

FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON  
ELECTIONEERING COMMUNICATIONS

Thursday, October 20, 2005

Ninth Floor Hearing Room  
999 E Street, N.W.  
Washington, D.C. 20463

The hearing in the above-entitled matter  
was convened, pursuant to notice, at 9:40 a.m.

BEFORE:

Chairman Scott E. Thomas  
Vice-Chairman Michael E. Toner  
Commissioner David M. Mason  
Commissioner Danny Lee McDonald  
Commissioner Ellen L. Weintraub  
Lawrence H. Norton  
General Counsel  
Tina Van Brakle  
Director of Congressional Affairs

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## P R O C E E D I N G S

CHAIRMAN THOMAS: Good morning, one and all. This special session of the Federal Election Commission for Thursday, October 24, 2005, will please come to order. This isn't the 24th. October 20th. I'm worried about reading my script already.

I would like to welcome everyone to this Commission hearing. Today we will discuss the Notice of Proposed Rulemaking on the definition of electioneering communications which was published in the Federal Register on August 24, 2005. The NPRM explored possible modifications to the definitions of "publicly distributed" as it is used in the electioneering communication regulation, and modifications to the exemptions from the definition of electioneering communication. This is all being done to try to reach some consistency with the District Court decision in Shays v. Federal Election Commission, a portion of which was affirmed by the Court of Appeals.

Additionally, the Notice of Proposed

Rulemaking granted a petition for rulemaking, and it considers an exemption from the definition of electioneering communication for advertisements of books, plays, and movies.

Thanks to all of the people who took the time and effort to comment on the proposed rules, and in particular those who have come here today to give us the benefit of their practical experience and expertise on the issues raised by the proposed rules. I would like to briefly describe the format we will be following today.

This morning we have a total of, I think, seven witnesses. We have divided this into two panels. We will start with the first panel, which has three witnesses. If they would like to come forward and have a seat, I would appreciate that.

We are going to have each of the panels last for an hour and a half, and we've got a little light system. You all are painfully familiar with it by now. We will start to give you a flashing light of some sort when you've got about a minute left, and a red light means please try to cut it

off very quickly.

We will have questions from each of the Commissioners. We will basically go in about 5-minute segments, so your opening remarks, if you can keep them to about 5 minutes, that would be helpful, and we will try to keep our questions to 5 minutes, and then if there is sufficient time we will go back around.

So with that, I don't have any particular preference in order. I guess if we can go alphabetically, that will work fine with me. That would be Mr. Bauer, Robert Bauer of the firm Perkins Coie. We also have Karl Sandstrom, also from the firm of Perkins Coie. Also we have Don Simon here on behalf of Democracy 21. He's with the law firm of Sonosky, Chambers, Sachse, Endreson & Perry.

So, Mr. Bauer, please proceed. Good morning.

MR. BAUER: Good morning. Thank you very much, to all of the members of the Commission, for holding the hearing and inviting the testimony, and

I am delighted to be here. As you can tell, the structure of the panel reflects a new policy, which is, we have two members of the firm of Perkins Coie go everywhere that Don Simon goes.

[Laughter.]

Prior to McConnell, we only assigned one.

In any event, I would like the written testimony to stand as written. I won't elaborate on it. I won't read it. There are two quick remarks I would like to make, emphasizing points made in that testimony, and the first is that of course with the Supreme Court's decision to hear Wisconsin Right to Life, I think it's highly likely that we will have some additional constitutional learning on the subject matter of this hearing.

And so I would caution the Commission not to put unneeded effort here into final rules which would leave open the possibility that whatever you decide, at least preliminarily, to do as a result of this hearing be revisited in light of what the Supreme Court has to say when the Wisconsin Right to Life case is decided. Whether what the Supreme

Court does is meaningful precisely because of the Court's ruling, that is to say, the holding itself, or whether there is other commentary of the Court that ultimately bears on the issues considered here today, one way or the other, I can't imagine the case will be decided without consequence for the issues before the agency. So I would urge the Commission to keep that in mind as it hears the testimony and decides, at least preliminarily, what it would like to do with final rules.

The second very brief comment I want to make is in support of the supremely wise decision to discuss advertising for books, plays, and movies, but I want to cavil a little bit with the General Counsel's recommendation. It seems to me that there is a redundancy built into the proposed rule, and that is, as the General Counsel's draft reads, the advertising in question is advertising in the ordinary course of the advertiser's business activity, but a PASO requirement is tacked onto that as well.

But it seems to me that if the advertising

that we're talking about is of artistic productions, in the ordinary course of the advertiser's activity that ought to cover the very concern that's addressed by adding the PASO requirement, and I would like to make sure that the Commission doesn't, if you will, over-PASO itself in the course of this hearing, and it seems to me that you have added a requirement there that only muddies the waters and probably takes away with the left hand what you intended to give with the right.

So with that, I'll close my introductory remarks, and thank you very much again.

CHAIRMAN THOMAS: Thank you, Bob.

Mr. Sandstrom?

MR. SANDSTROM: Good morning, Chairman, members of the Commission. I am here today to seek to petition, on behalf of my client, for a grassroots lobbying exemption from the electioneering communication rules. It is fall in Washington, and it is appropriation season. My client is currently urging appropriators, legislators, to reject a number of proposed budget

cuts.

They think those cuts in order pay for Katrina recovery fall on the back of those who have too little as is. They are going to fall on the back of, as the Washington Post reports today, it is proposed they fall on the back of those who take out student loans, on those who use food stamps to eat, on those who rely on Medicaid for their medical coverage.

So they are seeking redress of their grievance. As you know, the First Amendment provides that you have a right to petition your government to seek redress of your grievances. A fine constitutional scholar, Akhil Amar, in his book "Bill of Rights," suggests that this was actually a guarantee of popular sovereignty.

I would note, as those items are being discussed this fall, that if you went out and you surveyed the public, I would guess less than 25 percent understand what those cuts entail. OMB Watch is doing what the little engine can, and it will try. It will join with others to engage in that effort.

Now, next fall will also be appropriations season. Similar cuts will probably be on the table. For other organizations, similar proposals, legislative proposals, will be on the table to cut at issues that they care about. And the question is, will they have an exemption under your regulations to use television or radio to put forth to the public what is at stake, to encourage the public to contact their legislators to tell them that something matters here?

Now, the staff of OMB Watch and board members of OMB Watch I am confident have their preferred candidates. But I can also tell you that what they really care about is the issues that are being decided, regardless of who votes on those issues. The outcome of those issues is what they are concerned about.

Now, you have a number of witnesses who have come before you and have suggested that there can be no exceptions; that if you create exceptions, they see great danger, essentially the corruption of representative government. You know,

if little nonprofits, unincorporated associations, incorporated associations can make electioneering communications, something serious is threatened in representative government.

So their position is, there should be no exception for grassroots lobbying, even if the communications do not promote, support, attack or oppose a candidate. There should be no exception for unpaid communications, even if it means denying organizations and their representatives use of public service announcements or appearances on public access channels; no exceptions for religious broadcasting.

I would just note that I am a Comcast subscriber, and there are at least three channels that are devoted 24/7 to religious broadcasting. Of course, during that religious broadcasting we need the government to supervise, to make sure that no candidate appears, you know, in the front pew, or whose name might be invoked.

No exception even for a passing reference to a candidate in the way of a photograph or

otherwise. They are afraid that any exception would be exploited, so they are willing to sacrifice my client's right to appear on television or on radio because they need this formidable barrier to the corruption they foresee.

And they believe the Commission cannot be trusted to return to this issue if that corruption actually comes up. Because what is clear is, there is nothing in the record that would indicate that there is a problem. They do not believe that the sanctions of the IRS are sufficient, even though those sanctions can be applied to individual officers of the organization that speaks.

Now, the Court of Appeals has weighed in on the side of rather strict enforcement. Your choices appear to be limited, but you still do have choices. But you do not have the choices, I believe, unless you actually confront the issue of what promote, support, attack or oppose a candidate is.

Now, I think what brings this into sharp relief, and I'll use an example here, is that you

now allow or you are proposing to allow advertisements of books in the ordinary course of business. Now, this is a book called "Worth Fighting For." It has Senator McCain before a flag.

If you look at the photographs in that book, and I'll share them with you, and if they were used in an ad, they include photographs of Senator McCain with his father; with President Nixon; with Senator Feingold. Now, which of those photographs promote, support, attack or oppose Senator McCain? Particularly if you are promoting a book written by the candidate, how can you not be promoting, you know, that candidate?

So you are out to create an exception, maybe because these are powerful forces and my client isn't a powerful force. It's a small group of concerned citizens who struggle every year to meet their budget. Maybe you're afraid that they pose a risk, but AOL, Time-Warner, or Random House do not pose a risk. I'm somewhat at a loss at why you can create an exception there for Time-Warner,

and you can't create an exception for OMB Watch.

Now, let me divert a little bit to something mentioned in your Notice of Proposed Rulemaking. In that Notice of Proposed Rulemaking, you certify at the end that--I'll essentially read it to you, so I don't get it wrong--why this doesn't have a wide impact.

You have concluded: "First, the proposed changes to the definition of 'publicly distributed' will only affect a small number of advertisements" --now, this covers non-paid programming, so how is that accurate?--"advertisements that are run on broadcast, cable, or satellite TV or radio where the air time is donated without charge by a public access channel." Where is the evidence that small organizations do not use public access channels, do not appear on public access channels?

"Second, the proposed change to the exemption of paid-for by 501(c)(3) nonprofits would not affect a substantial number of small organizations because these organizations may not be able to afford expensive radio and television."

You just said this covers unpaid, so how is number two accurate? I'm just curious, with respect to the certification, and I'm going to go on to point number three, where is the factual record that says this does not have a wide impact?

Now, I'm going to put into the record a report done, a study done by OMB Watch of public advocacy groups, that indicates a large number of 501(c) (3)s are involved with grassroots lobbying. So where does the conclusion come that in doing that, they never appear on a public access channel, in a public service announcement? I'm just questioning the factual basis for that certification.

CHAIRMAN THOMAS: Thank you. You will notice I have been not even turning on the lights so far, because I'm assuming we have enough time to work with.

Mr. Simon, you're up next.

MR. SIMON: Thank you, Mr. Chairman, although let me say I shall not rest until I'm on a panel with three Perkins Coie lawyers.

[Laughter.]

I want to talk about the per se exemption for 501(c)(3) groups. The Court in the Shays case held that the Commission had failed to adequately explain or justify that exemption, and as such it was deemed to be arbitrary and capricious.

Now, the principal argument made in support of the exemption is that (c)(3) groups by definition cannot engage in electoral activity, so that their broadcast ads by definition are not within the sphere of Congress's concerns in enacting Title II. I think that view is wrong, for a couple of reasons.

First, Congress itself was in the best position to exempt (c)(3) groups from Title II, had it thought doing so was appropriate. Not only did it not do so, but all of the principal sponsors of BCRA specifically and explicitly told the Commission not to do so as well.

In a floor statement while the bill was pending in the House, Representative Shays said, "We do not intend that Clause 4 be used by the FEC

to create any per se exemption from the definition of electioneering communication for speech by Section 501(c)(3) charities," a comment that the other principal sponsors explicitly agreed with. Now, this is not post-enactment construction. This is the strongest form of contemporaneous legislative history, and the Commission should pay heed to it.

Second, while there is no doubt that IRS law absolutely prohibits (c)(3) groups from engaging in something called "campaign intervention" and provides sanctions for violating that rule, there is a good deal of doubt as to what that prohibited intervention really is, and a strong argument that it's quite different than what Title II is intended to cover.

I urge you to review the comments filed here by the Cancer Society, which called the IRS intervention standard "murky"--a description I think that is best illustrated by Revenue Ruling 2004-6, which is the most recent IRS guidance in this area, and which applies a nuanced,

multivariate facts and circumstances test that involves six factors that tend to show activity is lobbying, and another six factors that tend to show activity is political intervention. The IRS standard may be absolute, but it is far from self-evident.

I urge you to pay close attention to the comments of Professor Hill, an expert in this area, who repeatedly in her comments notes the lack of clarity about the IRS standard, and the scant guidance about it that has been offered by the IRS. Recent IRS rulings, she says, have served primarily to increase confusion in this area.

I urge you to take note of a letter to the IRS last year from tax lawyer Gregory Colton, which is--the letter is attached to our comments--in which he concludes that the IRS guidance in 2004-6, combined with the Commission's per se exemption for (c) (3) groups, allows (c) (3) groups to become what he called the "ideal vehicle" for interventionist advertising. And he said that the IRS may have inadvertently handed campaign strategists an

enormous loophole.

Now, the disjunction between Section 501(c)(3) of the tax law and Title II of BCRA I think is best illustrated by the comments of those who support the per se exemption, and to argue that the difference between lobbying, which a (c)(3) is permitted to do, and campaign intervention, which it is not permitted to do, essentially boils down to whether an ad promotes or attacks a candidate in the context of being a candidate or in the context of being a legislator.

Now, that may be what the IRS facts and circumstances test is about, but it is assuredly not what BCRA is about. Title II was intended to cover even issue ads broadcast during the pre-election period, which the Supreme Court called the functional equivalent of express advocacy. The Court said little difference existed between an ad that urged voters to vote against Jane Doe and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think."

Finally, let me make this point in the context of a concrete example. The NPRM correctly points to a radio ad run in 2000 by the Federation for American Immigration Reform. That was a (c) (3) group who criticized then-Senator Spencer Abraham and his position on immigration.

According to the ad, "Abraham is again pushing a bill to import hundreds of thousands or more foreign workers to take American jobs.

Abraham killed the requirement that employers hire Americans first. He clearly thinks it's okay to favor foreign workers. Abraham has raised big political money from huge corporations that want cheap foreign labor." And so on and so on.

Now, anyone familiar with the legislative history of BCRA would immediately recognize this ad as a classic example of the kind of sham issue ad that Congress meant Title II to cover.

Now, I thought the commenters who were seeking to preserve the (c) (3) exemption would dissociate themselves from this ad as some kind of aberration that's not within IRS rules. But

instead, the Alliance for Justice calls this ad a "legitimate grassroots lobbying communication permissible under 501(c)(3) law." It said that "while it may be true that the advertisement PASOs Senator Abraham as a legislator, it does not PASO him as a candidate." OMB Watch said the ad is "clearly a legitimate grassroots lobbying communication for a charitable organization."

Well, there you have it. If this ad is permissible (c)(3) lobbying, which it may be from the IRS point of view, and if you exempt this ad from Title II because it's sponsored by a (c)(3), then I think you have violated your Clause 4 exemption authority and you're fundamentally undermining the whole point of Title II.

Thank you.

CHAIRMAN THOMAS: Thank you, one and all. I think that I'm going to lead off the questioning. I forgot how I ordered the proceeding this time, but I'll start off.

I guess, Mr. Bauer, your concern about the pending litigation, I was going to ask you a little

bit about that. I gather that what is at stake there is some effort to get an as-applied constitutional exemption for some sort of what we'll call grassroots lobbying ads. And I think I have read that you are in the process of trying to gather folks to help support the Right to Life arguments. Is that correct?

MR. BAUER: With unbounded enthusiasm.

CHAIRMAN THOMAS: So you're the right one to ask. How far do you want that kind of constitutional exemption to go? Do you want it to encompass an ad like the FAIR ad, or the example I'm going to be using during the hearings: I've got some sort of communication that talks about--I'll call him "Senator Brain Dead"--"Senator Brain Dead outrageously voted against the Baby Seal Protection Act. Call him and tell him to vote right the next time it comes up." Are you seeking a constitutional exemption along those lines, that would also exempt those kinds of ads that clearly indicate, in essence, opposition to the position of the identified officeholder?

MR. BAUER: Yes. Wisconsin Right to Life, as you know, identifies for the Court in its cert petition a series of factors that it believes clearly distinguish exempt issue advertising or constitutionally protected issue advertising from issue advertising that might be swept up in Title II. And we will support what seem to us, what should be in our judgment noncontroversial, very carefully drawn, detailed standards that Right to Life believes that it satisfied in the case of the advertisements before the Court, and that I think any advertisement, if it satisfies those standards, ought to be exempt on the same grounds or constitutionally protected on the same grounds.

No reference--I don't have the entire set of standards in front of me, there are 12 of them, I believe, or something along that order--but no reference to candidacy, no reference to election, and a bona fide issue and a history of supporting the officeholders or appealing to the public on those issues. So those series of factors are ones that we believe are appropriate to the

constitutional analysis that the Court has to engage in.

CHAIRMAN THOMAS: Just to be clear--

MR. BAUER: The "Senator Brain Dead" example sort of stumps me a little bit because the PASO is built into his name.

[Laughter.]

CHAIRMAN THOMAS: That is a problem.

MR. BAUER: Yes, that's a problem.

CHAIRMAN THOMAS: The other Senator I'm going to be using is "Senator Well and Good," so you can sort of get a sense of where I'm going with that.

But obviously the concept, just to go back to the question, I gather in that list of factors you do contemplate that there could be an expression, if you will, of support or opposition to the position previously taken by the officeholder who is referred to.

MR. BAUER: If I understand your correction, yes. If it's an issue-directed commentary, the answer to your question is yes. If

it is a commentary--and I believe this is included in the standards--if it's a commentary about the moral or other personal deficiencies of the officeholder, that's something altogether different.

CHAIRMAN THOMAS: Yes, I appreciate that. And as I further understand it, it's expected that this as-applied constitutional exemption would be available not just to a (c) (3) organization but to a (c) (4), to a business, a for-profit corporation, and also to a labor union?

MR. BAUER: Well, right-to-life doesn't of course concern a labor union, so I'm not quite sure I'm here to discuss how far that principle might extend. I'm happy in separate views to present them to you in writing, if you're interested.

