

Indiana Election Commission
Minutes
October 25, 2001

Members Present: Dudley Cruea, Chairman of the Indiana Election Commission ("Commission"); S. Anthony Long, Vice Chairman of the Commission; Joseph M. Perkins, Jr., member; Butch Morgan, member.

Members Absent: None

Staff Attending: Laurie Christie, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Spencer Valentine, Co-Director of the Election Division; Kristi Robertson, Co-General Counsel of the Election Division; Dale Simmons, Co-General Counsel of the Election Division; Michelle Brzycki, Special Projects Coordinator; Lori Hershberger, Special Projects Coordinator.

Also Attending: Mr. Steve Eicholtz; Mr. Shaw R. Friedman; Mr. Tom Kirby; Mr. Brad Klopfenstein; Ms. Stephanie Mannon, Office of the Secretary of State.

1. Call to Order

The Chair called the October 25, 2001 meeting of the Commission to order at 10:00 a.m. in Conference Center Room A, at 402 West Washington Street, Indianapolis, Indiana.

The Chair noted that proper notice of the meeting had been given, as required by state law. A copy of the meeting notice, agenda, and designations of proxy are incorporated by reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying at the Election Division Office.]*

2. Transaction of Business

The Commission transacted the business set forth in the Transcript of Proceedings prepared by Ms. Rhonda J. Hobbs, RPR, of Connor+Associates Reporting. The Commission corrects the following scrivener's errors in this document:

Page 136, line 25, replace "KLOPPENSTEIN" with "KLOPFENSTEIN".

Page 140, line 25, replace "Caroll" with "Carroll"

3. Adjournment

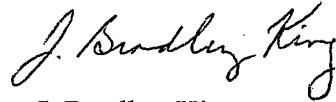
There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Mr. Cruea moved, seconded by Mr. Long, that the Commission do now

adjourn. The Chair called the question, and declared that with four members voting "aye" (Mr. Cruca, Mr. Long, Mr. Morgan, and Mr. Perkins), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 3:00 p.m.

Respectfully submitted,



Trent Deckard
Co-Director



J. Bradley King
Co-Director

APPROVED:



Daniel A. Dumezich
Chairman

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INDIANA ELECTION COMMISSION
PUBLIC SESSION AGENDA

Conducted On: Thursday, October 25, 2001

Location: Indiana Government Center South
Conference Center, Conference Room A
302 West Washington Street
Indianapolis, Indiana 46204

Rhonda J. Hobbs, RPR
Notary Public
Stenographic Reporter

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A P P E A R A N C E S

INDIANA ELECTION COMMISSION:

- Mr. Dudley Cruea - Chairman
- Mr. S. Anthony Long - Vice Chairman
- Mr. Joseph M. Perkins, Jr. - Commission Member
- Mr. Butch Morgan - Commission Member

INDIANA ELECTION DIVISION STAFF:

- Mr. Dale Simmons - Co-General Counsel
- Ms. Kristi Robertson - Co-General Counsel
- Ms. Laurie P. Christie - Co-Director
- Mr. Spencer Valentine - Co-Director
- Ms. Michelle Brzycki - Special Projects
Coordinator
- Ms. Lori Hershberger - Special Projects
Coordinator

1 CHAIRMAN D. CRUEA: I call to order the
2 meeting of Indiana Election Commission for
3 Thursday, October 25th. I apologize for being a
4 little late for starting, but wasn't notified of
5 the room change, and it took me a while to find
6 the new room so...

7 COMMISSION B. MORGAN: Mr. Chairman, I'm
8 willing to over look the punctuality challenges
9 of some people.

10 CHAIRMAN D. CRUEA: I appreciate that, Mr.
11 Morgan. Okay, first of all, we'll have the
12 approval of the September 27th, 2001 regular
13 meeting minutes.

14 MS. K. ROBERTSON: Mr. Chairman, Members of
15 the Commission, we just finished the minutes
16 last night actually, and so I know you all
17 haven't had time to review this so we would
18 suggest that -- give you time to review it and
19 maybe you could adopt these at your November
20 meeting and we'll also have the minutes from
21 this meeting and ready to be adopted
22 (indiscernible).

23 CHAIRMAN D. CRUEA: Okay, will be fine.
24 Thanks. Before we go into the next, I would
25 like to call on a representative of the

1 Secretary of State, Sue Ann Gilroy. I believe
2 she's here and brought a packet for us and would
3 you like to say a few words.

