Case No. 07-5360

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES FEDERAL ELECTION COMMISSION,

Defendant-Appellant,

v.

CHRISTOPHER SHAYS AND MARTY MEEHAN,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE CENTER FOR COMPETITIVE POLITICS (CCP) IN SUPPORT OF APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Center for Competitive Politics ("CCP") is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Center for Competitive Politics neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of the Center for Competitive Politics.

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STATEMENT OF AMICUS CURIAE

The Center for Competitive Politics ("CCP") is a non-profit organization founded in 2005 by former FEC Chairman Bradley A. Smith, professor of law at Capital University Law School, and Stephen M. Hoersting, campaign finance attorney and former general counsel to the National Republican Senatorial Committee. Both Chairman Smith and Mr. Hoersting maintain an active involvement in CCP's activities. Mr. Smith is Chairman of CCP and Mr. Hoersting is Executive Director and a member of the Board of Directors. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication, is to evaluate and explain the actual effects of money in politics, and the results of a more free and competitive electoral process.

CCP regularly files amicus briefs to assist the Supreme Court of the United States, United States Courts of Appeals, and various state courts in deciding cases involving regulation of political speech. CCP is interested in participating in this case as amicus curiae because the question of whether the government can regulate contributions to a committee engaged in independent expenditures is a matter of critical importance to those such as CCP who oppose greater government regulation of political speech.

CCP files this motion pursuant to this Court's order dated January 4, 2008 granting CCP leave to file an amicus brief.

SUMMARY OF ARGUMENT

The thrust of Appellees' argument is that the FEC's content standard is a new and novel creation. This gives the mistaken impression that the challenged regulations represent an abrupt departure from previous Commission standards, and thus are contrary to the intent of Congress in passing the Bipartisan Campaign Reform Act ("BCRA").

Nothing could be further from the truth. The FEC's application of a content standard long predates BCRA. Pre-BCRA, the Commission consistently, if not formally, applied the express advocacy and republication of campaign materials content standards when determining whether allegedly coordinated expenditures qualified as "contributions," *i.e.*, disbursements made "for the purpose of influencing any election." This express advocacy standard is consistent with the Constitution and the Supreme Court's repeated admonishments to regulate as narrowly as possible where core First Amendment principles are implicated, and was known to Congress at the time BCRA was passed.

ARGUMENT

I. Contrary To Plaintiffs' Assertions, The FEC Used An Express Advocacy Content Standard Pre-BCRA.

The Commission historically used two tests — a conduct test and a content test — to evaluate whether an expenditure violated the coordinated expenditures provision of the Federal Election Campaign Act ("FECA"). These tests have had

different forms, but there can be little doubt that the Commission's understanding has long been that expenditures violate FECA only if they expressly advocate the election or defeat of a candidate.

Prior to 2000, the views of the FEC Commissioners with regard to the threshold for beginning an investigation into an allegedly coordinated expenditure were heterodox. *See In re Alabama Republican Party, et al.*, MUR 4538, Statement of Reasons, Chairman David M. Mason & Commissioner Bradley A. Smith (May 23, 2002) (Mason and Smith Statement of Reasons, *Alabama Republican Party*) (Ex. A). This precluded a formal rule. Yet it was clear that a number of Commissioners were in practice applying a content test. Commissioner Eliot and her successor, Commissioner Smith, believed that express advocacy was required before an inquiry could be initiated, due to First Amendment overbreadth concerns. *Id.* at 1. Similarly, Commissioner Sandstrom subjected proposed inquiries to a content examination, and would only initiate an investigation if there was express advocacy by a party, basing his position on due process concerns. *Id.* at 1-2. Commissioner Thomas used a slightly more liberal variant of the content standard now used by the FEC, requiring an expenditure be "for the purpose of influencing" an election in order to be considered a coordinated communication. *Id.* at 2.

In 1999, four Commissioners (then Vice-Chairman Wold and Commissioners Elliott, Mason and Sandstrom) explained their rejection of staff repayment recommendations pertaining to the Dole and Clinton 1996 presidential campaigns by noting that the coordinated communications made by party committees did not meet a clear content test, which the Commissioners believed was required, "[e]ven in the context of coordinated, or presumably coordinated, communications." *On The Audits of "Dole For President Committee, Inc." et al.*, Statement of Reasons, Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom, at 4 (June 24, 1999) (Ex. B). Thus, even before 2000, a consistent majority of the FEC commissioners used one form or another of the present content test before voting to commence an investigation.