But I do want to stress that, as I said in the very beginning, it seems to me that when the Court issues the opinion--and as is so typical of Supreme Court opinions, any court opinions, certainly this Court's opinions in the field of campaign finance jurisprudence--something the Court

will say will surely influence what you do here, not merely by virtue of what the Court holds precisely on WRTL's claim, but just generally speaking in its discussion of the as-applied challenge and whether it's permissible, and then generally speaking on the merits of the arguments that are being made here to distinguish sham from real issue advertising. So something in that opinion here--it's impossible to imagine the Court ruling here without saying something that this Commission will find necessary to incorporate into a useful final rule.

CHAIRMAN THOMAS: I'll just gladly hear the other two panelists comment very quickly. I'm sure my time is close to being out. I keep forgetting to start the clock. Mr. Simon?

MR. SIMON: Well, let me say a few things about Bob's suggestion that the Commission defer this rulemaking and Karl's suggestion that the Commission affirmatively I guess at this point issue a grassroots exemption.

The second I don't think you can do, for

the simple reason that you haven't noticed it. I mean, I just think as a matter of kind of APA process it's not teed up for you to at this point create a full-fledged grassroots exemption.

In terms of the WRTL case, it is certainly possible that the Court could come out with something that influences this rulemaking, but I don't think it's necessarily going to do that. What we do know is that the Supreme Court has upheld Title II across the board as against a facial challenge.

Now, you know, the WRTL case involves, is an as-applied challenge to specific ads by a specific group in a specific context. And if you look at that context, you've got a group that announced its purpose was to defeat Senator Feingold, that had a long history of making independent expenditures against Senator Feingold, that ran ads about a campaign issue that was a central issue for which Senator Feingold was being attacked by his Republican opponents and the Republican Party. In other words, my point is, the

context of that case is shot through with electioneering considerations that these ads were then run in. So I think the Court is very likely to take a look at that context, and I think it's far from certain that the Court is going to strike down Title II as applied to these ads.

Final point, though, is that to me the suggestion that you just defer this rulemaking for some lengthy period of months, until next summer, is not acceptable in the following sense: that this rulemaking is not a kind of discretionary exercise by the Commission, "Let's take a look at the Title II rules again." This rulemaking is being conducted under court order, and the court order is that you have to expeditiously promulgate new rules to comply with the decision in the Shays case.

Now, there are something like 15 rules at issue, and to date--and we are now 13 months after the District Court's decision--to date you have in place as a final rule only one of those 15 rules struck down in the Shays case. Now, you know,

obviously there was an appeal pending through the D.C. Circuit, which has been resolved, at least at the panel level.

But what the District Court said was, for those rules that the Commission did not appeal, the District Court I think certainly expected you to move forward and put final rules in place. For the rules that were subject to appeal, I think the Court was quite clear that you were to prepare final rules up to the point of final promulgation, and then as soon as the appeal was resolved, to put those rules in place.

And I think the Commission is a good long way from meeting the directive of the Court as to how you were to handle the Shays case on remand. So to me the notion that "Let's wait until next summer to promulgate these rules" is simply not consistent with what is driving this rulemaking, which is the District Court order in Shays.

CHAIRMAN THOMAS: Do you have anything to add to what the senior member of your firm said on the issue, Mr. Sandstrom?

MR. SANDSTROM: I trust that I do.

CHAIRMAN THOMAS: In a few seconds? Or I'll be in trouble with my colleagues here.

MR. SANDSTROM: Actually what the First Amendment guarantees is the right to petition the government to redress grievances, and it would be rather surprising if you can't tell the government what the grievance is, whether the baby seals or bans on stem cell research or the cuts in Medicaid.

CHAIRMAN THOMAS: Thank you.

Vice-Chairman Toner?

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I think Mr. Simon has a good point, in terms of it was three years ago that we were debating the Title II rules. I'm looking forward to the day we don't have to debate them at all. I was hoping that would occur sometime during my term of service here, but that may be optimistic.

I want to thank the witnesses for being here this morning and being with us on these issues. Mr. Simon, I would like to begin with you. In reading your testimony, I guess it's clear that

in your view no exemption is appropriate for

(c) (3)s under any--

MR. SIMON: Right.

VICE-CHAIRMAN TONER: And no exemption is appropriate for any type of grassroots lobbying activity.

MR. SIMON: Well, if you go back to our 2002 comments in the Title II rulemaking, we did propose language for a grassroots lobbying exemption from Title II that I think was very narrowly drawn and carefully drawn. Now, the Commission at that point had proposed several alternatives of its own, and we criticized all those alternatives and proposed a different, but we did propose specific language.

Now, I think it's very interesting that in the final E&J arising out of the 2002 rulemaking, the Commission said none of the proposed exemptions for grassroots lobbying, including the one that commenters had proposed--and I took that as a reference to our proposal--none of them would protect against a potential ad that would promote,

support, attack or oppose a candidate, and therefore none of them met the statutory standard. So, you know, for the Commission to go forward at this point and propose that kind of exemption, I think it would have a lot of explaining to do as to why it was changing a very clear decision it made in 2002.

VICE-CHAIRMAN TONER: So at least as we sit here today, no exemption appropriate for (c) (3)s, no exemption appropriate for grassroots lobbying, and no exemption appropriate for unpaid broadcast spots, at all?

MR. SIMON: Well, I mean, the way the Commission went about it previously was--I mean, I think it was inappropriate, and I think the Court ruled it inappropriate substantively.

VICE CHAIRMAN TONER: So if you are a charitable organization in the United States and you, in the last 60 days before an election, are interested in having a spot air about your charitable mission, and for whatever reason you think it might advance your charitable mission to

have a federal candidate or officeholder appear in that spot, in your view just not appropriate under the statute.

MR. SIMON: You get the local hockey star. There are lots of spokespeople that charities can use to engage in PSAs in that period, you know. And as the Court of Appeals said, we're talking about 90 days out of two years, and I think the way the Court of Appeals discussed that, it did not view that as a significant burden.

VICE-CHAIRMAN TONER: I'm interested in that because some of the commenters noted that charitable organizations often don't control when PSAs are aired, so the theory that may have under--one of the underpinnings of the Court of Appeals conclusion there was, well, the PSA can air throughout the rest of the calendar year, it just can't air during the last 60 days before an election. But if the charitable organization or other group doesn't control when the PSA is aired, actually there could be a ripple effect far beyond just the last 60 days. Is that a fair assessment?

MR. SIMON: Yes. I mean, I was interested in those comments. I think that the charity, if it wanted to use a PSA with a federal candidate in it --not necessarily a public official, because there are public officials who aren't in a given year federal candidates--but if it insisted on using a PSA with a federal candidate, then it would have to take steps to ensure that it wasn't broadcast within the Title II windows.

VICE-CHAIRMAN TONER: But you are comfortable, as a matter of law, that basically under BCRA there is a total prohibition on (c)(3)s using federal candidates and officeholders in the last 60 days before an election. That's just the way the statute is, and we have no discretion at all on that.

MR. SIMON: I think that's the way the statute is.

VICE-CHAIRMAN TONER: Mr. Bauer, I'm interested in your discussion of the proposed exemption for books, plays, works of art. And as I understand your comments, you don't think that

conditioning that exemption on PASO is very productive, but you seem to be more comfortable with incorporating "in the normal course," in the normal commercial course. Is that sort of where you come down overall, that if that's the framework we end up with, that that's a workable exemption that producers of works of art could operate with?

MR. BAUER: There's no reason to believe that they couldn't. I mean, I don't think the Commission has any evidence to suggest that phony production companies with an election-related purpose are springing up to promote books or movies that have political content. Normally this advertising, which is expensive, requires planning and expertise, is going to be conducted by organizations that are in that business.

So adding the PASO requirement doesn't add anything because the PASO requirement's purpose, I would think, in this context would be to guard against misuse of that activity to influence with corporate dollars a federal election. It's unnecessary, and what it will do, of course,

because it's also in many respects an unworkable standard--I mean, I have to note that Mr. Simon talks about vague IRS standards and the like. PASO is, without any doubt, a standard that leads the parade of terminological vagueness. And I don't see that we add anything at all by introducing PASO, except to discourage organizations in the ordinary course from doing what they ought to do, which is to promote works of art.

VICE-CHAIRMAN TONER: Some of the commenters have suggested that maybe one way to get at this is to use the press exemption for this area; that the Commission has previously ruled that documentaries are within the press exemption, and of course under Phillips Publishing you have the theory that any advertising, any media advertising is also within the press exemption. How would you feel about us going down that road versus the road we've just talked about?

MR. BAUER: First of all, if it were the only way the Commission could see--which I would hope not be the case, I would hope was not the

case--the only way they could see to getting the substantive result I would hope for here, then of course it would be acceptable. That is to say it would be a good result, better than the worse result. I do, and have expressed this concern also with respect to what we're trying to do with internet regulation, I am somewhat concerned about the heavy over-use of the media exemption to permit the Commission to avoid in some cases coming really directly to terms with particular issues that the statute presents.

The media exemption has its weaknesses, one of which of course is that it is ultimately a provision of the statute that calls for a case-by-case determination, that puts the Commission in the position of policing which organizations will be bestowed with that particular grace and which won't. And that is a procedure which I think is inherently dangerous, and what it does is, it converts an exemption that was designed to provide broad leeway for journalistic activity into an exemption that brings the government directly into

the process of determining which organizations  
ought to qualify as press organizations or engage  
in activities that are considered press activities.

VICE-CHAIRMAN TONER: And, Mr. Simon, as I  
understand it--and I apologize, Mr. Chairman, this  
is my last question--you are comfortable with the  
proposed exemption for works of art as we had in  
the NPRM, but the only difference is, you would not  
require it to be conditioned on PASO. Is that  
fair?

MR. SIMON: Yes. We suggested some  
modification to the proposed exemption that really  
in my mind tries to build upon the analysis the  
Commission recently used in MUR 5474, which was the  
Fahrenheit 9/11 MUR, where I think the Commission  
did a fairly rigorous analysis to show that this  
was bona fide commercial activity and therefore not  
within the scope of the statute, building on a line  
of doctrine that the Commission had previously  
developed through advisory opinions.

You know, if you do--I mean, we're not  
advocating this exemption. This is Bob's proposal.

But if you do go down that road, it seems to us that's a better way to frame it. And for reasons that we explained at length, we do not think you should put a PASO limitation on that exemption.

VICE-CHAIRMAN TONER: And if we issued final rules with this kind of exemption, without a PASO limitation, do you believe in your view it would be legally permissible? I understand you're not advocating it, but do you on balance--

MR. SIMON: Yes. I mean, overall I think I'm sort of neutral about whether you should do it or not, but I think you have the authority to do it. It would be lawful, yes.

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I'm very disappointed the Mark and Judy didn't come, too. We would have the entire political law group if we added some chairs around the table.

I want to follow up on the last line of

questions, because it actually sounds like the two of you on my right, the left-hand side of the table, are actually more or less in agreement on this promotional advertising exception, which in and of itself is pretty remarkable. But, you know, we had a hearing this year where, Mr. Simon, you actually said nice things about a Commission proposal. Now you're agreeing with Mr. Bauer. I don't know. Are you going soft on us?

MR. BAUER: Yes, but please note, if I may, that he said (a) he was neutral and (b) he was sort of borderline on the question of whether it was lawful.

[Laughter.]

COMMISSIONER WEINTRAUB: Right. And I want to go back to that, because I think it's a charming idea, but where in the statute do we have the authority to create an exemption for commercial activity or ordinary course of business activity without importing the PASO standard, when the statute seems to say we're not allowed to create any exemptions without importing the PASO standard.

How do we get there?

MR. SIMON: Well, the way I read the statute, it's not that you issue exemptions that are constrained by the PASO standard as they apply to the regulated community. It's that you issue exemptions that in your judgment will not allow PASO ads to be run under the scope of those exemptions.

COMMISSIONER WEINTRAUB: Well, suppose we said in our judgment grassroots lobbying ads don't implicate PASO, so we don't have to incorporate that?

MR. SIMON: Well, I mean, that would be the theory of your issuing a grassroots lobbying exemption, and that was the basis on which the Commission decided not to do so, because it said that all the exemptions, all the drafted exemptions that were before you, in the Commission's judgment would have allowed PASO ads.

COMMISSIONER WEINTRAUB: But do we have the authority to do that?

MR. SIMON: You don't have the authority

to issue an exemption which you conclude would allow PASO ads. You have the authority to issue an exemption if you believe that ads run pursuant to the exemption would not PASO candidates.

COMMISSIONER WEINTRAUB: So we could write an exemption and put in the E&J--the exemption would say nothing about PASO, but we would write in the E&J, "We don't believe that this would PASO any candidates, and that's why we're doing this."

MR. SIMON: And I--

COMMISSIONER WEINTRAUB: And you wouldn't sue us over that?

MR. SIMON: No, no, no. Well, it depends on what we thought about the exemption. Indeed, that is the basis for challenging the exemptions we did challenge, because we went to court and we said, "Hey, they wrote this exemption. It didn't have a PASO standard. They must have thought it wouldn't allow PASO ads, but we think it does." And I think that's the principal basis on which the Court struck down the exemptions.

COMMISSIONER WEINTRAUB: Go ahead. You're

leaning towards the mike, Bob.

MR. BAUER: I want to emphasize, and I think this is what's in your line of questioning, I want to emphasize the Commission clearly has the authority, it clearly has the authority to decide that in the factual context in which we're discussing the art promotional exemptions, that an "ordinary course" requirement sufficiently addresses the statutes concerned with infection by PASO. In other words, these types of activities, if the "ordinary course" requirement is in force, will not produce PASO.

The Commission also has precisely that authority in making judgments about grassroots lobbying. It has precisely that authority in making judgments about 501(c)(3) grassroots lobbying.

What I detect in Don Simon's line of argument here, across all the issues that we're talking about--and I want to say this gently because I don't want him to withdraw support from the art promotional proposal--is a wish to have it

both ways, because it seems to me that the theory that he's embracing is a theory that ultimately could lead the Commission to a result on 501(c)(3) grassroots lobbying that he doesn't like.

But ultimately I think it's not that the Commission has to tack formally the PASO standard onto every exemption under Clause 4. It has to make a decision, a reasoned decision, in creating an exemption, that a threat of PASO is not presented by the activities that it is addressing.

MR. SIMON: Yes, I do agree with that. I mean, I agree with that--

MR. BAUER: Not-- [Laughter.]

MR. SIMON: Let me say I agree with that form of analysis, but let me apply it to the (c)(3) context, because I think Bob misapprehends what I'm saying.

If you exempt (c)(3)s across the board, as you did, on the theory that, well, under IRS law (c)(3)s can't run ads that PASO a candidate--

COMMISSIONER WEINTRAUB: What if we have some other theory?

MR. SIMON: Well, but the original theory of issuing the (c) (3) exemption in 2002, according to the E&J, was (c) (3)s can't run ads that PASO a candidate. But they can.

COMMISSIONER WEINTRAUB: No, I know what you're going to say. I don't want to argue about that, because I agree with you on that, or at least I understand what the arguments are, and I don't think it will add much. I don't want to waste my time on it.

But my point is, suppose we came up with another reason? Say it wasn't premised on the tax status. We said, we made some reasoned determination, and we came up with some evidence--I don't know where it would come from--that this didn't pose the risk of PASO. We can do that?

MR. SIMON: You can issue, you have Clause 4 authority to issue any exemption to Title II that is appropriate, consistent with Title II, and would not permit communications that PASO a candidate.

COMMISSIONER WEINTRAUB: But who decides what's appropriate?

MR. SIMON: In the first instance you do,  
subject to judicial review.

COMMISSIONER WEINTRAUB: And if you don't  
agree, you'll sue us.

MR. SIMON: Well, yes.

[Laughter.]

MR. SIMON: That's the way it works.

COMMISSIONER WEINTRAUB: All right. Karl?

MR. SANDSTROM: I am somewhat at a loss,  
and maybe when I was on the Commission I was  
somewhat at a loss. I look at this book, and I  
would like to know--

COMMISSIONER WEINTRAUB: Put that book  
away. I don't want to look at that.

MR. SANDSTROM: --how can you promote this  
book and not be promoting the author of this book?  
How can Miramax put out advertisements for  
Fahrenheit 9/11 and not be promoting the message of  
Fahrenheit 9/11? Is it the selection of pictures  
that is used?

Now, I may put in the record wonderful  
pictures that might be used in those ads for this

book. Here's one with Senator McCain with President Nixon. I'm not sure if that--

COMMISSIONER WEINTRAUB: Opposes, and the other one supports, right?

MR. SANDSTROM: This one with Barry Goldwater, which I imagine is supportive, so maybe they balance out. That's the reason they used both. It is now a balanced ad. And here is one with Feingold, and we all have our views on whether that promotes, attacks, supports or opposes. Here's one with his grandfather and his father. And I just don't understand how, you know, you can get there.

COMMISSIONER WEINTRAUB: I agree with you, and I think that partially underlines Bob's point that, you know, we shouldn't import the--that's exactly why we shouldn't put the PASO standard in, because it would obviate the entire exception.

MR. SANDSTROM: That's why we put in the 501(c)(3), because it would obviate--

COMMISSIONER WEINTRAUB: Right. Now, let me ask you a question, and I don't mean this to be

as flip as it's going to sound. But if you wanted a grassroots lobbying exemption, why didn't you do it in 2002 when you were sitting in my chair?

And what I mean is, you know, back then obviously the subject came up, you thought about it, you tossed around ideas, and you decided against it. What has changed now, other than the fact that you're sitting out there and I'm sitting up here?

MR. SANDSTROM: Maybe not a lot has changed. I looked around at my colleagues and what they were willing to do, and whether there was any desire at that time to try to define what "promote, support, attack or oppose" means, and there was no desire, and probably for good reason, because the standard is so inherently vague.

