are regulated (broadcast, cable, and satellite communications); 7
• 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.

BCRA contained two sets of provisions pertaining to electioneering communications, only one of which is still in effect. First, it prohibited corporations and unions from using general treasury funds to pay for communications that qualified as electioneering communications. This prohibition was invalidated in Citizens

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6 Id. § 434(f)(3)(C).

7 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.
Second, expenditures on electioneering communications of at least $10,000 in a calendar year would trigger a range of important reporting and disclaimer requirements. These disclosure requirements are still in place.

_Citizens United_ ended BCRA’s political advertisement funding restrictions for corporations and unions. In _Citizens United_, the Supreme Court overturned BCRA’s ban on spending union or corporate treasury funds on electioneering communications, as well as FECA’s ban on making independent expenditures with such funds. 130 S. Ct. at 897, 904. The decision did not invalidate the statutory definition of an “electioneering communication.” However, corporations and unions are now permitted to use general treasury funds to make independent expenditures, including both electioneering communications and express advocacy. _Citizens United_ also clarified that disclosure requirements for such communications remain constitutional, whatever their source.

At the time of this writing, the FEC has yet to promulgate post-_Citizens United_ rules. The FEC issued rule 11 C.F.R. § 114.15(c) following _WRTL II_ to address how it would evaluate the functional equivalent of express advocacy, but _Citizens United_ has largely rendered this rule dead-letter. The _Citizens United_ Court found that the _Hillary_ film at issue qualified as the functional equivalent of express advocacy but nonetheless could not be subjected to § 441b’s source restrictions without chilling speech in violation of the First Amendment. 130 S. Ct. at 890, 894, but could be subject BCRA’s disclaimer and disclosure requirements.

**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.

**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:** 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 both _McConnell_ and _Citizens United_ upheld BCRA’s disclosure requirements by a vote of eight to one. Moreover, the Court has upheld

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Disclosure requirements pertaining to the financing of ballot measures, which need not involve “magic words” 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 1947, with the adoption of Taft-Hartley which restricted expenditures by unions and corporations in federal elections. Taft-Hartley’s ban was recodified into FECA, but was not challenged in Buckley. In addition, one section of FECA imposed a $1,000 limit on expenditures by individuals “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,’

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9 See Doe v. Reed, 130 S. Cr. 2819-20 (upholding disclosure requirements for the financing of ballot measures to “preserv[e] the integrity of the electoral process” and to “provid[e] information to the electorate”).

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.\(^\text{11}\)

The Supreme Court made clear in *McConnell* that Buckley’s narrow 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. Congress cured FECA’s vagueness problem by setting forth a new four-part “bright-line” test for electioneering communications in BCRA, which the Court upheld in *McConnell*. 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.

*Citizens United*, however, overturned the portion of *McConnell* that upheld BCRA § 203’s extension of § 441b’s restrictions on corporate independent expenditures. In other words, because the *Citizens United* Court held that the Government may not limit independent expenditures that are funded by corporate or union treasury funds, the distinction between express advocacy and so-called issue advocacy is no longer constitutionally significant from the point of view of the funding sources of the ads. It does still have significance from the point of view of disclosure. A pure issue ad may not be subject to disclosure while independent expenditures and electioneering communications are.

Before *McConnell* and *Citizens United*, 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*, 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).

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. By a vote of 5-to-4, a divided 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. Three Justices argued that *McConnell* should be overturned, that BCRA’s corporate ban on electioneering communication was unconstitutional, and that the

\(^{11}\) 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.
other long-time bans on corporate campaign spending were unconstitutional. See 551 U.S. at 482-504. (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment). In an opinion written by Chief Justice Roberts and joined only by Justice Alito, 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 Court explained that the ads lacked any of the “indicia of express advocacy,” which include (1) “mention[ing] an election, candidacy, political party, or challenger,” and (2) “tak[ing] a position on a candidate’s character, qualifications, or fitness for office.” Id. at 470.

The WRTL II Court refused to broaden its test for express advocacy beyond these clearly defined indicia, and reacted skeptically to claims that “anyone who heard [WRTL’s] ads would know that WRTL’s message was to vote against” a particular candidate. Id at 470 n.6. Specifically, the majority declined to consider contextual evidence that WRTL had actively opposed the candidate in question during the same election cycle, despite its potential bearing on WRTL’s subjective intent in running the advertisement. Id. at 472. The Court also dismissed expert testimony that advertisements which avoided “magic words” like “elect” and “defeat,” in favor of more subtly advocacy, were most effective. Id. at 471. According to the majority, this “heads I win, tails you lose approach” would let Congress regulate the least express advocacy just as much as the most express advocacy, and transform every “genuine issue ad” prior to an election to a “very effective electioneering ad.” Id. at 471-72.