Developments in the law made it increasingly difficult for the FEC to maintain this *ad hoc* approach. In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), Judge Green found that the lack of a formal content inquiry "[n]ot only . . . heavily burden[s] communication leading up to the expenditure, but . . . also neglects the fact that expressive coordinated expenditures contain the political speech of the spender; more than the "speech by proxy" involved in a cash contribution." *Id.* at 91. While that decision was heavily criticized by FEC Commissioners for not going far enough to protect First Amendment rights, *see In*

re The Coalition, MUR 4624, Statement for the Record, Commissioner Bradley A. Smith, (Nov. 6, 2001) (Smith Statement for the Record, *NRCC*) (Ex. C), and did not *require* the FEC to adopt express advocacy as a minimum content standard, the weaker test enunciated by the Court still marked a court-mandated movement toward a formal definition of the content test. Still, under the narrower test enunciated by the *Christian Coalition* court, the FEC continued to operate under a *de facto* express advocacy test. *See* Mason and Smith Statement of Reasons, Alabama Republican Party, at 5 (citing examples from the campaigns of Johnson in South Dakota and Karpan in Wyoming). Indeed, in the Karpan matter, the Commission expressly found that there had been coordination with the DSCC, but nonetheless dismissed the matter because of the nature of the allegedly coordinated speech. *Id.* at 5-6.

This culminated in the Commission's 2002 decision in MUR 4538 to formalize what had previously been the unannounced position of the Commission. *See id.*; *In re Alabama Republican Party*, MUR 4538, Statement of Reasons, Commissioner Karl J. Sandstrom, (May 23, 2002) (Sandstrom Statement of Reasons, *Alabama Republican Party*) (Ex. D).[1] After lengthy discussions and

[1] Commissioner Wold was unable to sign this Statement of Reasons because he left the Commission before the Statement of Reasons was issued. Even the votes of these three Commissioners, however, would preclude a prosecution absent express advocacy.

debate, the Commission explained, "[t]he Commission's policy guidance and the absence of a consistent enforcement policy have, separately or together, made it impossible for the Commission to cite political parties for coordinating non-express advocacy communications with candidates." Mason and Smith Statement of Reasons, *Alabama Republican Party*, at 7. The Commission thus announced "we will not be making party coordination findings on further matters arising out of 1998 and 2000 elections absent express advocacy communications." *Id.* at 8.

Congress itself recognized this evolution in the Commission's voting patterns. The Senate version of BCRA, as passed in 2001, altered the definition of contribution by adding a new subsection to include specifically all coordinated expenditures, regardless of whether or not those expenditures included express advocacy. The original Senate bill would have included in its definition of expenditure:

> (iii) any coordinated expenditure or other disbursement made by any person in connection with a candidate's election, ***regardless of whether the expenditure or disbursement is for a communication that contains express advocacy***; or
>
> (iv) any expenditure or other disbursement made in coordination with a national committee, State committee, or other political committee of a political party by a person (other than a candidate or a candidate's authorized committee) in connection with an election, ***regardless of whether the expenditure or disbursement is for a communication that contains express advocacy***.

Bipartisan Campaign Reform Act of 2001 (Engrossed As Agreed to or Passed By Senate), S. 27, 107th Cong. § 214(a)(1)(C) (2001) (Ex. E) (emphasis added). The Senate clearly would not have felt the need to single out communications containing express advocacy if it did not believe that the FEC was already using that standard in evaluating whether or not to proceed with an investigation. Significantly, this definition ultimately was not included in the final version of BCRA.

The Commission's formal adoption of content standards in its post-BCRA regulations was therefore not novel, nor did it represent any movement against the flow of campaign finance law in general or BCRA in particular. Rather, by codifying a content standard, it merely formalized what the FEC's practice had been for the better part of the previous decade. Further, the post-BCRA content standard adopted by the FEC actually brings within the scope of the law substantially more activity than was covered by the pre-BCRA standard used by the Commission, by regulating a large swath of political speech that occurs in the various pre-election "windows," regardless of whether or not the speech expressly advocates the election or defeat of a political candidate.

II. A Content Standard is Consistent With the Supreme Court's Repeated Admonishments to Give Core Political Speech Sufficient Breathing Space.