And therefore, if you're going to come up with a grassroots exemption, you would need to have some definition, something similar to what the Wisconsin Right to Life is looking for in the Supreme Court case, some spelling out of what criteria you're going to employ. There was no

desire, and maybe because they didn't think it could be achieved, to come up with such criteria.

And I think probably coming up with such criteria is, from my own perspective, rather dangerous, because it really means--because you look at promote, support, attack or oppose, PASO--a little diversion here. You take El Paso, which is a salsa, it comes in mild, medium, and hot, depending on the amount of pepper.

And I am afraid that the PASO standard comes down to looking at how much pepper there is in an ad. And the pepper can be introduced, because there are several different varieties of pepper, it can be introduced in the visuals, it can be introduced in the music, it can be introduced in the words employed.

And that is why, you know, this Commission, when we looked at that, were afraid that we were becoming a Legion of Political Decency, and the only way we could determine whether a particular ad crossed that line was to look at the ad itself in each instance, which

became impossible to do.

COMMISSIONER WEINTRAUB: I appreciate what you're saying, and I love the salsa analogy. The problem is that, as your colleague just stated, a lot of people think that it's a vague standard and they can't figure out what it means. So there's a bunch of nonprofits who say, "Well, if you're going to use this PASO standard"--which in some fashion, whether it's explicitly in there or impliedly we make a determination, we seem to have to have to do--"we don't know what it means, so you need to give us some guidance on it."

And it seems to me that whichever way we take, you're right, there are dangers in defining it but there are also dangers in not defining it, in that people will just stop doing things because they don't know what it means.

MR. SANDSTROM: And precisely that's why I think you need to define it, and if we don't like your definition, let us challenge it in court.

COMMISSIONER WEINTRAUB: No, but you just said it was dangerous to define it.

MR. SANDSTROM: That's why I thought the Commissioners didn't. I think there is danger in this legislation, you know, and I guess some people haven't appreciated the danger I see in this legislation which would suggest that an administrative agency should sit in judgment of particular ads.

COMMISSIONER WEINTRAUB: Mr. Chairman, I know my red light is on. Can I have one more question?

CHAIRMAN THOMAS: No. We'll have time later on.

Commissioner Mason?

COMMISSIONER MASON: Maybe it's being the non-lawyer on the panel, but I'm just baffled by some of the claims that are being advanced here. I don't have any doubt that the fellow who made Fahrenheit 9/11 made it because he didn't like George Bush and, among other things, he wanted him defeated for reelection.

And Commissioner Sandstrom has brought up the bio. You know, I'm familiar with campaign

biographies that go back into the early 19th century. It's a well-revered American tradition. In several instances, I think in the case of Calhoun and Lincoln we have documented evidence that the candidates themselves wrote or contributed to the bios which were then published under somebody else's name, so the ghostwriters were there then, and they were clearly intended to support the campaigns.

And so I just--there's got to be something else going on there. Most of the time we cloak this in First Amendment language, and I don't know what it is about making a profit that singles out something for special protection under the First Amendment. I don't think necessarily it ought to be subject to greater scrutiny.

And so I just have to say, you know, I'm happy to have it, I suppose, but I really lack an understanding of why an ad, a book which has wonderful pictures of a candidate with an American flag and praises, justifiably praises his service to his country, would not be viewed as promoting,

supporting, attacking or opposing that candidate.

Is there anyone who cares to comment?

MR. BAUER: If I may, I understand the bafflement, although I have to say I think that the cause of your discomfort is the statute, and the proposed exemption is simply a way of dealing with the discomfort created by the statute. I mean, the statute, as you know, and particularly with the very strong gloss put on it by McConnell, is obsessed with this notion of circumvention, so we are continuously now chasing after various communications to ferret out a purpose of influencing elections.

Of course the books have it, and Fahrenheit 9/11 was part of an overall campaign by Mr. Moore to contribute to the defeat of George Bush. He never made any bones about it. That was exactly what it was for.

But the statute forces us then to be concerned when corporate dollars are spent to distribute compatible communications to the public, that is, communications compatible with that

purpose, to determine whether in fact they are illicit corporate communications to influence the outcome of elections, or electioneering communications specifically. It forces us in that direction.

And so the exemption shares in the zaniness, if you will, of the statute, to the extent that it has to address that concern of circumvention. I don't disagree with you that focusing on profit-making activity, ordinary course activity by an advertiser, seems an odd door to leave by, but it seems the only door that at the moment we can open. But I don't think that we were imprisoned in the first place by our zaniness. We were put there by the statute.

COMMISSIONER MASON: Maybe I can get Mr. Simon to comment, because, to give another example, when Congressman Shays made the comments that you referred to about a 501(c)(3) exemption, he said, "Well, now, of course we don't mean candidates appearing in a church." Well, it is transparent to me that candidates who appear in church,

particularly in televised church services, conveniently the last weekend in October every other year, are there campaigning. It's the only reason they are there.

And every two years you can go out and read a wrap-up just before the election of which candidates campaigned in which churches right before the election. And for whatever reason, people--you know, the IRS doesn't want to come down on that, people don't want to come down on that. And so we're going to allow that, but not some of these other things.

But on this books and movies point, I just want to get an understanding of why it is--and to take it back, for instance, to the context of this proceeding, the Circuit Court said, "Well, gosh, we can't have this *per se* exemption for PSAs, because then all you would have to have is a willing broadcaster, and you would have a huge circumvention." Well, why is it that all you would have to have is a willing publisher, who is willing to go out and publish a book and run these

wonderful ads, and that would be a willing circumvention?

MR. SIMON: Look, I mean, I think this operates in the broader context of the way the law has evolved. Corporations are not prohibited from making expenditures for the purpose of influencing federal elections under 441(b) unless they contain express advocacy. In other words, the Supreme Court for constitutional reasons has narrowly construed the ban on corporate spending.

COMMISSIONER MASON: The legal provision we're talking about here is not 441(b). It doesn't include express advocacy. In fact, it was presented to the Court and blessed by the Court as a replacement for express advocacy.

MR. SIMON: Yes, so the general principle is that corporations actually have a lot of leeway to spend money for activities and books and so forth that we all might think really have the motive of influencing federal elections, but don't contain express advocacy.

Now, Congress in a very narrow set of

circumstances passed a different bright line test to cover any reference to a candidate in certain media--not in books, not in all media, but in certain media--in what Congress deemed to be a narrow time frame. And that's a different bright line standard that operates, I think, pursuant to the general Supreme Court directive in this area, that you can regulate entities like corporations--not political parties or 527 groups but corporations--you can regulate those kinds of entities only pursuant to bright line standards. And I think that has to be the guiding principle here.

COMMISSIONER MASON: Well, that's fine, but why should book ads be different?

MR. SIMON: Why should--

COMMISSIONER MASON: Why should book ads be different? Why should Random House's purchase of a broadcast ad in the last 60 days before the general election, to promote a book, a biography of a candidate, be any different?

MR. SIMON: Well, I mean, building on a

line of doctrine that the Commission has developed over a long period of time, the Commission has said even if there is express advocacy, if there are a lot of indicia that that express advocacy--like somebody who is preparing buttons or T-shirts that contain express advocacy--if there are indicia that that is being done not for political purposes but for commercial purposes, and that's not a content test but a kind of contextual test about what the purpose going on is there, then the Commission over a long period of time has exempted that from the law.

COMMISSIONER MASON: Under a purpose of influence standard.

MR. SIMON: Well, under a purpose of commercial activity standard. And I think that would be the justification for what Bob is proposing.

MR. BAUER: If I may just add one thing here--because we're failing with you, clearly, from your facial expressions here, and I don't want to lose you on this issue--I think we ought to say

precisely what's going on here. What's going on here is similar to what you're facing in your internet rulemaking, and that is, to answer the question directly, we're trying to find a way to make sure that there are certain categories of expression that don't get overwhelmed by the enforcement of this statute. They just don't get swamped, if you will, by what this Commission is doing here.

One such category is free political expression, which is what is implicated in what you're hearing from bloggers about the internet rules. And another category, quite frankly, is artistic expression. Now, in different cases there are different tools at hand to do the job people want to do. The underlying values are what happen to be driving the debate.

The tools may be a little bit awkward. As you point out, we end up, in effect, using a commercial standard to protect artistic expression, which has a certain sort of awkwardness built into it, to say the least. There's a little dissonance

in that formula, but it's the only tool that we have at hand, because at the end nobody wants to believe that this statute in this country is going to prohibit artistic works from being promoted over any period of time, in any year, for however limited period of time, because our values suggest to us that that's not what political regulation was designed to do and it shouldn't be permitted to do it.

COMMISSIONER MASON: So the result is driving our analysis. That's what's going on, and I understand it.

My time is up, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. Don and Bob and Karl, welcome. I'm glad to see you all. I actually have a few comments and then just a real brief question.

The last Chairman indicated he hoped he would see the day that he wouldn't have to have issues discussing Title II before his term ended. For some of us, the term is going to end just a little

bit quicker, and we believe we will not see that for sure, so we're mindful of this.

In relationship to Bob's comment about the issue, about the pending matter before the Court and whether we should hold off or not, I take his point, and I think it's certainly an arguable point. I'm a little uncomfortable. I think one of the things is, it presupposes something that we don't know. I don't know what the Court will do. I have listened to experts come before this Commission for years, explaining to me how things are going to turn out, and they have not always turned out that way, so I don't know that I know the answer about what the Court would do.

The Commission has routinely been criticized for not proceeding. I was sorry to hear the correct recitation of the issues we have resolved on, as you went over some of them, and the time frame it has taken. So I think it's fair to say that the Commission is probably not in the best position to want to hold off, waiting on a pending case before the high court. I'm a little bit

uncomfortable with that.

I would like to go back and just ask Don, because you were in the middle of a response to Commissioner Weintraub--I don't know whether that's the one she wanted to go back to or not--but on the (c) (3) issue you were making some comments. Would you like to follow up on that?

MR. SIMON: Well, yes. I'll try to make the one point I was aiming for.

Again, in my view you have authority under Clause 4 to issue an exemption from the definition of electioneering communication if you make a judgment that the exemption will not permit ads that promote, support, attack or oppose a candidate. The problem with the (c) (3) exemption is that, under what I believe the IRS law allows for (c) (3)s--and you'll have a subsequent panel of people more expert in that than I--(c) (3)s, in the guise of lobbying, which they are permitted to do, can run ads that I think do meet the PASO standard.

And therefore, if you exempt (c) (3)s, you are acting outside your Clause 4 authority because

you are creating an exemption that does allow public communications that PASO a candidate, and that is the boundary around your Clause 4 authority. That was the point I was trying to make.

COMMISSIONER McDONALD: I appreciate that. I wanted to let you have an opportunity to finish that thought. I'm a little bit like Commissioner Mason. As I sit here, and I sit here often, I'm interested in specifically the book that Commissioner Sandstrom has brought to us today. And this is, this is just a standard. We'll see a ton of them, I'm sure, in short order. Any thoughts on that? That appears to be--

MR. SIMON: Well, I mean, the book is not an electioneering communication. The book itself is not within the scope of Title II, so we're sort of one step abstracted. We're not talking about the book. We're not talking about creating an exemption for the book, because the book isn't subject to regulation under Title II in the first instance. We're talking about a TV or radio ad

about the book, and only if that TV or radio ad mentions a candidate, refers to a candidate, and is run in the immediate pre-election period.

Now, you know, my understanding from reading the MUR that was generated off the Fahrenheit 9/11 controversy was that the promoters of that film simply did not engage in electioneering communications. Whatever advertisements they had for the film that were broadcast ads either ran prior to the window or, if they ran those ads within the window, they did not reference a clearly identified candidate.

Now, you know, I think fundamentally this then comes down to, is that constraint on someone promoting a film or a book so unreasonable a constraint--notwithstanding the fact that this set of commercial operators seemed to be able to work with it--is that constraint so onerous a constraint that you should create an exemption for that kind of promotional ad?

And, you know, again I think if you decide to do that, you need to put sufficient boundaries

around it in terms of a whole set of criteria that you have used in analogous situations in the past, about defining what bona fide commercial activity is, such as the entity is in the business of doing that kind of activity, of promoting books or movies, it's following the usual and normal course of business, it's following industry standards, it's engaging in arm's length transactions. You know, all those sorts of criteria you have used in the past to try to define bona fide commercial activity. And I think you could import those standards in this what I see as a very limited context here.

COMMISSIONER McDONALD: Thank you.

CHAIRMAN THOMAS: Office of General Counsel? Mr. Norton?

MR. NORTON: Thank you, Mr. Chairman.

Mr. Simon, if a film distributor ran ads during the relevant electioneering communications window and targeted the relevant electorate, they are in the business of distributing films and they meet your various commercial activity and bona fide

standards, but the ads for the film--the name of the film is "The Lies of Senator Jones" and Senator Jones is the candidate, could the Commission--I mean, I think we would all agree that that ad, while it may have other purposes, would have the effect of promoting or supporting a candidate. Could the Commission make a reasoned analysis that that communication does not PASO Senator Jones?

MR. SIMON: This is Bob's exemption. You should ask him the hard questions.

[Laughter.]

MR. NORTON: No, I'm asking about your exemption, the commercial, the bona fide, your proposal.

MR. SIMON: Well, I mean--

MR. NORTON: Does it satisfy that?

MR. SIMON: I'm sorry. I didn't understand that?

MR. NORTON: I'm talking about an ad that would satisfy your concerns. It's about a commercial ad.

MR. SIMON: Right, right.

MR. NORTON: The title of the film is "The Lies of Senator Jones." Could the Commission make a reasoned analysis that, even though your proposed exemption would cover that ad, that that ad doesn't PASO Senator Jones?

MR. SIMON: Well, you know, I think that's the hardest question. I think if the film was produced by a company in the business of producing films, it was not the film of an advocacy organization, all the indicia about the development of the film and the distribution of the film were indicative of normal commercial activity--I mean, again what I'm trying to do here is track your analysis in the Fahrenheit 9/11 context, where you applied all those standards.

MR. NORTON: As Commissioner Mason pointed out, what we were dealing with was the definition of an expenditure there, and the statutory definition is "for the purpose of influencing an election." And so what we were distinguishing between is activity for the purpose of influencing an election and activity for a commercial purpose.

That's not the test here.

MR. SIMON: Yes. I mean, I think those tests are closely related, though they are different. You know, again, if you think that the exemption would likely or reasonably, foreseeably lead to PASO communications, then I don't think you have the authority to do it. But I think that's the nature of the judgment you have to make.

MR. NORTON: Let me turn the question around just a little bit for Mr. Bauer. The courts have held us to a high standard, someone said a quite exacting standard in terms of record evidence to support regulations, and in particular exemptions. What record evidence does the Commission have or, in your view, does the Commission need in order to justify an exemption for ads for books, movies and plays, and to undertake that reasoned analysis that you and Mr. Simon agree needs to be undertaken, that such an exemption would not permit communications that PASO a federal candidate?

MR. BAUER: Well, first of all, I think we

can all agree that courts will very frequently assign a procedural defect to what they believe to be a substantive shortcoming. They'll allege that you haven't discussed something sufficiently because they don't like the way you came out. So I'm not sure you can completely satisfy the courts with any explanation unless they also like your rule.

Having said all of that--and that also applies to the litigious side of the equation here --but having said all of that, there is already before the Commission a fair amount of discussion, both in this hearing but previously, as Don has pointed out on a number of occasions, in considering the Fahrenheit 9/11 episode, that would suggest to the Court that a genuine, concrete issue was presented to the Commission that it had to grapple with.

And the point I was making to Commissioner Mason was, I really believe a Court would understand that this agency needs to figure out where the regulation of illicit political activity

ends and the protection of artistic activity, the production of books and movies and plays on a protected basis, begins. I think a Court would understand that.

So as long as the Commission identifies what the issue is, reviews the history of its deliberations, discusses exhaustively the various choices that it was presented, and then explains clearly why it was it chose, among the alternatives, the alternative that it did eventually adopt, I think the Court would be satisfied. But again, there is always the possibility the Court won't like the rule, at which point they'll say you didn't think about it hard enough.

MR. NORTON: Just to follow up on that, in your view it isn't necessary for the Commission to do any sort of review as to the ads that have run during the 60- and 30-day window prior to an election, to make some reasoned analysis as to whether those advertisements promote, support, attack or oppose a federal candidate?

MR. BAUER: No, I don't think you can, because for one thing, as we all know, the PASO standard is undefined, so you will be making calls on the basis of what? On the basis of no defined standard, with no opportunity on the part of those who made the ads to respond. So what sort of record evidence would that be? It would just be sort of a series of judgments you make along the way, probably ultimately shaped by the kind of rule that you think you're going to get out of it.

MR. NORTON: Mr. Sandstrom, I wanted to ask you a question about the (c) (3) exemption, and again focusing on this need for a factual record. What evidence is there that (c) (3) organizations availed themselves of the exemption in the past election cycle? And of course if they availed themselves of that exemption, that would support, I think, a decision--a need for the exemption, and support Commission action.

MR. SANDSTROM: I think you actually have identified that the record is probably rather sparse. I'm not sure to what extent, you know,

that the burden should be on OMB Watch, a small organization, to go out and try to gather this information. Taking away the exemption may have not been quite as important last time, when the "for a fee" requirement was in, but certainly with respect to wanting to appear on public access channels, programming even on C-SPAN, which no editorial control is being exercised other than the coverage of a program, now it's probably even more of a serious issue.

And one of the real dangers here, too, as we look at this saying "Well, what is the problem?" is we are going to have more and more ways that people are going to use the medium to try to communicate. You see on-demand programming and other things coming over satellite and cable systems, and we're going to have to confront whether you're even going to have your programming be delivered by those systems.

And then there's the whole problem, too, that yes, most (c) (3)s are rather financially constrained, so they can't afford television,

radio, but regrettably already eight states have expanded the electioneering communication to other forms of communication. So by establishing this principle with respect to television, radio, and you say "Oh, it's not particularly serious because it may only affect a few people's right to speak rather than a large number's right to speak," that now is being used as a basis in states to go ahead and expand this.