4 MS. S. MANNON: Sure. Thank you. I was
5 stepping in and I managed a project for the
6 Election Task Force that we -- that were
7 recommendations that we unveiled on Tuesday and
8 was the result of eight months of bipartisan
9 work, the likes of which I have never seen
10 before. Everyone sat at the table and conversed
11 openly and it was really a wonderful experience
12 to find that.

13 I have given you each of you gentlemen a copy
14 of the report. It's also then will be downloaded
15 on the Secretary of State's website. So we're
16 really looking forward to moving these
17 recommendations in place and hoping to build on the
18 momentum that started in the last session. Thank
19 you so much for your support.

20 CHAIRMAN D. CRUEA: Okay. Thank you,
21 Stephanie. Be sure to tell the Secretary of
22 State we appreciate getting a copy of this. I
23 know she worked awfully hard to get this
24 bipartisan task force together and they came up
25 with a lot of good recommendations.

1 MS. S. MANNON: If I may, I'd also like to
2 say the Election Division, especially these four
3 folks right here, worked so hard to support the
4 task force with legal opinion and technical
5 clarifications, (indiscernible). They really
6 are to be commended for their hard work so thank
7 you.

8 CHAIRMAN D. CRUEA: Okay. Thank you. I
9 know that a lot of these changes are going to
10 take action by the legislature, but if there's
11 any action that we as a commission can do, we'll
12 certainly look at that and do what we can.

13 VICE CHAIR A. LONG: The only question I
14 had, Mr. Chairman, is there anything,
15 specifically, that this commission needs to do
16 with regard to the report?

17 MS. S. MANNON: I can't think of anything
18 from you guys.

19 MR. D. SIMMONS: Members of the Commission,
20 there is no -- there are some administrative
21 suggestions that would apply to the clerks, but
22 the rest of them are legislative. Nothing
23 specifically recommended from the commission in
24 that report. So you're doing all you can do per
25 the Indiana election law.

1 CHAIRMAN D. CRUEA: Okay. Thank you. Next
2 we'll go on to campaign finance enforcement.

3 MR. D. SIMMONS: Today -- Chairman and
4 Members of the Commission, today in your packet,
5 we have previously provided you the motion
6 supporting documents filed by the Chamber on
7 this motion to dismiss. It was filed by the
8 Democratic Party.

9 Since the last meeting, the Chamber had an
10 opportunity to put out a reply brief. We have
11 included the reply brief in your packet for today's
12 hearing. We're ready to proceed when you have --
13 unless there is procedural matters that need to be
14 taken up.

15 VICE CHAIR A. LONG: Counsel has not been
16 here when we adopted our procedure. Has
17 everyone been briefed on it?

18 MR. D. SIMMONS: It was provided in the
19 notice that there would be a half hour allowed
20 for each party so present their arguments, and
21 then response rebuttals will be at the
22 discretion of the Commission -- I think that was
23 in the notice so that's just sort of the ground
24 rules. And it will be -- since the Chamber has
25 the burden of proof in this, it would be their

1 opportunity to go first.

2 CHAIRMAN D. CRUEA: Dale, do we need to
3 swear anyone in that -- no, okay.

4 MR. T. KIRBY: Mr. Chairman and Members of
5 the Commission, good morning.

6 THE COMMISSION: Good morning.

7 MR. T. KIRBY: I'm Tom Kirby, and I'm here
8 as counsel for the United States Chamber of
9 Commerce. As a lawyer I'm very relieved that
10 I'm not going to be sworn in. I'm also -- I
11 think I ought to start at the very beginning by
12 expressing my gratitude and my client's
13 gratitude for the courteous and professional way
14 that staff and counsel have dealt with us.
15 Getting to this point has been, I think, as
16 painless as it should be, and I'm looking
17 forward to the opportunity to discuss these
18 matters with the commission.

19 I'm also very pleased to have returned to
20 America's Heartland only briefly. We were able
21 simply to walk into both of these buildings and to
22 walk into both of these meetings without being
23 searched, without being x-rayed and magnified and
24 one thing or the other, and that is a relief, and
25 it's something that we -- something that we don't

1 have out of Washington DC where I hail from.