Appellees below derided the Commission's continued use of any content standard as a "functionally meaningless test" that creates a "free-for-all" of coordinated activity during the safe harbor periods. The district court held in its opinion below that the FEC made "no attempt whatsoever to justify [its] continued reliance on the express advocacy standard", *Shays v. U.S. Federal Election Com'n,* 508 F. Supp. 2d 10, 47 (D.D.C. 2007), and that the FEC failed to establish that "'its rule rationally separates election-related advocacy from other activity.'" *Id.* at 48 (citation omitted). But Appellees and Judge Kollar-Kotelly fail to acknowledge that the Commission adopted this test in light of the statute and is language in recognition of the cautionary note the Supreme Court voiced in *Buckley*: Because campaign finance laws "operate in an area of the most fundamental First Amendment activities," they must be interpreted to avoid a chilling effect on freedoms of speech and association. *Buckley*, 424 U.S. at 14, 41 n.47.

> [V]ague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.' 'Because First Amendment freedoms need breathing space to survive,

> government may regulate in the area only with narrow specificity.

Id. at 41, n.48.

Precisely because of the risk of chilling core First Amendment freedoms, the Supreme Court has consistently construed FECA's use of the term "expenditure" to include only "express advocacy" disbursements. Throughout *Buckley* the Supreme Court gives the term "expenditure" a narrowing construction. With regard to section 608(e)(1) of FECA, which provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which . . . exceeds $1000," the Court held that the phrase "relative to" was unconstitutionally vague and hence risked chilling core political speech. To cure that deficiency, the Court adopted the express advocacy test. *Buckley*, 424 U.S. at 41-44. With regard to the FECA's disclosure provisions, the Court again noted the inherent vagueness in FECA's definition of "expenditure" in terms of money disbursed "for the purpose of influencing any election." Again, the Court adopted the "express advocacy" test. *Id.* at 76-80.

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*"), the Court remained true to this core lesson of *Buckley*. Interpreting FECA's restrictions on corporate expenditures, the Court, again citing vagueness and overbreadth concerns, held that "an expenditure must constitute 'express advocacy' in order to be subject to" the corporate expenditure restrictions. *Id.*

Judge Kollar-Kotelly stated that "[b]y continuing to rely on the express advocacy standard — which the Supreme Court has determined to be 'functionally meaningless,' *McConnell*, 540 U.S. at 193 — the Commission has essentially concluded that communications made outside of the pre-election windows require virtually no regulation at all." *Shays,* 508 F. Supp. 2d at 47. The Commission, however, was correct to "rely on the express advocacy standard," and to include it among the four content standards listed in its rulemaking, because that is what the statutes require. Before BCRA, the FECA treated "expenditures" placed in "cooperation" with candidates as "contributions," *see* 2 U.S.C. § 441a(a)(7)(B)(i), and treated the "republication" of campaign materials as an "expenditure" for purposes of that paragraph. *See* 2 U.S.C. § 441a(a)(7)(B)(iii). With BCRA, Congress added a new class of communications — "electioneering communications" — to the class of communications that, when placed in "cooperation" with candidates, are to be treated as "contributions."[2] The FEC's content standards in its rulemaking elucidate each of those statutory standards: expenditures, a republication of campaign materials, and electioneering communications. The express advocacy standard elucidates the statutory term

[2] In BCRA, Congress also added provisions that make all three categories of communications — expenditures, republication of campaign materials and electioneering communications — "contributions" to political party committees when placed in "cooperation" with a political party committee. *See* 2 U.S.C. §§ 441a(a)(7)(B)(ii) and (C).

"expenditure," because, as discussed above, the Supreme Court has long construed the term "expenditure" as limited to communications that expressly advocate the election or defeat of a clearly identified candidate. Despite the Supreme Court's reference in *McConnell* to the express advocacy standard as "functionally meaningless," 540 U.S. at 193, nothing in *McConnell* changes the Court's requirement in *Buckley* that communications regulated as "expenditures" under FECA must be limited to express advocacy. Indeed, the *McConnell* Court itself noted that the Court's "decisions in *Buckley* and *MCFL* were specific to the statutory language before [it]." *McConnell v. FEC*, 540 U.S. at 192-93. The "language before" the *Buckley* and *MCFL* Courts was FECA. And it is FECA, not BCRA, that provides the term "expenditure."

