October 9, 2008

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2008-15 (NRLC)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2008-15, an advisory opinion request submitted on behalf of the National Right to Life Committee, Inc. ("NRLC"), requesting the Commission's "guidance as to whether it is permitted to broadcast two radio advertisements that mention a federal candidate for office." *See* AOR 2008-15 at 1. NRLC states that it:

> [W]ould be prohibited from broadcasting either of these ads (1) if they were deemed to be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ["*WRTL*"], or (2) if they were deemed to be a prohibited corporate independent expenditure because they were deemed to contain "express advocacy," as defined in 11 C.F.R. § 100.22(b).

AOR at 3.

Both ads overtly question the veracity of Senator Barack Obama, the Democratic presidential nominee, and thereby attack his character and fitness for office. For that reason, the Commission should advise NRLC that its proposed radio ads are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *WRTL*, 127 S. Ct. at 2667, and contain "express advocacy" as defined in 11 C.F.R. § 100.22(b). Consequently, the Commission should further advise NRCL that it is prohibited from using general corporate treasury funds to broadcast the ads – but it may, of course, fund the broadcast of the ads using federally permissible funds through its National Right to Life Political Action Committee ("NRLPAC"). As the AOR notes, NRLC began using its registered political committee,

NRLPAC, to broadcast at least one of the ads this week. *See* AOR at 1-2 ("[T]he second ad will be broadcast beginning the week of September 29th by the National Right to Life Political Action Committee ('NRLPAC'), which is NRLC's registered political committee.") (footnote omitted).

Discussion

As a legal and practical matter, the definition of "expressly advocating" in subpart (b) of section 100.22 is indistinguishable from the *WRTL* test for the "functional equivalent of express advocacy," which the Court described as whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667. The U.S. District Court for the Eastern District of Virginia, at the Commission's urging, just two weeks ago agreed that the two standards are indistinguishable, explaining:

> [T]he test in section 100.22(b) is the same analysis as was enumerated in WRTL. WRTL required that the ad be deemed express advocacy "only if the ad is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Section 100.22(b) states that express advocacy can be found if "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." Because section 100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of WRTL, ... the test enumerated in section 100.22(b) to determine express advocacy is constitutional.

The Real Truth About Obama v. FEC, No. 3:08-CV-483, slip op. at 21 (D. Va. Sept. 24, 2008) ("*RTAO*").

The Commission correctly and successfully urged this conclusion on the court:

> Section 100.22(b) is also consistent with the Supreme Court's holding in *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"). In that case, the Court reiterated *McConnell*'s upholding of restrictions on certain communications that are "the functional equivalent of express advocacy," *i.e.*, that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. This constitutional standard is similar to the test in section 100.22(b): Both tests narrowly inquire whether there is any reasonable way to interpret a communication as non-candidate-advocacy and, if so, do not restrict the financing of the communication.

FEC Br. in Opposition to Preliminary Injunction at 15, *The Real Truth About Obama v. FEC*, No. 3-08-00483 (E.D. Va. Aug. 14, 2008) (emphasis added); *see also* FEC Br. in Opposition to Appellant's Motion for Injunction Pending Appeal at 7, *The Real Truth About Obama v. FEC*, No. 08-1977 (4th Cir. Sept. 24, 2008) (same).

For this reason, NRLC's two-part question is really a single question: Is there any reasonable way to interpret NRLC's ads as "non-candidate-advocacy"? If there is not, then

NRLC's ads satisfy the standards to be considered as either "expenditures" or "electioneering communications," but in either event are both subject to the corporate and labor organization funding restrictions of 2 U.S.C. § 441b.

We urge the Commission to conclude that there is no reasonable way to interpret NRLC's ads as "non-candidate-advocacy."

In its 2003 *McConnell* decision reviewing the Bipartisan Campaign Reform Act of 2002 (BCRA), the Supreme Court rejected the claim that the BCRA "electioneering communication" provisions are overbroad, reasoning that the "argument fails to the extent that the issue ads broadcast during the thirty- and sixty-day periods preceding federal primary and general elections are the functional equivalent of express advocacy[,]" and finding that the "vast majority" of ads in the legislative record met this standard. *McConnell v. FEC*, 540 U.S. 93, 206 (2003). Accordingly, the Court upheld BCRA's "electioneering communication" provisions against a facial challenge.