And I think the right to speak, whether it's one, a half dozen, a hundred organizations or a thousand, is a very precious right, and the right to petition your government is a very precious right, and it probably shouldn't turn on precisely how many organizations had the financial resources in the past cycle to actually engage in that activity, when the alternative was to go ahead and use other means of communication--less effective, because that's what this provision does, drives you into less effective forms of communication.

MR. NORTON: Thank you. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you. We'll attempt another quick round. I was just going to maybe follow up on that point, Mr. Sandstrom. In OMB Watch's comments you've got a reference to the PIP program at the IRS that made some effort to examine whether there might be problems of intervention by nonprofit groups, and you have identified some 80 that resulted in an apparent investigation by the IRS coming out of the 2004 cycle.

And I'm just kind of wondering whether maybe that sort of feeds into the question that was just asked. Maybe, coming out of the more recent election cycle, we are starting to see some evidence of potential situations where 501(c)(3) groups are getting into some sort of activity that the IRS at least is starting to investigate. Now, I don't know the outcome of those, but maybe you can help us.

MR. SANDSTROM: In fact, it may have more to do with people complaining about the activity than the change in the nature of the activity, because more and more focus is being placed on

this. But remember, a 501(c)(3) goes and applies for an application, has that application granted, operates year-in and year-out, you know, subject to severe penalties. Some can be imposed on officers of that 501(c)(3) if they engage in activity that is in that gray area, so they run a risk.

And that's why essentially most of them forego it, and that's why being able to have the blanket exemption actually promotes, for the vast number of organizations, the ability to continue to petition their government on issues of importance. And trying to find out the one or two or three that may have taken advantage, you know, of the lack of IRS oversight and engaged in this--but where is the record that they were greatly influencing federal elections? Where is the record of any sort of corruptive influence? Where is the record of coordinating this with candidates? I think that's what is missing here, is that there is--

CHAIRMAN THOMAS: Maybe we need to have the IRS come talk to us about their program.

MR. SANDSTROM: They would come in and

they would essentially say, "Where is the problem?"

CHAIRMAN THOMAS: Thank you. I apologize.

I skipped over the Office of the Staff Director.

Tina, did you have any questions you wanted to raise? Please feel free.

MS. VAN BRAKLE: I do have just one question for Mr. Sandstrom.

I know that you support a 501(c)(3) exemption. You also do not support a PASO standard. But you said, I believe you testified that if the Commission does incorporate a PASO standard in the definition, we do need to define it. We need to define what PASO is. And I just wonder if you would be willing to work with the Commission in providing your ideas of what PASO does mean, or will you wait until you can take it to court, to define it there, challenge it there?

MR. SANDSTROM: Now, we think the blanket exemption was preferable to coming up with whether a PASO standard--of course a term that's not understood by the thousands of organizations that may want to engage in this, because they have no

idea. "Oh, it has been PASOed," I'm not sure if that has made its way into the Oxford English Dictionary. I will look next edition to see if it has.

But the problem for us is that if you go down that road, you're going to get a lot of defining, which I think if you create any exemption that turns on it, you have to define it. People have to be given fair notice of what's legal and what's not legal. And that's very important for these organizations, many of which cannot afford attorneys to try to vet all of their proposed ads, and certainly don't have the opportunity to send their ads and have this Commission vet their ads.

So the standard has to be very clear. And the problem, when you start going down that road, is that there is real danger that you are going to come up with a standard that essentially prevents people from effectively lobbying and petitioning their members, and this standard then applies to other sections of the law, too, so I think you have to be very careful.

But, look, I would prefer some standard that is very narrow. What Congress was getting at were a particular type of communication, and it should probably require reference to the fact that the person is running for office, that there is an election, and essentially focusing on what actually--you know, whatever that court said, that any reasonable person could determine what it is, or at least reasonable political party people.

Tell us what factors they're looking at.

And then, am I willing to work with the Commission? Always. Whether you accept my ideas, probably seldom, but I'm certainly willing to work with you.

MS. VAN BRAKLE: We'll take Mr. Bauer's ideas also. Thank you.

CHAIRMAN THOMAS: Vice-Chairman Toner?

VICE-CHAIRMAN TONER: Thank you, Mr.

Chairman.

Mr. Simon, I just wanted to follow up with you because I have found noteworthy your--I know you are not endorsing it--but your view that it

would be possible legally to fashion an exemption for works of art, the advertisement of those works of art. One of the issues that we've grappled with is, what do you do with start-up ventures? What do you do with producers of films or books or other works of art who don't have a long track record doing that? Can they get the exemption?

And at page 35 of your comments, as I understand it, your view is that they could. You say--I'm just reading here--"We believe that the bona fide commercial activity test we propose could extend the exemption to first-time distributors of works of art who provide evidence to the Commission that they are engaged in a bona fide commercial endeavor." Is that fair?

MR. SIMON: Yes. I mean, I do think that the General Counsel correctly identified the question before you, which is whether, applying a reasoned analysis, you think the bona fide commercial activity test sufficiently protects against PASO ads being run subject to the exemption. I think that's the question.

You know, again I would draw on your own jurisprudence in applying a commercial activities test from prior advisory opinions, to come up with the criteria about evidence of that kind of bona fide commercial behavior. I guess from my point of view it wasn't per se disqualifying to have a new venture, but it seems to me the quantum of evidence you would need would be higher.

VICE-CHAIRMAN TONER: And I do think this is an important point. I mean, in your view it wouldn't be appropriate to have one set of rules for Miramax, Warner Brothers and others, and another set of rules for first time start-up movie producers; that for all of those people the question is, at the end of the day, is this bona fide commercial activity?

MR. SIMON: Yes, yes.

VICE-CHAIRMAN TONER: Mr. Sandstrom, I'm interested in your thoughts. Mr. Simon doesn't think much of the FAIR ad, you know, the ad that was run in reference to Senator Abraham, and the view basically that it was a sort of a sham issue

ad that the Brennan Center and others sort of focused on in their studies and that BCRA was looking at. Do you agree with that, or do you think that advertisements such as this ad by FAIR should be permitted to be aired by a 501(c)(3) within the 60-day windows, within the electioneering communications windows? What's your sense on that?

MR. SANDSTROM: 501(c)(3)s are constrained in their enjoyment of their preferred status, in the ability to receive tax-deductible contributions, by the public intervention standard--

COMMISSIONER McDONALD: Karl, I just don't think we're picking you up.

MR. SANDSTROM: Certainly the 501(c)(3)s, because of their preferred tax status, their ability to receive tax-deductible contributions, have to avoid intervening in elections, and those who do understand that there are penalties and sanctions that the IRS will impose on them if they cross that line, including potentially the loss of

tax-exempt status and individual penalties being applied to officers. And so for the most part that serves as a very, very strong deterrent.

So the question it really comes down to is, if most of the activity out there is legitimate, most of the activity, shouldn't we actually create the presumption of legitimacy here, and allow those rare cases essentially to go punished by the IRS? Because otherwise you're actually deterring a lot of legitimate activity. It's almost like, you look at the criminal system, Is it better to let the guilty go so as not to wrongly imprison the innocent?

VICE-CHAIRMAN TONER: If I could ask you, if I could just ask you, your bottom-line judgment, if we were to conclude that no (c) (3) in this country could run ads in the last 60 days before and election that reference a federal candidate, what impact, in your view, would that have on charitable lobbying activities, lobbying activities by charitable organizations?

MR. SANDSTROM: I think, you know, what we

see here is, one, it's going to, because of the loss of the "for a fee," they're going to be very careful about any appearance that's going to be broadcast, so even their broadcasts over the public access channels, over the C-SPAN type of channels that exist, they essentially will censor themselves. If they do have the resources to try to push an issue that is before Congress at the time, they're going to have to do it in a way that's not as effective, and there's a loss in that regard.

VICE-CHAIRMAN TONER: Would it, in your view, so seriously erode their ability to petition the government as you were talking about earlier?

MR. SANDSTROM: Well, of course.

VICE-CHAIRMAN TONER: Thank you. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Following up on that, Mr. Simon, do you have any concerns about the administration, I don't

mean this administration in particular, but any administration or ruling party in Congress taking a look at these rules and saying, "Great. We are now going to start bringing up all of our controversial proposals just when the electioneering communications window kicks in, whether for primaries or for general elections, and that way we know that this entire range of labor organizations, nonprofit organizations, are going to be hamstrung in running ads to try and defeat these proposals." Not sham issue ads, real issue ads, where they care about the legislation that's being proposed, or the administrative proposals, and then they can't do anything about it.

MR. SIMON: Well, of course real issue ads can be run at any time up to the day of the election.

COMMISSIONER WEINTRAUB: Not if they mention a federal candidate.

MR. SIMON: Not if they mention a federal candidate. But you can certainly criticize an issue on the floor of the House or Senate, and you

can certainly motivate people to take action  
against an issue--

COMMISSIONER WEINTRAUB: But you can't say, "Your Senator is about to vote to deny you the right to X, Y or Z. Please call him and tell him not to do that."

MR. SIMON: That's right. That's right, and that's a judgment, on balance, that Congress thought was an acceptable trade-off. You know, your hypothetical was--it came up all the time, over many years, in the debate on Title II. You know, again I think that's the trade-off that Congress made, and a decision on that trade-off under the First Amendment was then made by the Supreme Court.

COMMISSIONER WEINTRAUB: I want to go back to focus in on the 501(c)s, because I think that part of what is underlying the promotional exception for artistic--and I like the way we call it "artistic," you know, some of these things are not necessarily all that artistic--you're not writing a screen play, are you, Mr. Bauer?--is the

sense that, although it might have some incidental effect or maybe not so incidental effect on politics, so that's not really what that activity is all about; that whether it's commercial or whatever, commercial or artistic, its primary motivation, major purpose if you will, is something other than influencing an election.

And I think that that is also the argument that the (c) (3)s make, which is that yes, technically it may be possible--I understand the argument that the IRS rules may not make it impossible for them to engage in the kind of activity that would PASO a federal candidate, but that is not the nature of their business, going out and PASOing federal candidates. The nature of their business is to do cancer research or whatever. And I actually am far more concerned about protecting the cancer researchers than the Michael Moore's of this world, frankly.

The Cancer Society, which you brought up, in their testimony points out that there are compliance costs, particularly when you're talking

about organizations that are not part of our normal regulated community. And I think that was part of the motivation for crafting a 501(c)(3) exemption, was to leave people off the hook, so that people who don't normally have to worry about our rules can continue to not worry about our rules.

And there are compliance costs in their having to worry about our rules, and what the Cancer Society said was, "You know, this comes out of the money, the money that we have to spend on compliance comes out of the money that we spend on cancer research." Now, I could ask you the sort of--I could phrase this in the inflammatory way and say, "Do you really think that preventing circumvention of BCRA is more important than finding a cure to cancer?" That's sort of cheap way of asking the question. But I think, more broadly speaking, do you have any policy concerns about imposing these kinds of costs on a vast array of organizations that really are not in the business of influencing federal elections?

MR. SIMON: Well, I mean, let me say a

couple things. First of all, I think the kind of premise of your argument proves too much, because if the premise is that, "Look, you know, this group is really not trying to influence the election, it's really trying to influence public policy and do lobbying," you know, that's true for (c)(4)s and that's true for for-profit corporations.

And so then we've done away with the bright line test of Title II, and then the whole thing becomes, you know, if people are really in the business of just trying to influence legislation, they shouldn't be caught up in Title II. But then we have functionally repealed Title II, and so I just don't think that's a road you can go down, that line of reasoning.

In terms of compliance costs, look, you know, the virtue of Title II as a constitutional matter is that it is a simple, clear, bright line test. It is not the PASO test. It is not a test where you have to go out and hire Bob, at whatever he charges per hour, to review every one of your ads and decide whether it's lawful or not. The

point of that, of the way Title II was drafted, was to make it easy for people to comply.

Now, you know, are the costs going to be zero? Probably not, but again, the rule was enacted and upheld and sustained because it is the kind of clear test that should be relatively simple for groups to comply with.

COMMISSIONER WEINTRAUB: And let me say that I actually like the electioneering communications provision for exactly that reason. It makes my life very simple. It would make my life even simpler if we had zero exceptions altogether, and just sort of stuck with the bright line.

MR. SIMON: Well, yes, and for that reason I think the Commission really should not be in the business of creating exceptions that undermine the simplicity and clarity and ease of administration of the rule.

COMMISSIONER WEINTRAUB: Which is a fine goal for me. And that's almost a pun, I didn't mean it that way. But I think that we have to

recognize that in saving myself the aggravation of having the exemptions and having to figure out what they mean, I am imposing costs on organizations that have to figure out how to negotiate them.

Mr. Sandstrom?

MR. SANDSTROM: I'll show you how bright that line is. Here is the ad that I introduced in the record: It says, "Call today and tell your representatives to oppose the cut." Now, if you air that on the radio, it's probably okay in most states because it's plural, "representatives," so it's not a clearly identified candidate. But if you ran it in South Dakota, I gather, it would be an electioneering communication. And because you didn't run it by counsel and ensure that compliance, you have violated the law because of the use of the word "representatives."

CHAIRMAN THOMAS: Commissioner Mason, any follow-up?

COMMISSIONER MASON: I wanted to go to the grassroots lobbying issue, in part because of this question about complexity, because I take it all of

you are familiar with the text in the Wisconsin Right to Life ad that's at issue. And one of the interesting things about that is, as I looked at it compared to the various proposals put forward in 2002, that ad would have been exempt under just about any of them.

MR. SIMON: Not under the one we proposed.

COMMISSIONER MASON: All right. Tell me about that.

MR. SIMON: Actually, I mean, one of the elements of our proposal was that the communication refers to the candidate only by use of the term "your Congressman," "your Senator," "your member of Congress," or a similar reference, and does not include the name or likeness of the candidate in any form. So, I mean, that's--

COMMISSIONER MASON: So in that case the name alone is--I guess what I wanted to get to about that is--and Mr. Simon, you're the one who brought up context, and yet you were just discussing simplicity. And it seems to me, absent the name, and in this case interestingly there were

both names, including the Senator who wasn't up for reelection in that cycle, this was pretty straightforward.

I mean, the whole judicial filibuster thing was a very, very live issue. I mean, progress was held up in the Senate, meetings, gangs of 14. I mean, this was not some phony issue that somebody ginned up or, you know, got a bill introduced so that they could have an excuse. This was a live public policy issue, and the ads didn't characterize the position of either Senator on the issue, they didn't criticize either one of them.

So if we're going to try and protect grassroots lobbying in some way, and we're going to try and do it in a way that's fairly understandable, to have some objective standards out there, why doesn't this one pass the test? And I understand your name reference, but if you could answer it without reference to that criteria, I would appreciate it.

MR. SIMON: Well, I mean, I don't think that's an incidental part of the test we proposed.

I think that's an essential part of the test we proposed, so I think to kind of represent this ad as meeting the proposal that even we suggested importantly misstates the situation.

COMMISSIONER MASON: I'll concede that.

MR. SIMON: Okay. You know, it may be that this case illustrates the problem with the proposal, which is, as I said before, the surrounding facts here I think demonstrate pretty clearly that this ad was in the context of trying to defeat Senator Feingold. The problem is that even if you have a purely stripped-down ad that would meet our proposal, it's easy I think for a group to create a context in which that ad could have effectiveness as a campaign tool.

In other words, you could run that kind of ad within the electioneering communication window, telling your Senator to vote against judicial filibusters, and at the same time you could run, out of your PAC, ads saying that Russ Feingold is supporting the filibuster, and the combination of those two ads run by a single group could very much

impact the election. So, you know, I think this case is a good illustration that operating solely within the four corners of the text of the ad itself may not always be the most reliable guide to determine the political impact of the ad.

COMMISSIONER MASON: So when crafting this exemption to the clear standard that we've got, and all of you are telling us that if we craft an exemption, it needs to be a clear standard, you're saying it's impossible to devise a clear standard.

MR. SIMON: Well, you know, again I remind you that it was the Commission that determined that the standard, even the rigorous standard we proposed, was not adequate to protect against ads that PASO a candidate.

COMMISSIONER MASON: But I'm asking you about your views.

MR. SIMON: Well, I don't think at this point the Commission should issue the aggressive lobbying exemption.

COMMISSIONER MASON: In part because you don't think a clear grassroots lobbying exemption

can be crafted.

MR. SIMON: Well, I mean, in part because I don't think you can in the context of this rulemaking, and in part because at least to that extent I agree with Bob that you should--I mean, this is an issue we're talking about which is not a Shays issue, and I think given the fact that the Supreme Court is considering this matter, you would be well advised to wait for that case to be decided.

COMMISSIONER MASON: Mr. Bauer?

MR. BAUER: I'm certain that I heard Mr. Simon say an hour ago that he was troubled by the notion that you should put the rulemaking off, so I think this hearing has obviously had a significant educative effect, if not on the Commissioners.

But I do think also that it is troubling to me that on the one hand Mr. Simon and the interests that he represents here are extolling the virtues of clarity, and on the other hand telling us that really the area is quite muddy. And as you pointed out, Commissioner Mason, there are all

sorts of contextual and other considerations that as a practical matter, as the American Cancer Society has pointed out, and as Commissioner Weintraub mentioned a few minutes ago, dramatically raise the costs of uncertainty and the costs of compliance.

My hope would be that we step back and recognize that it is the Congress, something we have not discussed here much today, that the Congress has very, very specifically provided that the Commission have rulemaking authority to create exemptions from this provision. This has been I'm not sure even directly mentioned by Don or frankly anybody else so far. Congress was aware that the sweeping approach taken in the electioneering communications provision was one that necessarily overlooked, did not take into account important possible exceptions.