Judge Kollar-Kotelly also suggests that *amicus* CCP makes a "legislative reenactment argument": that the district court should have affirmed the express-advocacy content standard in the FEC's regulations because Congress had known the FEC had acted under an express advocacy standard and had reaffirmed that standard in subsequent legislation. *Shays,* 508 F. Supp. 2d, at 48 n. 25. But CCP does not argue that Congress legislatively reenacted the express advocacy content standard in BCRA. Instead, we submit that Congress was aware of the FEC's past

practice[3], was aware of the Supreme Court's admonition in *Buckley* and *MCFL, supra*, that "expenditures" for communications are limited to express advocacy, and that Congress, in light of that awareness, chose to do two things: 1) to leave undisturbed statutory language that treats "expenditures" made in "cooperation" with a candidate as "contributions," and 2) to capture more communications by adding another class of communications to the coordination restriction. Specifically, Congress added the requirement that "electioneering communications" made in "cooperation" with candidates are *also* to be treated as "contributions." 2 U.S.C. § 441a(a)(7)(C). Because Congress left undisturbed the requirement that "expenditures" made in "cooperation" with candidates are "contributions", *see* 2 U.S.C. § 441a(a)(7)(B)(i), the Commission can hardly be faulted for "relying on express advocacy" communications made at any time of the year as one of the four content standards it promulgated in regulations in response to Congress' enactments.

The FEC knew all too well that the risks identified in *Buckley* and *MCFL* were not hypothetical. One need only look at the Commission's experience when it lost sight of the express advocacy standard in formulating and enforcing coordinated communications regulations. Over time, the Commission came to

[3] This awareness is reflected in earlier iterations of McCain-Feingold, which specifically referenced express advocacy. *See* amicus brief, *supra*, at 6-7).

recognize that a conduct standard alone failed to provide adequate guidance to persons making independent political expenditures to "prevent the specter of investigation and litigation from chilling constitutionally protected speech." Smith Statement for the Record, *The Coalition*, at 4.

Prior to that, however, the absence of a formal bright-line content standard led to fruitless investigations that caused exactly the result that the *Buckley* court sought to avoid – the suffocation of First Amendment freedoms. Without a content standard, individuals accused of illicit coordination lacked the benefit of a ready and inexpensive defense to an FEC investigation. Instead, they were subjected to highly intrusive investigations – including invasive file review, public disclosure of confidential strategies, and depositions of leaders – to determine whether invariably imprecise conduct standards had been satisfied.

Consider the example of the Coalition investigation. In 1997, the Democratic National Committee ("DNC") filed a complaint alleging that Republican Party affiliated committees and associations had violated FECA in 1996 through allegedly "coordinated" activities.[4] The Commission ultimately

[4] The investigation that exonerated the AFL-CIO of illegally coordinating its communications with the Democrats lasted 4 years and generated over 35,000 pages of documents. *See* Kenneth P. Doyle, *FEC Closes Long Running Probe of GOP Links to Business Groups*, BNA, No. 112, p. A-8 (June 11, 2001)

found no violation, but subjected the respondents to four years of intrusive investigation. As Commissioner Smith aptly observed at the time,

> I strongly suspect that the [DNC] considers its complaint to have been a success. The complaint undoubtedly forced their political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these groups in the future.
>
> We cannot fault [the DNC] for pursuing its goals through the legal tools made available to it . . . . These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing "corruption or the appearance of corruption."

Id. at 2.

Fortunately, the Supreme Court anticipated this problem in *Buckley* and again in *MCFL* and provided a workable solution – the "express advocacy" content standard that the Commission has included among other content standards in its current regulations.

III. The Commission's Content Standard Enforces the Act's "Coordination Provisions" While Protecting Issue Advocates from Unwarranted Investigations.

The Commission was obliged to select some content standard reasonably limited to the class of communications that Congress listed in 2 U.S.C. §

441a(a)(7) without subjecting genuine issue advocates to unwarranted and protracted investigations. The Supreme Court has stated that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, at 42-43. Without a content standard, "[n]o speaker, in such circumstances, safely could assume that anything he might say upon [a] general subject would not be understood by some as [an exhortation to elect or defeat a particular candidate]" *Id.* The lack of a content standard "offers no security for free discussion," and "compels the speaker to hedge and trim." *Id.*

The Court's recent teaching in *Wisconsin Right to Life v. FEC*, __ U.S. __, 127 S. Ct. 2652 (2007) demands a test that "focus[es] on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* at 2666. This is because "an intent-based test would chill core political speech by opening the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Id.* at 2665-2666.