WRTL II limited BCRA’s funding restrictions to ads that were express advocacy or “the functional equivalent” of express advocacy. After Citizens United, both express advocacy and its functional equivalent are protected areas of speech no longer subject to source restrictions. Furthermore, Citizens United rejected the WRTL II functional equivalence test for disclosure laws, thus rendering WRTL II largely a dead letter.

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

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12 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).

13 The Court cited a study finding that 85 percent of voters could not name any candidates for the House of Representatives from their own districts. WRTL II, 551 U.S. at 470 n.6.

14 The Court declared that an organization’s subjective intent in running an advertisement is entirely “irrelevant” to whether the advertisement constitutes express advocacy. WRTL II, 551 U.S. at 472.

15 One place where WRTL II’s approach lives on is in the FEC’s rulemakings. In 2010, the FEC adopted a new federal coordination rule which specifically covers communications which are either express advocacy, electioneering communications or the functional equivalent of express advocacy. According to this new rule, “[t]he new content standard applies to any public communication that is the ‘functional equivalent of express advocacy.’” New 11 CFR 109.21(c)(5) specifies that a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. The new content standard applies without regard to the timing of the communication or the targeted audience.” FEC, “Coordinated Communications Final Rule,” Notice 2010-17 (Sept. 15, 2010) (effective Dec. 1, 2010).
campaign ads that do not use magic words. *Citizens United* affirmed this holding as applied to disclosure and disclaimer regulations. However, the government is prohibited from limiting independent expenditures just because of the identity of the speaker, including any express advocacy containing magic words.

**Tips**

**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. 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. Several circuits explicitly adopted the magic words test, while others invalidated state laws seeking to regulate speech other than express advocacy, but without ruling that express advocacy requires magic words. Only the Ninth Circuit explicitly rejected the magic words test for express advocacy.

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). *Citizens United*, by eliminating the prohibition on the use of corporate or union general treasury funds in campaign advertising, permits even corporate and union express advocacy.

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16 *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).

17 *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).

18 *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).*

19 *See FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).*
**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.

**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:** Provide guidance as to what factors courts consider when evaluating advertisements under a “reasonable person” standard. Although “magic words” like “vote for” and “defeat” are still constitutionally sufficient to trigger disclaimer and disclosure regulations, courts have recently been willing to scrutinize the content of advertisements more deeply. Citizens United relied on a variety of factors within an advertisement to hold that it was an electioneering communication, including its critical commentary about the candidate’s character and fitness for office, its selectively chosen historical footage, and its repeated references to future policies and to the political office in question.

**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 FEC’s new definition of “express advocacy” and the Supreme Court’s approval of a “reasonable person” test for the “functional equivalent of express advocacy” in WRTL II set up an alternative framework for regulating campaign advertising. Noting that a “magic words” definition of “express advocacy” could be easily evaded, the WRTL II Court adopted a test under which an advertisement does not qualify as express advocacy “unless [the] ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Id. at 474 n.7.
Following an influential opinion in the Ninth Circuit, the FEC promulgated a new definition of “express advocacy” under FECA. See 11 CFR § 100.22. Under the 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 candidate(s).” Id. 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.

The test for the functional equivalent of express advocacy in WRTL II is virtually indistinguishable from the test for express advocacy articulated in 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.” 551 U.S. at 469. 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 474 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.” Id. The magic words standard is merely the product of statutory construction and “does not dictate a constitutional test.” Id.

The Citizens United decision shed light on what factors support a finding of express advocacy. Under consideration was the polemical film Hillary, or as the Court described, an “extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency.” 130 S. Ct. at 890. The Court rejected claims that Hillary was just a “documentary film that examines certain historical events,” and held that Hillary was the “functional equivalent of express advocacy” as defined in McConnell and WRTL II. Id. Because Hillary was the functional equivalent of express advocacy, the Court concluded, it triggered both the now-invalidated ban on corporate independent expenditures and BCRA’s still-effective disclaimer and disclosure provisions. The Court cited specific factors present in the film to support its finding of express advocacy: (1) “critical” interviews and voiceover; (2) the particular selection of “historical footage”; (3) a focus on past “alleged wrongdoing” and predicted future “policies”; (4) references to the political office in question, to past holders of that office, and to the vote; and (5) suggestions that much is “at stake,” even without explicit reference to a particular vote. Id. Based on these factors, the Court concluded that there was “no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton,” thus employing the standard of WRTL II to find that Hillary was the functional equivalent of express advocacy. Id. The willingness of the Court to look for express advocacy not only beyond phrases like “vote for” and “defeat,” but even in the selection of what was indisputably “historical footage,” represents a remarkable broadening of the narrow “magic words” standard announced in Buckley and long embraced by circuit courts.