So I think it is a mistake to say, particularly when you think grassroots lobbying as a category of exemption is so compelling that we ought not to adopt one, that Congress had anything

in mind--as the sponsors themselves acknowledged by bringing their own grassroots lobbying exception proposals to this Commission--that they had anything in mind that presumably included grassroots lobbying.

CHAIRMAN THOMAS: Commissioner McDonald? General Counsel? Office of Staff Director, Tina?

Well, I would only close by noting, Mr. Bauer, you have the pleasant task of going to Senator Kerry and explaining to him that your allowance for ads promoting books will mean that the producer of a book called, "The Many Faces of John Kerry: Why This Massachusetts Liberal is Wrong for America," can spend unlimited amounts of money to advertise that book. I don't envy you having that conversation. But I do appreciate your appearance here, all of you. Thank you very much.

I think that, without objection, we do plan to leave an opportunity for people to supplement their comments, and I think maybe allowing up until October 31st, which I think is a Monday, would be appropriate. So without

objection, we will let you supplement your comments with any additional materials that you feel appropriate. Thank you very much.

We will now take a shorter break than we had planned. Let's see if we can work with a 5-minute break, and we'll try to get our next panel started, and we'll see if we can catch up. We're a little bit behind schedule. Thank you.

[Recess.]

CHAIRMAN THOMAS: Thank you, one and all. Let us continue with our second panel for the day. We are happy to welcome four very distinguished testifiers: Professor Frances Hill from the University of Miami School of Law; Elizabeth Kingsley from the law firm of Harmon, Curran, Spielberg & Eisenberg; Tim Mooney, who is senior counsel with the Alliance for Justice; and Paul S. Ryan, who is counsel at the Campaign Legal Center.

And I guess for lack of any other creative way to go at it, we'll go alphabetically. We would urge you to stick with an opening statement of 5 minutes, and we'll try to limit Commissioner rounds

of questioning to about 5 minutes, and I'll try to pay attention to the lighting system this time a little bit better than I have in the past. I'm trying to be very flexible, as well, in case you hadn't noticed.

Anyway, we'll start with Professor Hill.

Please proceed when you're ready.

MS. HILL: Chairman Thomas, Vice-Chairman Toner, members of the Commission, thank you for this opportunity to testify. Thank you for having a tax lawyer at your august Commission and, even worse, an academic, currently, tax lawyer.

My concern in filing comments on the 501(c)(3) exception and my reasons for asking to appear today are grounded in what is always my continuing concern, which is to ensure the integrity of the exempt sector, particularly Section 501(c)(3) organizations that are both exempt from taxation and qualified for the Section 170 charitable contribution deduction.

I think the 501(c)(3) organizations are a vitally important part of the national fabric.

They play multiple roles. They engage in multiple activities. But the mere fact that they do so much good and are so important does not give them broad license to do just everything or to be exempt from any other constraints.

As the Supreme Court made clear in its case *Taxation With Representation*, exemption is a subsidy. It can be conditioned, and the condition against participation, intervention in political campaigns, is one of those conditions, as is the limitation on lobbying.

I have said in my written comments that I believe that what happens with the blanket exemption for (c)(3)s is to confuse and conflate an exemption based on tax status with an examination of the activities conducted by (c)(3) organizations, and I thought it might be useful to have a tax lawyer's take on what those activities can be. Characterization of activities as lobbying or issue advocacy, which in tax parlance is public education, or as participation or intervention, is an art form that we as tax lawyers have not

perfected and that the IRS has not perfected.

I would like to state that there is no requirement that the lobbying of a 501(c)(3) organization be related to its other exempt purposes. There is no requirement at all. As long as we're within the limits, if we are the Feline Protection Society, we can lobby on cat eradication until our contributors rebel.

A 501(c)(3) can log roll with the best of them. On occasion, they have. On occasion, it has caused quite a "flim flam" within organizations. But there is no tax requirement that lobbying be related to our mission as otherwise determined.

Of the many things we don't know about characterizing activities, which I have discussed at some length in my written testimony, what is clear is that there is no settled approach to characterization. At times the IRS tries to look at inherent characteristics of a communication. At times it looks at the likely consequences of a communication. At times it looks at the intent of the communicators. At times it sort of mushes all

of these together.

Exempt organizations engage in activities, either exempt education about public issues, limited lobbying, or prohibited participation or intervention, and these overlap, and I have set forth these overlaps and the pattern. I think it is important to realize the IRS has provided no guidance at all on the default position when these activities overlap, and the failure to do so has caused quite a lot of confusion for us as tax lawyers, and also in my mind makes it possible to run a message that would be an electioneering communication without losing our exempt status.

Much has been made of the fear of the IRS. As a tax lawyer, I do not fear the IRS. I do not fear that they're going to revoke my clients' exemptions. I do not fear the \$15,000 shared among other managers, if I were an organization manager, that 4955 could impose on my organization.

I do not fear the political intervention process, and I would be glad to discuss that at some length, because they have no idea what it is

they are doing and whether it's going to amount to anything at all. And I would be happy to discuss with the Commission the Treasury Inspector General's report which I think bears that out, which I have referenced in my testimony.

As my time is up, I will simply say that I do not believe that the IRS is equipped to, nor does it have such a strict approach to participation or intervention that it makes it completely safe for the Commission to have a blanket 501(c)(3) exemption. It simply in my mind invites abuse, and it invites bad actors or risk-tolerant and aggressive actors to use our sector as yet another kind of organization to try to promote the interests of political candidates, and that's not what we're for.

CHAIRMAN THOMAS: Thank you.

Ms. Kingsley?

MS. KINGSLEY: Thank you very much. I appreciate the opportunity to be here. What I would like to do is highlight a few points that are perhaps somewhat disparate, but what I would like

to clarify are highlights and things from the record.

And I think you will find that my perspective is coming from the very practical, in-the-trenches view of having to talk to organizations who are acting in good faith and trying very hard to comply with the law and wanting to know what they need to do. And I understand the need to protect against the bad actors, but I think it's important not to forget the good actors while you're doing that.

First of all I would like to address the public service announcements, and I think there are in the record in several places some misapprehensions about how these things work. They have been characterized as "donated air time," and there may be instances where broadcasters donate time to organizations of a variety of sorts.

But the public service announcement as we mostly refer to it is a communication created by an organization, given to broadcasters, who then choose to broadcast it or not at whatever time they

think is appropriate. Typically I think it's between about 2:00 and 4:00 in the morning, when they don't have quite so many paid ads.

I actually had some personal experience with this in my pre-law school professional life, and I know that we distributed videotapes to every TV station in Baltimore, and sometimes they would run them. Sometimes you really couldn't predict when they were going to run them. We didn't have any control, and hardly any knowledge, over what was going on there.

And I think it's also important to point out that that would happen over months after we had distributed the tapes. I think it's entirely possible that you could choose a public figure, a local personality, to appear in such an ad and have them subsequently become a federal candidate, and the organization wouldn't even have known at the time that it distributed and lost control of the communication.

So however you do it, I have to emphasize that it's really important that that sort of good

faith activity, which is critical to many organizations to get out the information about the services they offer or to carry out their educational mission, not be chilled by whatever rule is adopted.

On a somewhat unrelated matter, I wanted to follow up on a reference in a couple of the comments about Revenue Ruling 2004-6, and some concerns raised by a couple colleagues of mine, other attorneys, who wrote a letter to the IRS suggesting that this was susceptible to an interpretation that would allow (c) (3)s to be used as a surreptitious campaign vehicle.

The concern they were focusing on was the use of the word "targeting," that it might be misinterpreted to allow an organization to choose districts based on electoral criteria. They raised that concern because they thought it was ambiguous.

Subsequently at a public hearing, a public appearance, a representative of the IRS was asked about that and clarified that no, that was not what they meant by "targeting." They merely meant that

the ad was available, was viewed by the voters in that district. And of course if there were electoral considerations in the targeting decision, that would be the definition of what is a 527 exempt function and therefore not (c) (3) permissible.

I actually brought some copies of an article which wrote up that appearance, and I would like to introduce that, if I may, for the record.

CHAIRMAN THOMAS: Certainly.

MS. KINGSLEY: A final point. The point was raised earlier about the effect that some of these proposed changes would have, not having a significant impact on small organizations. In addition to when you remove the "for fee" language, yes, you do broaden the impact significantly, I think it's a mistake to assume that all broadcast time is extremely expensive. We don't all live in major media markets.

And I am not a communications expert by any means, but I understand from talking to people that you can get on the radio, you can get on cable

television in some markets for hundreds of dollars.

The costs of production are coming down as technology evolves. And so it's really not unimaginable that people are running advocacy or educational messages through broadcast media without spending tens or hundreds of thousands of dollars.

In conclusion, I would like to highlight a statement that was in the NPRM, that 501(c)(3)s may not be familiar with the nuances of federal election law. I think that is perhaps something of an understatement. Typically these organizations really, if they are acting in good faith and working very hard to comply with the IRS restrictions, they don't imagine that your rules could apply to them.

If you are not careful, you may create situations that entrap some of them unintentionally. I think it's very important that the rules you state be clear, and account for the fact that these are not political actors and they need to know what they can do. And I would hope

that you can find a way to both give them clear guidance about what's permissible without simply cutting off broadcast speech for them.

Thank you.

CHAIRMAN THOMAS: Mr. Mooney?

MR. MOONEY: Good morning, everyone. I'm having a mysterious case of deja vu here. It was about three years ago I appeared before the Commission. The only things that are different are Commissioner Weintraub and the absence of my horrendous goatee.

MS. KINGSLEY: I'm glad I didn't have to experience that.

[Laughter.]

MR. MOONEY: It's true. I am here representing, as senior counsel for Alliance for Justice. We are a membership organization representing over 70 different nonprofits throughout the country, most of which are 501(c)(3) organizations. If you don't have an attorney from the first panel or on this particular panel, then generally you're calling either myself or one of my

colleagues if you have a question on advocacy rights for nonprofits.

If Beth is in the trenches, Ms. Kingsley is in the trenches, I'm further in on the trenches. I deal with mostly 501(c)(3)s that are small or otherwise can't afford to have attorneys of their own, and I hope that you bear that in mind when I give my comments here.

Alliance for Justice supports the exemption for the 501(c)(3) organizations in BCRA's electioneering communications regulations. It's good public policy and, as our written comments set out, perfectly fits within the area of the exemption authority that the Commission has. Our written comments go into much more detail than I'm going to obviously go into here during my oral testimony, but obviously I'm up for hearing any questions and answering any questions on those.

But just to kind of summarize what I talked about in the comments, (c)(3)s are built, as a matter of law, to be exclusively nonpartisan, non-electoral actors. Now, we've heard some

thoughts to the contrary here. I'm willing to flesh those ideas out a little bit more here through my testimony.

There has really never been any kind of a record , a real record of 501(c)(3) broadcast ads that are supporting or opposing candidates as candidates. The record before Congress, in the now-famous Brennan Center "Buying Time" study, as I talked about in my written comments, included only one identifiable 501(c)(3) organization, and we have already mentioned it today, the FAIR ad. That was very clearly a small ad buy for a lobbying activity, and had nothing to do with support or opposition of a candidacy.

And 501(c)(3)s, as we're going to talk about probably ad nauseam here, are allowed, as a matter of their rights under the law, to support or oppose legislation. They are not allowed to, they are specifically prohibited from supporting or opposing any kind of candidates for office.

The bottom line here has to do with a difference in perception and the power of

government to regulate speech. In the campaign finance arena, I'm sure I do not have to tell you, government's only extends to whether or not the speech corrupts or causes the appearance of corruption within officeholders. Lobbying activity falls far short of that. That is an area where the government is not allowed to tread.

Some of the commenters, in written comments and also in the first panel, seem to use some kind of bootstrap logic to argue against the exemption, saying, "Well, here is a 501(c)(3), and because it fits within the definition of electioneering communications, this is precisely the type of ad we were trying to go after." Well, we wouldn't be here looking for an exemption if that were the case.

We are here looking for exemptions in areas where categorically 501(c)(3)s cannot do anything that supports or opposes candidates for office. It is beyond the power of government to regulate 501(c)(3)s in that particular matter, in the campaign finance system, according to all the

different types of Supreme Court precedent that we have, including McConnell and Shays. Neither Shays nor McConnell provide any kind of evidence that contradicts that very basic premise that dates back, of course, to the 1970s.

The Commission--and we talked about this in our initial comments several years ago, we reiterate it in our comments here today--the Federal Election Commission has the authority to promulgate a full (c)(3) exemption. I won't go into too much on it, but the PASO limitation on your ability to create exemptions or to find exemptions within the law, well, that is not a barrier, and I would be happy to go into that as we go along here.

There are compelling policy reasons to exempt 501(c)(3)s. They do good work. We've talked about a few of the different things that 501(c)(3)s do. They are responsible for curing disease, providing research, community organizing. They are not these gigantic bogeyman that are out there trying to destroy the campaign finance

system. In fact, the vast majority of them have nothing to do with federal elections whatsoever. In fact, the vast majority of them stay far away from them because precisely of the IRS prohibitions on any campaign activity whatsoever.

What we're left with here is a balancing act. What do we get for what? If the Commission determines to leave behind 501(c)(3)s and let them remain under the electioneering communications umbrella, it solves nothing. It's duplicative of tax law, and any assertions that 501(c)(3)s are out there and are able to do things that support or oppose candidates are based largely on hypothetical assertions and hypothetical readings of the law, or otherwise misreadings of perfectly legal activity, including grassroots lobbying activity.

So what are we going to be giving up? If 501(c)(3)s are left behind, I can assure you, just based on my own experience, we're not just going to be dealing with 30- and 60-day windows. 501(c)(3)s will, in my opinion, not do any kind of ads that mention federal officeholders for far more than

those 30- and 60-day windows. It's kind of a trite thing to say that it's going to chill speech, but I can assure you it will.

In my experience, I have been traveling around the country dealing with all sorts of different nonprofits out there. I have been, this year in the past few months I have been in Oklahoma, I have been in Arkansas, I have been in Missouri. These are states that have child advocacy organizations that really need this kind of an exemption for them to be able to get involved with appropriations issues on a congressional level, and I really do believe that the 501(c) (3) exemption is the only way that these organizations are going to continue to be able to do the good work that they can within these windows.

I see my time is up. I'm happy to answer any questions you have.

CHAIRMAN THOMAS: Thank you.

Mr. Ryan?

MR. RYAN: Good morning, Mr. Chairman, Commissioners, Commission staff. It's a pleasure

to be here this morning testifying before you on this rulemaking.

As the Chairman noted, I am here testifying on behalf of the Campaign Legal Center, which I serve as associate legal counsel. The Campaign Legal Center submitted detailed written comments in this rulemaking. Given the large number of issues at stake in this rulemaking and the limited amount of time we have, I'm going to focus my opening remarks to what appears to be the most contentious of the issues, the per se exemption for 501(c)(3) organizations.

We urge the Commission to eliminate the per se exemption for 501(c)(3) organizations from the definition of electioneering communication. All four of BCRA's principal sponsors in Congress construed the Commission's so-called Clause 4 authority, under which the Commission promulgated the existing 501(c)(3) exemption, to specifically prohibit a per se exemption for 501(c)(3) groups.

Representative Shays stated on the floor of the Congress, "We do not intend that Clause 4 be

used by the FEC to create any per se exemption from the definition of electioneering communications for speech by 501(c)(3) charities." In the Commission's first electioneering communications rulemaking, the Commission's general counsel correctly rejected a blanket 501(c)(3) exemption as inconsistent with BCRA.

And the District Court in Shays stated, in its Chevron analysis, "It is clear that the validity of the Commission's regulation depends on whether or not the tax laws and regulations effectively prevent Section 501(c)(3) groups from issuing public communications that promote or oppose a candidate for federal office."

However, the District Court believed it didn't have enough information to determine whether the exemption was invalid under Chevron. Instead, the Court invalidated the rule under Administrative Procedures Act grounds. The record compiled in this rulemaking, I believe, would provide a court with ample evidence to invalidate a per se 501(c)(3) exemption on Chevron grounds.

It is clear from the IRS Revenue Ruling in 2004-6, the IRS's written comments submitted in this rulemaking interpreting that Revenue Rulemaking, and the comments of many 501(c)(3) groups and their attorneys embracing as legitimate grassroots lobbying the Revenue Ruling examples, which were--there are six of them set out in the Revenue Ruling--as well as the ad run by Federation for American Immigration Reform or FAIR that was described in the NPRM, that federal tax laws as interpreted by the IRS do not prevent Section 501(c)(3) groups from issuing public communications that promote or attack candidates.

Instead, under tax law, so long as a 501(c) organization can point to some event separate from the election as its purported reason for running the ad, the advertisement constitutes lobbying, not electioneering. The advertisement by the American Federation for Immigration Reform and the hypothetical situations examined in Revenue Ruling 2004-6 are precisely the type of ads Congress sought to regulate through passage of

BCRA's electioneering communications provisions.

Simply put, communications the IRS considers to be lobbying, determined through application of a complicated, vague facts-and-circumstances test, Congress and the Supreme Court consider to be electioneering, if the communication meets BCRA's easily understood bright line electioneering communication definition.

Finally, the Campaign Legal Center urges the Commission not to incorporate the PASO standard into a 501(c)(3) exemption or any broader exemption. 501(c)(3) organizations and attorneys submitting comments in this rulemaking near uniformly oppose incorporation of the currently undefined PASO standard into the Commission's electioneering communication regulations.

Incorporating the PASO standard into a 501(c)(3) exemption or an even broader exemption would undermine the whole point of the statute, which is to provide a bright line test for what constitutes an electioneering communication. Furthermore, doing so would raise constitutional

questions because the PASO standard is not appropriate for application to individuals and entities other than candidates, political committees, or other groups with a major purpose to influence elections.

Thank you for your attention. I look forward to answering any of your questions to the best of my abilities.

CHAIRMAN THOMAS: Thank you, Paul. We'll start with Vice-Chairman Toner on the question round.