2 In this particular proceeding, my client, the
3 Chamber of Commerce, stands accused. It stands
4 accused under a criminal statute, and what it
5 stands accused of doing is exercising its First
6 Amendment right of free speech to criticize a high
7 government official saying that that high
8 government official has displayed poor judgment.

9 Right here in America, right here in Indiana,
10 right here in front of you, an American
11 organization stands accused under a criminal
12 statute because it dared to say on public TV that a
13 high government official had exercised poor
14 judgment, and that's what this case is about.

15 Now the Complainants will tell you, and you
16 know, by the way, that the Complainants are the
17 State Democratic Party. They're not any candidate
18 that had a personal stake in this. The Democratic
19 Party asked you, because my client said that a high
20 government official had exercised poor judgment, to
21 throw open our files and then subject us to all the
22 other burdens of litigation and discovery because
23 my client said that a high government official in
24 the State of Indiana had exercised poor judgment.

25 The only grounds they've offered, or No. 1, we

1 did say that. No. 2, well, the chairman of my
2 organization happens to be a gentleman who has
3 supported Republican causes. And No. 3, although
4 the Chamber of Commerce has many Indiana members,
5 it's in fact organized outside of Indiana and
6 therefore is, in the terms of the opposing side, an
7 outside corporation.

8 That's what this whole case will stand to, and
9 it's on that basis the commission is being asked to
10 launch an investigation and subject my client to
11 the burdens of discovery and to discourage my
12 client's supporters to contribute from this ad.

13 Now our position here today is very simple.
14 This complaint is a fundamental abuse of the
15 commission's process, fundamental abuse of the
16 commission's process. It's an attack on the
17 exercise of a clearly defined constitutional right,
18 and it lacks, moreover, even the slightest
19 statutory (indiscernible), a statutory
20 justification.

21 Our first point and our point that is
22 dispositive with this entire case and in fact
23 explains why this case isn't even properly within
24 this -- this commission's jurisdiction proceeding,
25 is that the Chamber of Commerce ad -- ads, actually

1 there were two of them, did not employ explicit
2 words that expressly advocated the election or
3 defeat of anyone. That's the Buckley issue, and
4 I'm going to spend a fair amount of time on the
5 Buckley issue.

6 No explicit words that expressly advocated the
7 election or defeat of anyone. Now beyond that, our
8 papers, and I'm not going go repeat everything in
9 my papers, although I certainly welcome any
10 questions from the commission at any time about
11 what we said, our papers also discuss the fact that
12 if you take the facts that are alleged in the
13 complaint and align them up against Indiana's
14 election law statutes, even if you had -- even if
15 you put aside the Buckley question, we haven't
16 violated the law and there's no substantial reason
17 in what you're told in that complaint to believe
18 that any violation has occurred.

19 First, it's alleged that while there were some
20 contribution related violations, but a contribution
21 requires an acceptance under Indiana law and there
22 is no allegation of an acceptance. Indeed, I think
23 in previous discussions with the commission before
24 we were first involved, I think it was acknowledged
25 that the Republican candidate, the supposedly

1 benefitting candidate, made quite clear his
2 preference that these ads not run. It wasn't an
3 acceptance. There was a repudiation.

4 We have been told in the papers, oh, well,
5 maybe a theory of coordination similar to the
6 coordination theory that's applied under federal
7 law might work and might satisfy this required
8 element of acceptance.

9 Well, of course, federal law has provisions
10 that Indiana law doesn't have in that regard, but
11 even if you assume that that's true, as our papers
12 point out, to establish coordination as a matter of
13 constitutional requirement, you have to have a very
14 close working together, substantial negotiation so
15 that the person putting out the speech and the
16 candidate can be viewed as in some kind of
17 partnership, and we cited the case for that.

18 There's a very recent case and the FEC
19 recently accepted that case and put out a
20 regulation based on it, and there are no facts here
21 alleging that the Chamber of Commerce entered into
22 any such coordination with anybody. So the
23 coordination point just has no statutory
24 justification.

25 There is an expenditure related count. Now,

1 one problem with this count, of course, is
2 expenditures have to be (indiscernible), and that
3 brings us around the circle and I'm going to get
4 back to that in just a minute, but the other
5 problem is that to report an expenditure, which is
6 what they want us to do, you've got to have an
7 expenditure.