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20 See FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

21 See Virginia Soc’y for Human Life, 263 F.3d at 392; Maine Right to Life Comm., 98 F.3d at 1-2.

22 See also WRTL II, 551 U.S. at 470 (the “indicia of express advocacy” include “tak[ing] a position on a candidate’s character . . . or fitness for office”) (emphasis added).

23 One lingering and potentially important question is whether two communications, neither of which is express advocacy on its own, may be treated as single piece of express advocacy together. For example, if one mailing urges recipients to vote for
Because *Citizens United* is less than a year old presently, few court have had a chance to apply its new standards. Applying the new *Citizens United* standard, a district court upheld Maine’s disclaimer and disclosure requirements. The Maine District Court explained that, “*Citizens United* rejected the idea that ‘disclosure requirements must be limited to speech that is the functional equivalent of express advocacy’ [and] that even if ads ‘only pertain to a commercial transaction’ and do not engage directly in political speech, government can require disclosure of ‘who is speaking about a candidate.’” *National Organization for Marriage v. McKee*, --- F. Supp. 2d ---, 2010 WL 3270092, *9* (D. Me. Aug. 19, 2010).

III. 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 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 by 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).

Some recent decisions have continued to narrow state definitions of “political committee” to accord with a more rigid reading of *Buckley*. In *North Carolina Right to Life, Inc. v. Leake* (“NCRTL III”), the Fourth Circuit struck down a provision that included as a political committee any organization that has “a major purpose” to support a particular candidate. 525 F.3d 274, 286 (4th Cir. 2008) (emphasis added). The Court held that, under *Buckley*, to regulate an organization as a political committee, “the major purpose” of the organization must be “supporting or opposing a candidate.” *Id.* at 288. To include every organization with “a major purpose” of influencing elections would be both unconstitutionally overbroad, because it would sweep in too much constitutionally protected political speech, and unconstitutionally vague, because the statute provided “absolutely no direction” as to what constituted “a major purpose.” *Id.* at 289. The Court suggested as a constitutionally sound alternative that the state may pass new disclosure requirements “based on the communication, not the organization,” which would “only impos[e] regulatory burdens on communications that [we]re unambiguously campaign related.” *Id.* at 290 (punctuation removed). The Court opined that

whomever takes the proper positions on certain issues, and another mailing lists which candidates “rate best” on the same issues, may these be treated as a single piece of express advocacy? The D.C. District Court recently expressed skepticism about integrating two documents as one piece of advocacy, but declined to decide the issue. *Akins v. FEC*, No. 92-1864, 2010 WL 3563109, *10* (D.D.C. Sept. 10, 2010).
these communication-based disclosure requirements may produce the “same benefits of transparency and accountability” as did organization-based regulations. *Id.* 24

The Ninth Circuit, in contrast, has explicitly rejected this narrow construction of “political committee” from *NCRTL III*. *Human Life of Washington Inc. v. Brumsickle*, No. 09-35128, 2010 WL 3987316, at *15-16 (9th Cir. Oct. 12, 2010). While groups with “the major purpose of political advocacy” are obviously “sufficient” to qualify as political committees, the Court explained, this does not mean an “entity must have that major purpose to be deemed constitutionally a political committee.” *Id.* at *16. The operative part of the major purpose test is “the word ‘major,’ not the article before it.” *Id.* at *17 (quoting *NCRTL III*, 525 F.3d at 328 (Michael, J., dissenting)). Any group with “a major purpose” of political advocacy that is not “engaged purely in issue discussion” may be regulated as a political committee, but only if the “burdens imposed by the disclosure requirements are substantially related to the government’s important informational interest.” *Id.* at *16.

The *Human Life* decision runs directly contrary to *NCRTL III*’s holding that the major purpose of a political committee must be to influence elections. The Ninth Circuit declared that the result of *NCRTL III* was unreasonable, based on the “fundamental organizational reality that most organizations do not have just one major purpose.” *Id.* at *16-*17 (quoting *NCRTL III*, 525 F.3d at 330 (Michael, J., dissenting)) (punctuation removed). An organization could easily circumvent regulation as a political committee, under the Fourth Circuit’s definition, by “merging with [an] affiliated organization, and thus diluting the newly created organization’s relative share of advocacy activity.” *Id.* at *18. For these reasons, the Court upheld a broadly worded state law requiring disclosure from any organization “one of whose primary purposes [is] to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.” *Id.* at *3, *28.

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24 The Tenth Circuit has followed the same approach. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (“Regulation as a political committee is only proper if an organization primarily engages in election-related speech because an alternate rule would threaten the regulation of too much ordinary political speech to be constitutional”) (quoting *NCRTL III*, 525 F.3d at 286) (punctuation removed).