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank all the witnesses for being here, particularly all of our tax experts here. We thought the election laws were complex until we started reading these Revenue Rulings. Now we have the circumstances test, multi-factor prongs. It would make any election lawyer proud. But thank you for sharing your wisdom with us this morning.

The General Counsel noted this morning that under the Circuit Court ruling it's important

to develop a factual record no matter what we do, and I'm interested in trying to do that in a couple of respects here with the witnesses we have. First of all I want to start, Mr. Mooney, with you.

There is obviously a threshold factual issue, which is, do (c)(3)s in the normal course run broadcast ads that promote or attack federal candidates?

MR. MOONEY: Absolutely not.

VICE-CHAIRMAN TONER: I didn't even finish the question.

MR. MOONEY: It was that simple of an answer.

VICE-CHAIRMAN TONER: And I'm asking it not in terms of your capacity as a lawyer. I'm asking you in terms of your knowledge of (c)(3)s, in terms of how they operate and factually what they do. Is it your view that they do not tend to run ads that promote or attack federal candidates?

MR. MOONEY: Absolutely, they do not promote or attack, any of the PASO--I'm sorry, I'm stumbling over the acronym here. That's why we use PASO, right? They do not, and the only extent to

which 501(c) (3)s are involved in broadcast advertising tends to be in the area of public service announcements, and even probably a little bit more rare, grassroots lobby advertising.

VICE-CHAIRMAN TONER: And Ms. Kingsley, again based on your understanding of how (c) (3)s operate, do you concur with that view?

MS. KINGSLEY: I certainly concur with it if we're saying promote or support them as candidates, absolutely. As I think I've said in my written comments, if we mean expressing agreement or disagreement with a position that has been taken by a legislator or representative who happens to be a candidate, that may happen. In my experience, it rarely happens close to an election, even when there is a critical legislative issue pending. Because of the tax code restrictions, (c) (3)s are worried about running anything that might appear to be critical or supportive within the electioneering communication window.

VICE-CHAIRMAN TONER: So in your view, it's your judgment as a factual matter that (c) (3)s

do not tend to run broadcast ads that promote or attack federal candidates as candidates in the last couple of months before an election?

MS. KINGSLEY: Definitely.

VICE-CHAIRMAN TONER: Now, Professor Hill, again I just would like you--do you agree or disagree with those assessments? What's your sense? I mean, again as a factual matter.

MS. HILL: Well, as a factual matter, to an academic, having not done a study of it, I don't feel that I can say anything that would have any factual merit at all. But there is a perspective here that I think we shouldn't lose track of, which is, certainly they did it in the past when Congressman J.J. Pickle found himself being attacked as he was sitting in his family room in Austin, Texas, and that kicked off the 1987 hearings, where (c) (3)s were running these ads. So having done it once, it's not clear to me that all (c) (3)s regard this as outside their bounds.

I would also like to point out that the use of the 527s that do not have to register as

political committees with the Federal Election Commission has created an alternative, so that you don't have to make that decision.

And I would like to point out to the Commission how permissive the IRS was in treating a variety of activities heretofore not thought to constitute attempting to influence an election. The 527(e)(2) definition, how permissive they were in saying, "Oh, yes, that would be attempting to influence an election," for purposes of getting you to be a 527 so we don't have to worry about whether you're violating your (c)(3) status or overstepping the limits imposed on a (c)(4).

And so we are in a situation now where, due to a variety of circumstances, organizations that might well choose to use a (c)(3) are using a 527. You have to understand that we as tax lawyers are planners who always look for alternate structures. This is our life's work. We do it--

VICE-CHAIRMAN TONER: Sounds like election lawyers.

MS. HILL: Yes, but we do it on the

taxable side. Should we be a C corporation, S corporation, an LLC? How about a partnership, a general partnership, a limited partnership? We just pick through our structural alternatives.

That is, in part, what's going on.

And if I may sort of run your question a little bit to say, do I think that rulemaking is limited to the same kind "there is an abuse, I'm going to stop it" part of the Administrative Procedure Act that deals with adjudication, I think, at least from the perspective of the tax lawyer, it is not. We look to our agency, the Internal Revenue Service, for guidance, for clarification about the law, without worrying about, for instance, whether Enron was doing what it was doing.

VICE-CHAIRMAN TONER: I know my time is up, so just one question. Is it fair to say that, as a factual matter, (c)(3)s running broadcast ads that promote or attack federal candidates is relatively rare in your experience?

MS. HILL: I think it was rare in the 2004

election. What was going on in the 1996 election, for instance, is hard to say, because the Thompson committee hearings stopped at just at the point that the committee was getting to the exempt entities, just at that point, and I know that to a certainty because I was writing testimony for those hearings at that very time, and was somewhat relieved I could go back to my academic articles and didn't have to trundle up to Washington to do that.

VICE-CHAIRMAN TONER: Is it fair to say that the (c) (3) activity is much less rare than (c) (4) and 527 activity in this area? Not less rare. More rare, rarer than. Is that fair? Again, as a factual matter, I'm just trying to--

MS. HILL: What I would like to get out on the table is that sometimes making these distinctions is also a little artificial, given that there are complex structures of (c) (3)s, (c) (4)s, connected PACs, related 527s. And so I think, to put this in tax lawyer perspective, we also like complex structures where we can move

activities around our complex structures, and this is what we teach our students, this is what we do for our clients.

So at some level we may have little reason to put it in a (c)(3). But one of the factors to consider here is that our (c)(3)s give contributors a charitable contribution deduction, and we know from the record in the Gingrich matter before Congress that there are on occasion contributors who press very hard to get that 170 charitable contribution deduction, and I can understand why.

As the wife of someone who has run for public office, I understand what we ask of those who are our closest supporters and why. Had I only known during my husband's campaign what I could have done with an abusive (c)(3), perhaps I would have done it. But I was only a third year law student, and I didn't know, and we didn't do it, and he lost.

VICE-CHAIRMAN TONER: I'll hold my follow-up questions for the next round. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you. I'm going to direct this to Ms. Kingsley and Mr. Mooney. Assume that I'm sympathetic to your policy goal. Tell me how I do this legally and survive judicial scrutiny.

MR. MOONEY: Well, I'll start. I think that, as our written comments set out, the threshold issue is what is PASO and how does that limit--PASO of a candidate, I should say--how does that limit the ability of the Commission to be able to promulgate regulations that include exemption authority, under your exemption authority. And I think that it necessarily includes context involved in that. There has to be a reading of context involved.

It's not promote, attack, support or oppose anybody out there; it's promote, attack, support or oppose candidates. And context is taken into account in all sorts of different areas under the law, particularly under federal election law. You do it in terms of coordination issues and

things along those lines.

I think that when you look at the context of any particular 501(c)(3) communication, you will note that in no circumstance will a 501(c)(3) communication legally support, attack, promote, oppose candidates for office. The closest that we ever get is in this kind of area where we have, it seems, a lot of disagreement with some folks over certain types of grassroots lobbying ads, and in that instance I think that's the only type of example that's every trotted out by folks that oppose this particular exemption.

I think there, based on the contextual analysis, it's very clear that there is PASO of a person in their role as a legislator, or there is PASO of legislation, not of candidates. And that is a distinction with a difference, and I think it's constitutional matter that you also have to consider as well.

MS. KINGSLEY: A couple things. Looking at the FAIR ad, actually I'm not sure I would insist that is a (c)(3) permissible ad, for the

simple reason that I do not have all the facts and circumstances in front of me. And the IRS, I mean, they have these six factors they set out in 2004-6. They will look at every single fact that you might think could possibly be relevant.

So I don't know if the organization had a history of working on that issue. I don't know if they selected the target for that ad based a reasonable belief that that person might be swayed in their position on the legislation, or what was really going on was that they were trying to influence an election.

So if you're worried that that ad is surreptitious campaign intervention and may not be permissible, a (c) (3) exemption wouldn't necessarily--(c) (3)s, acting within the scope of their exempt status, might or might not run such a communication. And I actually, I think it's fairly--it's close. I mean, it's quite harsh and critical.

And one of the things I will look at in talking to my clients about what they can say if

they want to make lobbying communications, broadcast or otherwise, is looking at the language, and are you criticizing someone's character or their position on a policy? And those are factors that, to comply with their IRS status, they have to take into account in crafting their communications.

I also think that you can take some comfort from the legislative history that was cited with the reference to a broadcast church service. I understand the situation of the candidate who appears in church the Sunday before election, but I think there's also a situation just of a church which perhaps routinely prays for the well-being of various elected officials, mentions them by name or by office.

And I think that for most people doing that prayer is certainly a way of supporting someone, not as a candidate, however. And I think that supports a reading of PASO which is not about any sort of support but something somewhat more closely tied to the purpose of FECA and of BCRA.

COMMISSIONER WEINTRAUB: And, Ms.

Kingsley, you think that rather than just using the PASO, we would be better off, if we wanted to go down this road, to say a 501(c)(3) that--you know, to put in the specifics of what PASO would mean in this context.

MS. KINGSLEY: I would first of all encourage you to retain a simple exemption, based on the fact that--

COMMISSIONER WEINTRAUB: You think we can do that?

MS. KINGSLEY: I think you can do that. I think you can do that because you can find that (c)(3)s generally do not--there is no record that they have. You've got two years. You've got a full election cycle, with lots of money washing around in the system, with this exemption in place, and no evidence that anyone took advantage of it to do anything that was problematic from your point of view, that involved PASO. And given the other legal restrictions on these organizations, I think you can find that this exemption would not permit PASO activity.

If you don't determine you can go there, I would urge you to have an exemption plus some clear standard, certainly not merely PASO, not the IRS "facts and circumstances," but some set of criteria that perhaps define grassroots lobbying, as was suggested earlier, something that people can look at and say yes or no, I am covered by that or I am not.

COMMISSIONER WEINTRAUB: Mr. Ryan, what do you think of this idea that PASO means PASOing someone in their capacity as a candidate?

MR. RYAN: I think that contextual interpretation entirely and completely misconstrues all of the constitutional rationale underlying our restrictions on campaign finance activities. The Supreme Court and lower courts have upheld these restrictions as permissible means of preventing the real and apparent corruption of candidates, but not candidates *per se*; candidates in their capacity as future elected officials, as legislators, as executive branch members. If these people don't win election, if they do not become legislators,

what is there to be corrupted. They will never be in a position to pay back the contribution. So I think it's an entire misconstruction of this notion of corruption as it applies to candidates.

COMMISSIONER WEINTRAUB: In the absence of--I mean, are you aware of anything to contradict what Ms. Kingsley just said, that in the first full cycle under BCRA, nobody can point to any example of a (c) (3) taking advantage of this exemption to do something that you would find problematic?

MR. RYAN: I think that (c) (3) organizations will quite possibly serve, if this exemption is retained, as the ideal vehicle in future elections--

COMMISSIONER WEINTRAUB: That's not what I asked you. I asked you if you were aware of it happening.

MR. RYAN: I'm not, but as with any exception to a generally applicable rule, I think the burden fairly rests on those who seek the exemption or the exception to demonstrate that they would or have availed themselves of that exception

in past elections. There is no evidence that (c) (3) organizations needed this exception in past elections.

MR. MOONEY: Can I address that really quickly? I think the big reason--that came up in the prior panel, as well. There was a lot of confusion amongst at least the smaller 501(c) (3)s out there as to what the status of the law was following the Shays decision. There was some confusion I think also in the legal community as to whether or not the 501(c) (3) exemption existed post-Shays. And when you get press releases from a Democracy 21 or other organizations celebrating the demise of the 501(c) (3) exemptions report ruling, that in and of itself put the kibosh, as it were, on a lot of 501(c) (3)s even considering taking advantage of it. So I think that that analysis doesn't really hold water in the practical world.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: I want to go back, Mr. Mooney--and I appreciate, especially appreciate Ms. Kingsley's take on the FAIR ad, because I think

there is a good argument under the Revenue Ruling 2004-6 that that one fails.

One of the reasons it fails is because there was no real outside event. I mean, the ad said this bill could be voted on any day. Well, that was transparently untrue. It was also pretty clear to people who were watching elections, as to those of us on this panel, that was all about defeating Spencer Abraham. It was why the other criteria were met. It was right before the election, and so on.

And I suspect, I don't know what the IRS would do if only one of the factors switched between Example 5 and Example 6 in there, but I suspect that FAIR would have had a difficult time demonstrating that this was part of an ongoing campaign. So I think there's a pretty good case that that ad would have fallen within Example 6, would have been impermissible campaign intervention.

Now, I know you counsels for the nonprofits don't want to concede anything, but it

seems to me that our ability to justify using the tax status as a per se indicator that, well, these organizations don't do this, would require us looking at something like that and saying, well, in fact maybe that did fall within the category of campaign intervention.

And so my question is, first, you know, let's understand that if you're going to push too far, it makes it very difficult for us to justify this and then say, okay, now what do we do? Conceding, for purposes of discussion, this fell within Category 6 and was campaign intervention, what would we do?

MR. MOONEY: Never let it be said that I never concede a point. I think that Ms. Kingsley's analysis was 100 percent on point, which is that the law, the tax law demands a full facts and circumstances review. And when looked at in that light, the question is whether or not, if the IRS rules under, the standards set up under the 2004-6 tend to point towards intervention in a campaign, where does that put that type of an organization?

I think that the first thing that you have to look at is the fact that this is the single actual example that we have on the record of any type of activity like this. And when you put that in the context of all of the activity that is done by the thousands, the hundreds of thousands of nonprofits that are out there that fall within Section 501(c)(3), that actually is a very compelling aspect to this entire thing.

I think that when you put the onus of the exemption on compliance with 501(c)(3), there is I think some difficulty in that application from the Commission's point of view, and something that came up in the last go-round. But I also think that if you make it contingent on actual application of that law, actually following what the rules are, then I think that the Commission shouldn't have any problem in dealing with that.

COMMISSIONER MASON: Let me go to another point, and that was, Mr. Ryan in particular said, "Gosh, the IRS says this doesn't cover PASO." And take the IRS's comments. They addressed themselves

to two different provisions in our rule, one on PASO and the other on organizations controlled by officeholders, and addressed them separately.

And here is their beginning take: "The tax laws and regulations do not allow Section 501(c)(3) organizations to promote or oppose candidates for federal office." Period. "In addition, the tax laws provide several consequences for this type of activity," and they describe that in the standards. "The consequences for Section 501(c)(3) organizations that promote or oppose candidates for federal office include revocation of their exempt status," and so on.

Now, Professor Hill has talked about some frustration she has with those perhaps not being very exact or not being strict, and so on like that, but it looks to me as if the IRS has flatly said that the campaign intervention standard does not allow, as it says, does not allow Section 501(c)(3) organizations to promote or oppose candidates for federal office. Why can't we rely on that?

MR. RYAN: The problem with the IRS's use of those terms in its letter is that those terms are undefined. The IRS letter proceeds to describe in detail its Revenue Ruling that we have been discussing today, which sets forth six examples, three of which the IRS--

COMMISSIONER MASON: I mean, can we take it as a fair reading that the IRS is using the terms "promote or oppose" as analogous to or consistent with their campaign intervention standard? I don't know any other way we could read it.

MR. RYAN: I would not advise that you in any way attempt to read into their use of those two terms a definition that doesn't exist. I think that the terms or the concepts are used differently. Congress made very clear, in passing BCRA, what it thought was activities or communications that influence elections. Electioneering communications, it defined it.

The IRS disagrees. The IRS says, "Congress may have said those communications

influence elections. We don't think they promote or oppose candidates." And that's the line here.

Your job is to implement BCRA, which was passed by Congress, and Congress came down differently on this issue than the IRS. So that's the only--I think Fran may be more capable than myself of explaining the IRS, the ambiguity in the IRS's position on this issue.

COMMISSIONER MASON: Professor Hill?

MS. HILL: The IRS letter sent to the Federal Election Commission mystifies me on a couple of grounds. One, I agree with them that something is absolutely prohibited, but they have never seen fit in the last 30 years to tell us what that is, or to provide any kind of updated guidance on a useful basis of what it is.

And the letter, by merely reiterating, as I read it, that something is absolutely prohibited, is both correct and not misleading to the Federal Election Commission, and not particularly useful and does not engage with the topic before us today. And I must say, as a tax lawyer, singularly

unuseful in the same way most of their activity has been unuseful in the last 25 to 30 years.

Secondly, far be it from me, as a citizen and a taxpayer and member of the tax bar, to criticize the IRS, but I will. I would have expected a letter from the IRS to come from, at the very least, the Commissioner of Tax Exempt and Governmental Entities, Steve Miller. I'm sure the Senior Technical Reviewer, who is quite a junior person at the IRS, is a worthy and well-informed and well-intentioned public servant, admirably discharging his duties.

But until I get something from the IRS from somebody in a position to be a policy-maker, whose views on policy are expressed in a way that I can as a tax lawyer rely on it, and that kind of reliance is set forth in the Internal Revenue Code in some detail, then I say, "My, how interesting," and treat it with the same deference I would having a nice chat with a well-intentioned IRS person, of whom there are legion, and whom I have before Congress said repeatedly should be paid more and

there should be more of them, because there are some wonderful people over there, and this is undoubtedly one of them.

So when the letter came in as it did from the IRS, I said, "How interesting. Of course we all agree that something is absolutely prohibited." But I still don't know what that is.

COMMISSIONER MASON: I don't want to ask another question, but let me just suggest that your frustration with the IRS's inability to promulgate clear standards is unlikely to be remedied by referring it to a six-member commission.

[Laughter.]

COMMISSIONER WEINTRAUB: It's only five of us now.

[Laughter.]

COMMISSIONER WEINTRAUB: The odds are better?

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: First of all, I want to be real clear I'm very fond of the IRS. And let me thank all of the guests for coming.