8 There's a definable section in this statute.
9 Those definitions, we're told at the very
10 beginning, apply throughout the title, and we're
11 told that expenditure is a defined term, an
12 expenditure is a particular type of disbursement
13 made by particular types of entities, and the types
14 of entities are listed and there's no allegation
15 here that the Chamber of Commerce is any of the
16 types of entities that are capable of making an
17 expenditure. So we can't have failed to report
18 something we couldn't have done.

19 VICE CHAIR A. LONG: Isn't there an
20 allegation that the Chamber is a PAC in the
21 complaint --

22 MR. T. KIRBY: You're right.

23 VICE CHAIR A. LONG: -- and isn't that one
24 of the four categories under the -- under that?

25 MR. T. KIRBY: It is one of the four

1 categories. That allegation does appear in
2 Count III. The complaint is very careful in
3 saying what allegations it's incorporating, not
4 to rely on the Count III PAC allegations. We
5 pointed that out in our motion to dismiss. The
6 opposition didn't say oh, no, no, no, that was
7 on oversight. We really meant to do that.

8 And I think there's a sound tactical reason
9 why they haven't made that argument. It's because
10 if you tie the expenditure argument to our status
11 as a PAC, then you tie Count II with Count III, and
12 Count III then fails for the reasons I'm going to
13 turn to right now. We can't be considered a PAC.
14 Just flat out as a matter of law, read it in black
15 and white, in Indiana law, a corporation cannot be
16 a PAC. And the corporate, or the statute says that
17 very clearly to be a PAC, you have to make
18 expenditures or accept contributions. The statute
19 says that. That's what a PAC is, and it says that
20 a corporation that accepts contributions or make
21 expenditures is not a PAC. So we are not a PAC.

22 VICE CHAIR A. LONG: Doesn't that -- and
23 your -- your response there, when you quoted
24 that section of the law, didn't -- isn't the --
25 the statute, actually, it says that makes

1 contributions under the provisions of the
2 limitations. You would have to be under the
3 maximum limitation before you would be, but if a
4 corporation made an expenditure in excess of
5 that or would -- would that not then make it a
6 PAC?

7 MR. T. KIRBY: No. The -- there is a
8 provision such as you're talking about, and let
9 me just -- let me just turn to that rather than
10 trying to do that my memory. Here, for a
11 corporation, and I'm reading from IC 3-5-2-37.

12 VICE CHAIR A. LONG: A(1)?

13 MR. T. KIRBY: Paren B.

14 VICE CHAIR A. LONG: B?

15 MR. T. KIRBY: Yes, I believe it's bracket
16 B. It says a corporation or labor organization
17 makes a contribution in accordance with IC
18 3-9-2.

19 VICE CHAIR A. LONG: Now that's where I
20 want to stop you.

21 MR. T. KIRBY: Yeah.

22 VICE CHAIR A. LONG: 3-9-2 is the
23 limitations statute on the amount that a
24 corporation can make contributions, is it not?

25 MR. T. KIRBY: It is, but we have allege

1 and allege No. 1, to make any contribution, and
2 No. 2 it talks about a contribution in
3 accordance with, not in excess of the limits of.

4 VICE CHAIR A. LONG: Well, what would a
5 contribution in accordance with 3-9-2 be?

6 MR. T. KIRBY: It would be a contribution
7 within the provisions of that statute. It would
8 have to be...

9 VICE CHAIR A. LONG: Which puts a maximum
10 amount on it?

11 MR. T. KIRBY: That's right.

12 VICE CHAIR A. LONG: Okay. I mean, that
13 was just...

14 MR. T. KIRBY: But see, the complaint here
15 doesn't accuse us for this purpose of failing to
16 report a contribution, that's Count I -- we've
17 get with this. We're now dealing with an
18 expenditure related count and then you're a PAC
19 related count and we just are not a PAC, and
20 it's just crystal clear.

21 Another reason we're not a PAC is that to be a
22 PAC, an organization has to have a purpose to
23 engage in express advocacy, and that's going to be
24 the theme of my talk, which I'm going to get to in
25 just a minute, is what do we mean by express

1 advocacy?

2 But even the Indiana Supreme Court has said in
3 interpreting the relevant language, that to be a
4 PAC, you have to intend to engage in express
5 advocacy, and we haven't done that. Now that bring
6 us really to the starting point where I began and
7 where I think this entire matter can be ended,
8 about that is what do we mean by express advocacy,
9 and when you go to that question, you go back to
10 the Buckley case. It was a 1976 decision by the
11 U.S. Supreme Court interpreting the Federal
12 Election Campaign Act, but interpreting it under
13 the First Amendment and establishing constitutional
14 principles that as the Democratic Party has
15 acknowledged are fully binding here as well.