Yet Judge Kollar-Kotelly worries that, despite its best efforts to implement the statute, that the Commission's contest standards would have missed "the 8.56% of advertisements . . . aired by House candidates more than 90 days prior to the

2004 primaries, or the 8.44% of advertisements . . . aired by presidential candidates more than 120 [days] prior to the 2004 primaries." *Shays,* 508 F. Supp. 2d at 47. But Judge Kollar-Kotelly herself acknowledged, in determining the facial validity of BCRA's "electioneering communication" provisions in *McConnell v. FEC*, 251 F. Supp. 176 (D.D.C. 2003), that a substantial amount of issue advocacy can be captured even when Congress or the Commission adopts a bright-line standard. She acknowledged that competing experts with the added benefit of hindsight could not say with certainty what percentage of advertising run within 60 days of a general election was genuine issue advocacy deserving of protection.

> As my Findings discuss, I have not accepted either side's discussion of the conclusion in *Buying Time 1998* related to the percentage of genuine issue advertisements that would be affected by BCRA. *Id.* PP2.12.5-2.12.9. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the 1998 election, 14.7 percent were "genuine" issue advertisements. *Id.* P2.12.8. Dr. Gibson presented figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* I have found that given the record it is impossible to determine which expert's view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on the likely effect [the "electioneering communications" provisions of] BCRA would have [on genuine issue advocacy] based on the *Buying Time 1998* data.

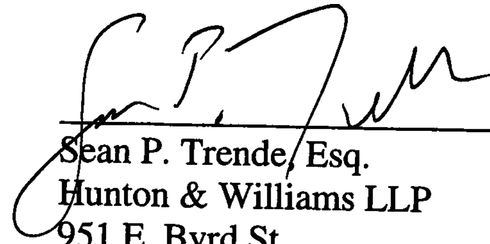
251 F. Supp. 2d 176, 634, 635 (D.D.C. 2003) (J. Kollar-Kotelly).

The trial court concerned itself with the possibility that the government would not be able to regulate a sufficient amount of political speech under a content standard. But the Constitution and the Supreme Court direct courts to err against overly broad regulations to avoid chilling speech. The trial court's decision erroneously errs on the side of regulation, and it must be reversed.

CONCLUSION

The FEC's use of content standards is nothing new, and for years before the passage of BCRA, that standard had been a republication of campaign materials and "express advocacy." Contrary to plaintiffs' assertions, the FEC's explicit inclusion of content standards does not mark a retreat from the Commission's prior practice. It represents the culmination of years of informal understandings and agreements at the Commission, respect for Congress' intent in FECA and BCRA, and recognition of the need to give First Amendment freedoms necessary "breathing room." This breathing room will be curtailed substantially should the present regulations be struck down in favor of a more restrictive approach. The regulations are consistent with the statute and Congressional intent and therefore should be upheld.

Dated: January 24, 2008



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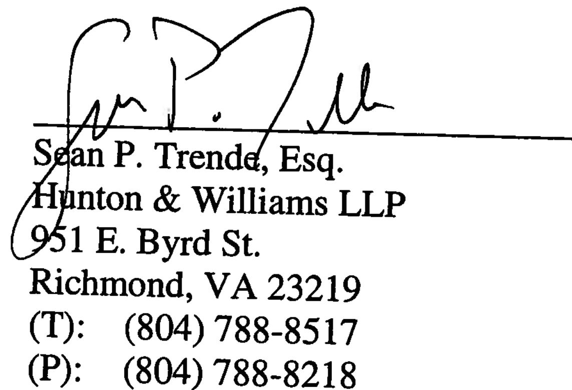
CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus* brief complies with the type-volume limitation, typeface requirements and type style requirements set forth in Rules 29(d) and 32(a)(5)-(7) of the Federal Rules of Appellate Procedure. This brief uses a proportionally-spaced Times New Roman 14 point typeface and contains 3,962 words, as determined by the "word count" feature of Microsoft Word software.



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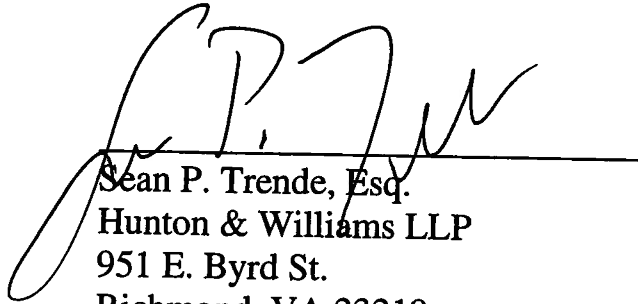
CERTIFICATE OF FILING AND PROOF OF SERVICE

I do hereby certify that I have on this 24th day of January 2008, served a copy of the foregoing pleading, by mailing the same by United States mail, properly addressed, and first class postage prepaid on counsel for all parties.



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