It's always good to see Paul, but it's also nice to see folks that aren't normally in attendance. And I think Commissioner Mason gave you some awfully Good advice there.

I am kind of interested in--I am puzzled because--if you don't mind, Ms. Kingsley, I'll start with you. You talked quite a bit about the public service announcement, and I appreciated that because it had been alluded to in the first panel as well. And we are always confronted with some scenario where something bad is going to happen and that frequently doesn't happen.

We are not noted as being the most aggressive enforcement agency in town. You may not know that, but I can assure you that that has not normally been a concern. It has been a concern people have raised, but when you ask people to say, well, point that out to us, like witnesses do all the time when they say there hasn't been any harm, there's not a number of cases that indicate we've been overly aggressive.

But on the PSA announcement, for example,

I believe you said most of them run between 2:00 and 4:00 o'clock, and I know they do because I watch those myself. I don't sleep well, and after I've seen sports three times I switch to something else.

I guess what I'm having trouble with, and that's why I want to ask Tim a follow-up question, the scenarios that have been posited seem like to me that there is really no concern that people will be inadvertently caught in this terrible web, because in Tim's comments he said--and I'll come to him in a minute--that in fact they almost never allude to federal candidates at all.

So if you've got PSA announcements from 2:00 to 4:00 in the morning, and you say somebody might inadvertently run one--and I would be suspicious if they started to run them at 7 o'clock of an evening 30 days out, and I would take the position that at least the broadcaster would have a problem, and maybe the broadcaster plus, if in fact there was some sort of arrangement--but I don't quite understand the problem or the concern about

public service announcements based on what you have said.

And what if we did get somebody and it was inadvertent? My guess is, based on the history of the Commission, it would be dismissed so fast that --again, I just don't see this as a problem, I guess.

MS. KINGSLEY: I think my response is twofold. One is that this agency is required to investigate every complaint it receives, and having been on the other end of that, it is not always--I realize that once the facts are in front of you, you may make a quick decision to dismiss. But for a small organization, a (c)(3) suddenly faced with an FEC inquiry, that's a scary thing, and that's going to run up the legal bills pretty fast.

The second is, honestly, the chilling effect; the concern that if we aren't sure that our ad is going to be protected--

COMMISSIONER McDONALD: Do you have examples of that? I mean, do you have examples of it? I have been involved in 501(c)(3)s for a long

time. I'm just curious. Do you have a--

MS. KINGSLEY: I think what's going to happen is, if there is not a certainty that so long as we aren't controlling when this ad runs, and it is just about our mission, and we send it out and it happens to run in the electioneering communication window at the discretion of the broadcaster, if the organization isn't protected, they will certainly stop using anyone who is or might be a federal candidate. And I think anyone who has any--

COMMISSIONER McDONALD: And how often do you use federal candidates?

MS. KINGSLEY: You know, I can't think of a lot of examples where my clients have. The American Cancer Society had an example in their comments. As they pointed out, that was not broadcast, but it could have been.

I did a little bit of checking on the internet and came up with a handful of examples of--and I assume that Members of Congress are perpetual candidates for this purpose. I found a

record of an ad of Senator McCain promoting National Mentoring Month. I mean, good for him. He should. That's probably a very--

COMMISSIONER McDONALD: And when was that ad run?

MS. KINGSLEY: It was '02, I think.

COMMISSIONER McDONALD: Pardon?

MS. KINGSLEY: I think it was 2002, was when it was dated. I wasn't actually able to access the ad. It was a description of it from someone's web site.

COMMISSIONER McDONALD: In February of 2002?

MS. KINGSLEY: National Mentoring Month is in January.

COMMISSIONER McDONALD: It would have been run in January. That's 11 months out. Okay. I'm just trying to be sure I understand, because--

MS. KINGSLEY: Yes. That's the timing--

COMMISSIONER McDONALD: --I'm not concerned that there is no evidence on one side, but I'm not hearing any evidence on the other side

of this, is my problem.

MS. KINGSLEY: I think the reality simply is that organizations, these organizations, if they're not sure they're safe on the law, are likely to step way back, and I think the broadcasters may as well, too. I think that they may meet their public service obligations through other means and just not bother with these outside groups' ads, if they have any concerns.

COMMISSIONER McDONALD: Well, I take your point, and I do think it's a good point and one we obviously have to worry about, but it seems like to me that based on what you all have said--and I want to follow up and just ask Tim, if I might. I had forgotten about the goatee. I'll have to think back. My memory is--

MR. MOONEY: There are pictures on the internet, I'm afraid.

COMMISSIONER McDONALD: You have said, and I think you're absolutely right that there are probably very few public service announcements--I believe I'm quoting you correctly, I may be

paraphrasing--that mention federal candidates at all.

MR. MOONEY: At least in my experience, I think that's correct.

COMMISSIONER McDONALD: I think you're right.

MR. MOONEY: In the PSA context you're talking about, yes.

COMMISSIONER McDONALD: Yes. And do you have--I mean, so I guess again I'm not quite understanding necessarily what your problem is.

I think that the problem I've always had with the chilling effect is that I have heard that as long as I have been there, and there is a record amount of money raised and spent every year, so the chill, it must be part of that global warming, because it appears to me that money is somewhat rampant.

But I guess what I haven't heard this morning, and it puzzles me a little bit, is we all want to be--and I mean this very seriously--I'm really strong for 501(c)(3)s. I don't know who

wouldn't be. And I think the question gets to be--I gathered what Ms. Hill was saying earlier was, she was frustrated because she goes out of her way to try to comply and she realizes others may not be quite as interested in complying, is what I thought she was kind of stating in her opening comments. And I think that in itself is part of the rub, it seems like to me.

MS. HILL: I think actually, and I have written this to the IRS in the past, and done congressional testimony mentioning this, but I think that the current state of guidance from the Internal Revenue Service creates what academics like to call a moral hazard, which is to say that it allows the hyper-aggressive, who have a great tolerance for risk and a lot of money for really good, high-priced lawyers, to get out there and push the envelope. Or for people who are going to just form themselves, you know, for an election cycle, and then go out of business and dare anyone to find them.

Those people push the limits, whereas

compliant organizations, organizations that wish to comply, I think have a record of not so much being chilled, I think, as somewhat hesitant, and maybe take the very sensible view that in many cases their exempt mission does not require that they be running broadcast ads within the electioneering communication window.

You know, one of the enigmas here--and so there is this kind of moral hazard, that it may play differently--I have been struck this morning by the always-invoked small organization. It reminds me of two things. One is agricultural policy. I grew up on a family farm in Wisconsin, and every time big agriculture wanted something, they invoked people like us. And we, of course, didn't want that at all and didn't like being used. So I have grown up with this kind of large/small arbitrage that always goes on in these conversations.

The second thing is that I have been serving this year on the Small Organization Task Force with the Independent Sector's effort, you

know, to get involved with the Senate Finance Committee, and the efforts to make sure we're maintaining the integrity of the exempt sector. So I've been on the Small Organization Task Force, and most of the members there have been managers of literally every grassroots organizations who are out there every day running these.

And what they uniformly rejected was any idea they should have special rules for them because they're small. They're more pure because they're small. And we saw the same dynamic there. Large organizations were pushing agendas within this process, and trying to get us to agree to them in the name of smallness.

And we rejected all of them because those organization managers took the position that they wanted the same rules applied to them. They wanted their integrity respected and maintained, and they were having none of it. It was an absolutely fascinating experience over the last year, working within that process with people from small organizations.

And so, you know, that's anecdotal evidence but I think it's kind of a cautionary tale about thinking that small organizations are looking for every bit of leeway and loophole potentially that they can find. In my experience, the people who call me up, thinking that maybe for once I'll stop thinking about reform and actually just get on board for them for some amount of money, to help them find a way around the rules, tend to be large, well-funded, and rather connected with high-profile candidates. And, you know, my university pays me to teach. I'm fortunate. I don't have to do it. I don't.

CHAIRMAN THOMAS: Let me sort of follow down that path. I think it might be kind of helpful to sort of get out from the experience of our panel some examples, maybe, of some 501(c)(3) groups that are large-scale operations, and that perhaps take a significant amount of corporate or maybe even union funding. Professor Hill, do you have some examples that you could share with us in that category?

MS. HILL: Well, I think that, you know, I didn't come with examples, but I certainly would be able to amplify my comments.

I want to state for the record that as a matter of tax law, there is absolutely nothing wrong for a 501(c)(3) organization to take money for its exempt activities from a corporation or a union or a foreign person of any type. There is nothing wrong with that at all. It is completely legal for a 501(c)(3) to do it. It is perfectly appropriate for tax law, assuming that these organizations engage in their exempt activity.

And one of the reasons to be, I think, concerned and to kind of look back to the '96 election, was there were all those allegations about foreign money coming into the election process. You know, the hearing stopped and we never did get quite to the bottom of that.

But, you know, given the position of this country in the world, you can see why certain foreign interests might think that they should help us come to some voting decision, that they have

interests at stake, too, and would like to be heard. But I think the (c) (3)s should not become a vehicle for that.

And so that's one place where the Federal Election Campaign Act and the Internal Revenue Code just diverge in their purposes. There's every reason in the world that corporate and union and foreign money should be coming in to our charities or our exempt activities. That's positive. It's different if we're going to arbitrage (c) (3) status into electioneering communications.

CHAIRMAN THOMAS: And while I have you here, your written statements are very helpful, but could you just in essence summarize and emphasize for us how you feel that the ability of an organization as a (c) (3) to go ahead and promote or support a candidate, and perhaps even cross the line into intervening, might not really generate a significant or effective response by the IRS?

MS. HILL: First of all, the IRS does not generally examine organizations, and probably does not even have statutory authority to fast track--which is

one of the controversies around PIP--until you file your annual information return, which is going to be well after the election. And then the processes for attempting to revoke exempt status are very slow and designed to be slow. The organization has a right to seek a declaratory judgment.

The IRS has proved itself remarkably reluctant to revoke exemptions, using instead 4955, which has remarkably soft sanctions in it, just monetary penalties. At times it will just enter into a closing agreement, which I think is very much like an indulgence in the medieval church, if they promise to sin no more, if you promise to at least think seriously about undertaking certain corrective actions. The Service has done this, and they were perhaps right to do so. It's within their authority to do that.

They have authority to, in fact in cases of flagrant participation or intervention, to immediately go to court and revoke exempt status. They have never done that, even in the face of

explicit endorsement of a candidate. They have never even seen fit, under their statutory authority, to define "flagrant." In fact, there are regulations saying "It's flagrant if it's flagrant." There is the exact quote in my written testimony, but that's what it is. It's completely circular.

And so the IRS, and I've cited to you very recent private letter rulings, in which organizations which certainly were participating or intervening did not have their exemption revoked, and in one case where they had violated most of the other big ticket items that should call for revocation as well. The Service does not like to revoke exemption.

And whether that is good tax administration is not a question before us today. The question is then, when you've got a blanket 501(c)(3) exemption, you have to know that once you've done that, even an organization that has participated or intervened is still going to be a 501(c)(3), and you have exempted them with your

blanket exemption.

CHAIRMAN THOMAS: Thank you. I'll turn to Ms. Kingsley and Mr. Mooney.

We have to deal with this distinction which I think you're bringing to us, which is, the IRS as you interpret their publications and pronouncements does draw a line, and they seem to suggest that a 501(c)(3) cannot in fact promote or oppose a candidate, but then you put the gloss on it, "as a candidate."

So I'm curious. How in the world are we going to sort of figure out whether something is PASOing a candidate as a candidate? Are you basically asking us to use a magic words tests? There has to be a reference that says, in essence, "Senator Brain Dead voted against the Baby Seal Protection Act as a candidate. Therefore, call him." Is there going to have to be some reference to an election? I'm puzzled as to how we can go with your test and in essence rely on the Internal Revenue Service to make that kind of a meaningful distinction.

MS. KINGSLEY: I would not ask you to adopt a standard which says PASO as a candidate. I think the question is whether, if you're going to look at the IRS standard, whether that is sufficient to protect against PASO communications. You have to look at what PASO means and what the IRS test means, and I agree there is a lot of tea leaf reading that goes on there.

I think Professor Hill mentioned earlier the question of things that overlap, where you're doing two things. Maybe you're lobbying and intervening in an election. And I would disagree that there is no--we don't know where the IRS would come out on that. If you're doing both, if you're doing any campaign intervention, it's campaign intervention, and it's not going to be permissible for a (c) (3).

We have to honestly say it. We can't say that you can never be critical of someone who holds office just because they happen to be a candidate. As a (c) (3), they are allowed to criticize or praise actions that people take as officeholders,

but there is this murky, difficult to understand, very broad test that keeps them away from anything which not only refers to elections but would be understood, under all the facts and circumstances, as evaluating the person as a candidate. And I wish I could frame that more clearly, but--

MR. MOONEY: I think that Commissioner Everson said it best when he was discussing the PIP, the much maligned, much-discussed PIP program, which is redundant because I think it's a political intervention program.

"Our obligation is to enforce the law," he said, "which prohibits all charities," prohibits all charities, "from engaging in political activities." And he went on to say, "The IRS follows strict procedures involving selection of tax-exempt organizations for audit and resolution of any complaints about such groups." Now, that's not some low-level IRS official. That's the Commissioner of the Internal Revenue Service speaking very bluntly about this issue.

So, you know, when it comes to the Baby

Seal hypothetical, I bring us back. We're talking about hypotheticals, quite often, and the reality is that 501(c)(3)'s don't engage in activities that fall into these hypothetical situations, that support or oppose candidates in some sort of sneaky back way. They just don't do it. There is no record of that. There are some examples that have been floated about that I think are somewhat arguable. But for the most part, the hundreds of thousands of charities that are out there, they simply don't engage in that activity, and that's why they at least in part deserve--that's one reason to suggest that the exemption is appropriate for them.

CHAIRMAN THOMAS: Professor Hill, I see you leaning toward the mike one more time. Could I ask you to keep it short?

MS. HILL: Yes. Could I just observe, with respect to the Commissioner's statement and PIP, Commissioner Everson was making that statement because he was defending his agency against charges, allegations that they had selected certain

organizations for inclusion in the process on partisan political grounds, and he was out there defending his agency and taking umbrage over that characterization. I don't believe he was making a statement that tells us what political activity is for purposes of what's absolutely prohibited.

The IRS seemed to think that at least 131 organizations merited some looking at this time around. We know, as I have said in my written statement, that at least one organization expressly endorsed a candidate, although not in a broadcast ad. We know of other instances where--at least two others who I think are 501(c)(3) have expressly endorsed a candidate in this election cycle. What will happen to those is not clear at all.

So I think that what one says about PIP is, the IRS thinks that something is going on. The controversy over whether they chose the participants for that examination on partisan grounds is still out there, and what is going to be the upshot of it we don't know.

CHAIRMAN THOMAS: Mr. General Counsel?

MR. NORTON: Thank you, Mr. Chairman.

My question is for you, Mr. Ryan. We're not here to adopt a regulation defining the PASO standard, but we are of course by necessity struggling with the authority of the Commission to adopt exemptions under its statutory authority for categories of communications that don't promote, support, attack or oppose a candidate or otherwise satisfy the electioneering communication elements.

When I was reading Professor Hill's comments, it struck me that the overlaps that she spent some time addressing in the tax law were apt here as well. You know, a PSA runs a few weeks before an election that features a federal candidate who is going to participate in a charity golf event to raise money for kids with cancer, certainly motivated predominantly by other things or maybe by other things than the election, but to say that it has no effect on promoting that candidate is probably a stretch. I think the same could be said of ads that are run by (c) (3)s that may be predominantly motivated to influence or

exhort a legislator to act on legislation, but likewise it would be difficult to say had no effect on promoting, supporting, attacking or opposing a candidate.

Congressman Shays, in that testimony that you cite, also said--he mentioned the example of a church that regularly broadcasts its religious services, and that mentions in passing as part of the service the name of an elected official, as an example of something the Commission might exempt. And he said there could be other examples where the Commission could conclude that the broadcast communication in the immediate pre-election period does not in any way promote or support any candidate or oppose the opponent.

So my question to you is, we've got three and a half years to think about this. Is there another example that you can give in the category of communications, that would satisfy the elements of an electioneering communication that would not in any way promote or support a candidate or oppose the opponent?

MR. RYAN: I think the exemption that is in your regulations currently that immediately precedes the 501(c) (3) exemption, that deals with local and state candidates, I think that's a perfect example of an appropriate use of your Clause 4 authority. There was some mention in the NPRM about whether or not that exemption was appropriate, and we commented in our written comments that we do believe it is.

Actually, I think we made these comments in the context of the NPRM's discussion of advisory opinions, several advisory opinions, and discussing their applicability in this context, this rulemaking context, where we stated that state and local candidates can rightfully have the PASO test applied to them because in the McConnell court's words and in the Buckley court's words, going back to the 1970s, organizations with the major purpose of influencing elections, it's fair to apply a PASO-type test, or for a purpose of influencing statutory language to those organizations.

I'm not sure of how to craft an exemption

much broader than that, you know, the exemption where this PASO standard applies to candidates, committees at the local government level, but I think that's a good example of a permissible and wise use of the Clause 4 authority.

MR. NORTON: Does Congressman Shays articulate the right standard? If the Commission determines that, look, the motivation is predominantly charitable, artistic, something else, and clearly has that purpose and effect, but it in some way, in any way, could be construed to promote, support, attack or oppose a candidate, we simply can't exempt that category of communications. Is that the standard?

MR. RYAN: I think that Congressman Shays got it right, and I think the devil is in the details. There was some discussion in the first panel about a grassroots lobbying exemption, what would it look like. That's not really on the table in this rulemaking. It wasn't noticed. But it would be difficult and it would be a challenge for the Commission to craft statutory--regulatory

language, I should say--that would effectively create an exemption that would not encompass within its bounds PASO communications. But I think Congressman Shays seems to have gotten it right.