In *WRTL*, the Court re-visited these provisions of BCRA, this time in the context of an as-applied challenge regarding three broadcast ads that Wisconsin Right to Life sought to air. Chief Justice Roberts, writing the controlling opinion for the Court, held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667 (emphasis added). Applying this test by balancing the "indicia of express advocacy" in the ads versus their characteristics as "genuine issue ads," the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.* The Court explained:

> 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.

In implementing the Supreme Court decision, the Commission applies these same factors when it considers whether an ad constitutes the "functional equivalent of express advocacy" under *WRTL*, or express advocacy under subpart (b). In its brief filed two weeks ago with the U.S. Court of Appeals for the Fourth Circuit in *RTAO*, for example, the Commission explained its conclusion that one of the ads at issue in that litigation, entitled "Survivors," "contains numerous elements of express advocacy" including:

- criticizing a candidate's character;
- referring to a candidate's political party;
- attacking a candidate personally for "lying";

- condemning a candidate's record on an issue;[1]
- not imploring listeners to take any action relative to any public policy issue; and
- urging "everyone" to "pause" before voting for the named candidate.

FEC Br. in Opp. to Appellant's Mot. for Inj. Pending Appeal, *supra* at 9-10.

Based on its application of these *WRTL* factors – balancing the "indicia of express advocacy" in the ads versus their characteristics as "genuine issue ads" – the Commission concluded that the *RTAO* ad "Survivors" is express advocacy under subpart (b). *Id.*[2]

Similarly here, applying the *WRTL* factors, NRLC's ads can only be interpreted as candidate advocacy. Each ad is solely an attack on Sen. Obama's character, focusing exclusively on his truthfulness in characterizing his past actions on a legislative issue.

Specifically, with respect to the ads' repeated attacks on Senator Obama's truthfulness, both ads:

- state that Sen. Obama "misrepresented the bill's contents;"
- challenge Sen. Obama to "admit to his previous misrepresentations;"
- assert that "Obama's claim [about his record] is wrong;"
- assert that NRLC's documents "support the group's claims that Obama is misrepresenting the contents" of past legislation, and
- ask the listener: "Will Obama apologize for calling us liars when we were the ones telling the truth?"

AOR at 2-3. The second ad goes a step further with an even more explicit attack on Senator Obama's character and veracity, stating: "Barack Obama: a candidate whose word you can't believe in." AOR at 3. By referencing Senator Obama as a "candidate" who "you can't believe in," there is no question that this ad expressly advocates his defeat. But even without that tag line, both ads, fundamentally, are about Senator Obama's truthfulness, not about the issue of abortion.[3]

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[1] *See WRTL*, 127 S. Ct. at 2667 n.6 (distinguishing WRTL's ads from those that "condemn[ ] [a candidate's] record on a particular issue").

[2] Pertinently, the Commission concluded that the other ad under scrutiny in the *RTAO* case, entitled "Change," was not subpart (b) express advocacy, or the "functional equivalent of express advocacy" under *WRTL*. But the district court disagreed with the Commission in this regard, stating, "[I]n reading the "Change" ad, it is clear that reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama." *RTAO*, slip op. at 13.

[3] NRLC asserts that the ads' claims about Senator Obama's lack of truthfulness "are indisputably true," AOR at 3, and it submits a 15-page "White Paper" in support of this assertion. This is irrelevant to the issue before the Commission. It is not the Commission's job to referee Senator Obama's truthfulness, or the truthfulness of NRLC's ads in attacking Senator Obama's truthfulness. The fact that an attack on a candidate's character may be true makes it no less an attack on the candidate's character.

Under the standards articulated by the Supreme Court in *WRTL*, the content of NRLC's ads contains indicia of express advocacy and is not consistent with that of a genuine issue ad. *See WRTL*, 127 S. Ct. at 2667. The ads:

- do take a position on Sen. Obama's character, repeatedly challenging the truthfulness of his public assertions with respect to past legislative action;
- do not focus on a pending or future legislative issue;
- do not take a position on a pending or future legislative issue, and
- do not exhort the public to adopt a position on any pending or future legislative issue.

NRLC's ads serve no communicative purpose beyond attacking Sen. Obama's character by challenging his truthfulness. NRLC's ads are susceptible of no reasonable interpretation other than as an appeal to vote against Senator Obama, and thus constitute express advocacy under subpart (b) and "the functional equivalent of express advocacy" under *WRTL*. We urge the Commission to advise NRCL that it is prohibited from using general treasury funds to broadcast the ads, but that it may continue funding the broadcast of the ads using federally permissible funds through NRLPAC.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

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