MR. NORTON: Thank you. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Vice-Chairman Toner?

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman.

Mr. Ryan, I would like to follow up on that question and bring us to the discussion in the first panel which deals with the possible exemption for works of art, books, films. Mr. Simon this morning indicated that he thought, although he wasn't endorsing it, it could be legally permissible for the agency to fashion an exemption for the promotions of works of art, provided that there was a requirement that those promotional efforts be done in the course of business, bona fide commercial activity.

And then he went further and indicated, and I think your written comments also said this,

towards the end of your written comments, that there would be no requirement or no showing, there would be no requirement that it has to be an ongoing movie producer or book publisher, or even a first-time work of art, to qualify. Do you agree with Mr. Simon's assessment? Would it be legally permissible for the agency to do that?

MR. RYAN: I do think it would be permissible, given the caveat that we haven't seen the regulatory language itself, but I think conceptually it would be permissible. I think Mr. Norton raised a very difficult hypothetical this morning, very wisely did so. He hit the nail on the head with, what is the most challenging aspect of creating this exemption? And Commissioner Mason posed a simple question: What's the rationale behind this?

And something that occurred to me during the discussion this morning was that one of the primary rationales undergirding the limitations on corporate use of treasury funds to engage in election activities is their ability to amass

economic resources, vast resources in the economic marketplace, and transfer those resources to the political marketplace.

This example is right on the cusp. It's right on the edge of those examples. But what I think we have, particularly if the regulation is crafted well, is an example of an entity amassing resources in the economic marketplace and deploying those resources in the economic marketplace, even though it's bumping up against the political marketplace.

VICE-CHAIRMAN TONER: Let me ask, you make a good point about the particular regulation language, and in the NPRM at 49,515--I always like the fact that when we're talking about page numbers, there's a whole lot of regulation going on here. But anyway, I want to note that we only have a very few number of pages of regulation compared to the IRS, and that our regulations are eminently--

COMMISSIONER McDONALD: We are very fond of them, by the way.

[Laughter.]

VICE-CHAIRMAN TONER: We're looking better and better.

Mr. Ryan, my question to you is this: As I understand it, and Mr. Simon's testimony this morning and your testimony today is that you would be comfortable with an exemption for the promotions of movies, books or plays, provided that it was in the ordinary course of business.

And so reading this regs language, proposed paragraph 7 in here, 100.29(b)(7), "promotes a movie, book or play, provided that the communication is within the ordinary course of business of the person that pays for such communication," period, and you tend to delete the language that talks about, furthermore, that it also doesn't PASO the candidate. Would you be comfortable with that framework?

MR. RYAN: As we stated in our written comments, I think that you need to elaborate a bit. One of the things that the NPRM doesn't mention, but that you have mentioned in the course of MUR

5474 and some advisory opinions, is this notion of bona fide commercial activity, and you flesh it out a little bit. I think you would be very wise to look at the language you used in the context of your discussions of bona fide commercial activity and augment this language about ordinary course of business with some of the factors that you include in those other discussions.

VICE-CHAIRMAN TONER: So if we went with this last language I just read, and we fleshed out, as you indicated, bona fide commercial activity, on balance would it be your view that that would be legally permissible, on balance?

MR. RYAN: Provided that the language that was chosen reflects those advisory opinions and the MUR in a way that we think is appropriate or is comprehensive, yes. And I think it's a difficult question. I don't feel strongly about this exemption. I'm not here to champion it. I'm not going to defend it. But, you know, I think that there may be a way to do it satisfactorily.

And I think Mr. Bauer perhaps put it best

this morning when he described how the Court approaches these things, and that the Court will likely be receptive to explanations of why you're doing this, and perhaps talking about the rationales underlying the Supreme Court's opinions in Austin and Beaumont and the notion of commercial marketplace and political marketplace, you know, it may be an effective way, combined with a well-crafted regulation, to implement this type of exemption.

VICE-CHAIRMAN TONER: Spoken like a true lawyer.

MR. RYAN: I always try.

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you.

Mr. Ryan I want to clarify something, because I thought I heard you say something before, and maybe I misheard you. I thought I heard you say that the Congress made a determination in the electioneering communications provision that

communications that fit within those criteria by definition PASO a federal candidate. And that can't be right, because then it would make absolutely no sense to say you're going to exempt any category of communication from the electioneering communications provision on the grounds that it doesn't PASO. If these things by definition PASO, then you could never write an exemption that would fit the criteria that Congress laid out for us. So did I mishear you, or--

MR. RYAN: You misheard me to the extent that I made that comment in the context or in reference to the six examples given in the Revenue Ruling, as well as the FAIR advertisements described in the NPRM. I think that those ads, because PASO is an undefined term, as was discussed all morning, there is no way to nail it down, and I think you're correct to say that if the electioneering communication--you know, if those two terms are coincident, "PASO" and "electioneering communication," then one of them becomes functionally meaningless. The PASO test

becomes functionally meaningless.

But I made that comment in the context of the examples we have before us, the six Revenue Ruling "situations" as they call them, and the FAIR advertisement, all of which in my interpretation do meet both the definition of electioneering communication and the spirit or the intent of congressional package of BCRA.

COMMISSIONER WEINTRAUB: Let me ask you about an issue that Ms. Kingsley raised in her written comments, and I think also mentioned here at the table, that when an organization does a PSA, they have no control over when it's going to be aired. And so not only was the judge wrong in saying, well, this is a really minor thing because it only means that they can't, politicians can't be involved in PSAs for this brief window of time, because you could do it six months earlier and it could just happen to be broadcast during the window.

But it's also not an answer--because I have heard this argument, maybe it's in your

comments, and I think somebody said it earlier today--you say, well, fine, so use sports figures of somebody else. Because, as the Cancer Society example shows, somebody who is not a candidate, such as the First Lady, can become a candidate, and sports figures in particular are increasingly running for office. So I think it would be--you know, what if somebody said, "Hey, Jim Bunning, there's a guy I would want to have do a PSA for me in Kentucky," and then, lo and behold, he runs for political office. I mean, there's any number of--

COMMISSIONER McDONALD: A few decades later, just so you know.

COMMISSIONER WEINTRAUB: You know, we're in an area that I don't understand naturally. I happen to know that Mr. Bunning is a former baseball player. But I know that I repeatedly read in the newspaper about one sports figure or another being courted to run for office.

So what's a nonprofit to do? You know, they say, "Okay, fine, we'll avoid politicians. We'll go out and get an athlete," and then the

athlete ends up running for office, or some other prominent person who, because they're prominent, they are courted to run for office.

Should there be or can there be some kind of good faith exemption, some kind of exemption based on--some safe harbor based on when the ad was created rather than when it's run? Are you troubled by this? Is there anything we can do about it?

MR. RYAN: I don't know enough about the area of PSAs to state with authority what the definitive answer is, but I don't think that it's unreasonable, at least with respect to those individuals who are known to be candidates or elected officials at the time the PSA is made, to have the PSA given to whoever is going to distribute with a notice attached that, you know, this mentions a federal candidate or officeholder, and there are federal campaign finance laws that apply to it.

With regards to the individuals who we don't know at the time the PSA is made, that they

will eventually become a candidate or elected official, it seems as though the disbursement that has been made by the corporation that happens to be registered under 501(c) (3) in this context is made to produce a communication that doesn't refer to a candidate or an officeholder at the time that it's produced.

And I'm not sure how this would intersect with the Commission's existing regulations, but once that communication is made and given to another legal entity, another corporation which is going to do, in Ms. Kingsley's words, whatever they want to do with it, I'm not so sure that liability attaches to the organization that created this communication involving someone who wasn't a candidate or officeholder.

COMMISSIONER WEINTRAUB: Now you sound dangerously close to Ms. Kingsley's--

MR. RYAN: It's been a scary morning.

COMMISSIONER WEINTRAUB: And you were certainly nice about Mr. Bauer. That's two in one day. Simon and you both said nice things about

him. But I think I forgot what I was going to say,  
so I'll just stop. Thank you.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Mr. Ryan, I wanted to  
continue to pursue this electioneering  
communication point, and first of all I want to say  
we're in the unfortunate position of not being able  
to say "I'm not so sure." We're charged with  
saying what the rule is, and I'm very sympathetic  
to either the (c)(3) organizations or the  
broadcasters, whoever is going to be on the  
griddle, at least in being able to lay out a rule  
for them, a way that they could become sure.

And so if you're suggesting that it would  
be appropriate to say, I think the operative  
language might more be "makes a disbursement" for  
the costs of producing, that if the person wasn't a  
candidate when the organization, when the (c)(3)  
organization paid to produce the ad, that they  
wouldn't be liable, I think that would be partially  
satisfactory or significantly satisfactory to them.  
The question would then be, okay, who is liable?

Let's say the Hillary Clinton example which was given, was in fact a broadcast ad. It was made when she was First Lady, and let's say it was made in good faith before the discussions about her running for Senate, but a broadcaster then ran it in New York after she became a candidate, within the window. Who is liable at that point?

MR. RYAN: Well, I think we have two different disbursements, you know, in the eyes of federal campaign finance law, in this hypothetical scenario. One is the disbursement to create the video or whatever it might be, the radio ad or the video. And the second is a disbursement, if you will, for the giving away of air time that would otherwise be charged for, by a media corporation.

And in the scenario that you have laid forth, the initial disbursement to create this communication didn't involve a candidate, didn't involve an individual who was either a candidate or an officeholder at the time. I think it may be reasonable to say that that 501(c) (3) organization is not liable.

But the second part of the equation is the corporation that chooses to disperse this communication, and they would be, at least at first blush, thinking--and I haven't thought this through prior to this meeting--but they would be liable for any disbursement they were to make or costs they were to incur for dispersing this message, if it refers to a clearly identified candidate within the specified time frames under the statute and is targeted to the relevant electorate.

COMMISSIONER MASON: Now, give us a little sort of more general policy advice, because there's a certain part of me that wants to say, well, gosh, a (c) (3), if we can use non-political figures, and particularly if we give them the assurance, the kind of assurance you talked about, and if they're not a candidate when the ad is made, at least they know who they can go to for their PSAs.

But then we're in this position of, as I think some of my colleagues have said, look, of course a candidate being associated with blood donations in the wake of Hurricane Katrina is great

for the candidate. It's great for them anytime, it doesn't matter, 30 or 60 days. And so do you really think Congress, in passing BCRA, intended to throw a regulatory net out there that essentially said, "Hey, just forget about Members of Congress making PSAs," because they could eventually become entangled with this, and that that would be as it were acceptable collateral damage to our enforcement of the electioneering communication window?

MR. RYAN: Well, I'm not sure how the candidate or official gets entangled with it when you have either of several corporations making disbursements to do this stuff. I don't know where liability--

COMMISSIONER MASON: Well, they're entangled with it because they're asked to do these and they obviously want to do these, and we'll presume they want to do these because they believe in the cause, and perhaps also because they think it's good for their public image.

So what I'm asking is in terms of judging

how Congress would want us to interpret this. Do you think it's fair to say that Congress would want us to interpret it in a way which would cause nonprofit organizations to say, "We're just not going to use candidates anymore, Members of Congress, in our PSAs." Is that what Congress must have wanted?

MR. RYAN: I think Congress wanted to enact and it did enact a bright line test, and to the extent that it would discourage nonprofit organizations or any corporations to engage in this type of behavior, then that may be a collateral effect. I'm not confident that the underlying premise to this hypothetical is in fact true, that all use of candidates and officials will be ceased if there is no blanket exemption for 501(c)(3) organizations.

And it gets back to comments that were made earlier by Mr. Mooney. We don't have a lot of evidence of this exemption being used, and the question cuts both ways. So does that mean we need an exemption or we don't need an exemption? Why

didn't they use it? Because the laws are vague? The fact of the matter is, cancer research hasn't stopped, even though nonprofit organizations haven't been using this exemption to a very great degree, and I don't think cancer research is going to stop if this exemption that hasn't been used is eliminated.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. I'll be real brief.

Again, that gets to my point. We've said, and rightfully so, what we need is, what we're hoping for is evidence, and that cuts both ways. I feel a little awkward simply because I have great affection for 501(c) (3)s, so it puts me in kind of an odd circumstance.

But, for example, we've just been discussing, I leaned over to the Chairman, I'm not sure, don't we have about 2,000 candidates per election cycle? Is that about right? I used to know the answer. But let's say give or take a few. Now, I don't know that that's right.

I dare say to you that it is a minuscule amount that are either sports figures, First Ladies, actors, I don't know, whatever else, in the whole field. I mean, I'm just so fascinated that all of a sudden this is--I'm not saying it isn't important--and that by the way have done public service announcements that somehow inadvertently got caught within this time frame. I would venture to say to you that it's not one-tenth of 1 percent.

Now, it turns out that when you're interpreting law, there is not always a bright line test because if there was, there wouldn't be any Commissioners, and we would be very unhappy about that. I think a lot of people would be happy but it wouldn't be us, as it turns out.

So I think if we're going to talk about facts, and the Chairman indicated to the first panel--I mean, I just think it would be helpful to us, we're in an area we're grappling with that's not easy, and I would urge folks on either point of view to come forward with examples, more examples. It would really help us.

Because on the one hand I am puzzled. If 501(c)(3)s seldom ever avail themselves of this kind of a relationship to begin with, and if public service announcements basically--where I happen to agree, I must say. I've always found it kind of sad in a way. Somehow calling it a public service announcement and then hiding it from the public doesn't seem like a public service announcement to me, but that's what they call them, which is kind of slick if you think about it, I suppose.

It just seems like to me that we've got to come to grips with the facts. And the first panel was very articulate about the facts, and we need this and we need that, and we all can cite an example or two, maybe even three, but that's not really what we're confronted with. What we're confronted with, it seems like to me, is a much larger body than that, and we have to make some decisions.

I kind of take the position philosophically that the IRS, with a full understanding of--I won't say full understanding of

what they say and do, I wouldn't go quite that far --but I certainly watched with great interest the pronouncements they've made in this area, and there are some fairly interesting and celebrated pronouncements and issues that have come up of late.

We're still discharged with enforcing the law from our vantage point. And, you know, we can always bail, and we've got to find somebody else to hold accountable. That's all very interesting, but I don't think in terms of clarity that helps in relationship to our responsibility.

But I would love, and I am assuming that the Chair is going to extend the same consideration to this panel, if there are examples, we would like to have them because it would help us. I mean, it really, genuinely would help us. And I took a point that Commissioner--that our Chairman made earlier on when he was asking somebody about, you know, "Give us some facts," and the same applies on the other side, if there is anecdotal evidence of a chilling effect, and I would take that point. I

suspect that's right. I can certainly foresee it.

I would like to know a little bit more about it, and not somebody said, "Well, gee, that looks kind of complicated. We don't want to be involved." But if it looked complicated because they wanted to call on somebody and they wanted to take a particular position that might in fact get themselves into deeper water than they are normally used to, I think that's a fact that I would be interested in.

Otherwise, on either side, I might say, I can't get much from it because it's not concrete enough. And I think ultimately what we have with 501(c)(3)s, for example, is--and people ought to avail themselves of it--I think if they, with the full understanding that there's very few of them that would do any of this anyhow, but the ones that do, they may be well advised to call on the Commission for an advisory opinion. And I think that's something that they should avail themselves of, and that's something that we get paid to do.

CHAIRMAN THOMAS: Thank you. I'm just

going to hit on a point involving PSAs. I don't think we've quite covered it yet.

We have, as you are all painfully aware also, a set of regulations defining coordinated communications. And I notice, Ms. Kingsley, in your comments you made reference to the advisory opinion that we issued to Congressman Davis involving some public service announcement situations that he was asking about. He was willing to promote support of the National Kidney Foundation.

But that advisory opinion ultimately was for the most part turning on whether or not those should be deemed a coordinated communication, and we had that issue because we have a regulation that says if you make reference to a candidate within 120 days of an election, and it goes to some folks within that person's electorate, and it makes reference to that candidate, that gets you into the content prong of our coordination rule. And we have also said basically in other contexts that participating in an ad basically brings you to the

point of coordinating in that ad.

So I want to get clear, I assume that all of you, when you're dealing with coordinating with a candidate in terms of having them appear in a PSA, you are basically saying, totally apart from this electioneering communications stuff we've been talking about today, you've got a separate legal issue about it being a coordinated communication, which for an incorporated (c) (3) would be impermissible. Am I correct that your understanding is along those lines and that you advise your clients along those lines?

MR. MOONEY: That's an interesting point, but I will tell you that when I talk to 501(c) (3)s, in particular in this area, they have much more to worry about from the federal tax law prohibitions. They will have long violated federal tax law prohibitions before they even come close to coordinated communications issues.

When I speak with 501(c) (3)s that are dealing with federal candidates in kind of the context that you describe, I suggest that they

write a letter and make it very clear to that candidate what the limits of the organization are and what the limits of that transaction are, in order to make sure that there is no potential liability on the tax side. As far as the FEC goes, 501(c) (3)s largely don't cross your, put a shadow upon your path, at least when I deal with them.

MS. KINGSLEY: I did take your point that the same concern we're raising about the 60 days for the PSAs could arguably apply to the 120 days, although I understand that that regulation is to be revisited and we don't know where we'll end up on that. I think the same policy considerations should apply, though.

Again, if the organization isn't controlling the timing--and I haven't looked at the wording of those regulations, so I can't cite the specific language. I haven't pulled it up for a while. But I would hope that there is a way that, if it is not itself distributing the communication within that window, then it's not making a prohibited corporate coordinated communication.

CHAIRMAN THOMAS: Thanks. Mr. General Counsel, any further follow-up? Very well, we've reached the end of our hearing today. Thank you, one and all, for coming and helping us better understand what we're about to do, and we look forward to seeing you again down the road, let's hope maybe not on the exact same issue but something different.

The hearing is adjourned.

[Whereupon, at 1:12 p.m., the hearing was adjourned.] □