16 Now what I'd like to do is I just -- just
17 Buckley is a long decision with a lot of ins and
18 outs in it, I've made a copy of some of the
19 relevant pages, and if I could, I'd like to give
20 these pages to the members of the commission just
21 so I could -- Mr. Chairman, if I could, just so I
22 could walk my way through it. I think it would
23 make it more efficient.

24 CHAIRMAN D. CRUEA: Okay.

25 COMMISSION B. MORGAN: Thank you.

1 VICE CHAIR A. LONG: Thank you.

2 MR. T. KIRBY: What I've done here is --
3 I'm sure the commission is well aware of the
4 whole Buckley decisions, but I've simply pulled
5 out some particular pages that I'm going to --
6 going to focus my discussions on, and these are
7 the pages in Buckley that deal with the express
8 advocacy issue, and if you turn past the first
9 page, it tells you what page you're on, you'll
10 see several sections that I have highlighted.

11 The first two sections that I've highlighted,
12 since they were on the page anyway, I thought I
13 would note them because they're an important
14 conceptual background here that I'm sure you're all
15 familiar with.

16 The first of those highlights make the point
17 that -- when you're talking about the point of
18 regulating core protected speech, I'm not talking
19 about obscenity, I'm not talking about fighting
20 words, but when you're talking about regulating at
21 the heart of the First Amendment, you have to have
22 a precision of regulation, and that's the first --
23 and that's the dominant theme that you're going to
24 see throughout Buckley, and you see that in the
25 first thing that I marked.

1 And then they have a footnote and I've marked
2 just a part of the footnote where it explains the
3 peculiar reason why you have to have that
4 precision. The First Amendment affirmatively
5 guarantees the right to engage in political speech,
6 and really, the First Amendment says there shall be
7 no restrictions on that right.

8 Now the Supreme Court has said for compelling
9 reasons the legislature can carve out, if we
10 approve, some limited exceptions, but the point is
11 right up to where the legislature is allowed to say
12 it's bad -- it's not only good but it's
13 affirmatively protected and has the highest
14 constitutional value.

15 So you don't have the kind of situation where
16 you may in defining fraud, for example, on a
17 commercial transaction, where you have actionable
18 fraud and then you have sleazy conduct and then you
19 have what a reputable business might do, and so,
20 okay, there's a little bit of a gray zone, but
21 what's the worst that can happen?

22 Maybe some people have to steer clear a little
23 bit and avoid some -- some sleazy commercial
24 behavior. That's not what you have in the First
25 Amendment area. You have highly protected

1 activity, the highest level of constitutional
2 protection smack up to the line, and then you've
3 got a prohibition. And for that reason, in this
4 area, you have to draw that line clearly, and
5 that's the principle that the Supreme Court is
6 enunciating there as the background for its
7 analysis.

8 You can't have people who are going to engage
9 in political theme hedging and trimming and being
10 careful. They have to know right where it is that
11 they step across the line and get into trouble. So
12 that was their background principles. So then they
13 say here's the statute that we're looking at --
14 I've just marked the statute, the statutory
15 language, and there's something I didn't mark, but
16 should have, it's right above the Footnote 49 there
17 at the bottom of the page where they say look, it's
18 very easy to read that statutory language and
19 understand that it means that the speech we're
20 trying to regulate has to advocate the election or
21 defeat of the candidate.

22 But then the Supreme Court says then, as
23 you'll see, turn to the next page, that's not a
24 good enough stand, because there are all sorts of
25 ways that speech can be thought to advocate the

1 election or defeat of a candidate, and there's a
2 entire discussion there and I've just highlighted a
3 couple of points.

4 The first highlight in the left-hand column
5 there is where they're making the point that well,
6 we could try to distinguish between issue advocacy
7 and candidate advocacy -- I mean, that's been
8 suggested as an approach, but they say look, that
9 won't work. Lots of discussions of issues really
10 in effect support candidates. Lots of times when
11 you talk about candidates, you end up talking about
12 issues. That line collapses.

13 So then they say we consider drawing the line
14 between issue advocacy and candidate advocacy --
15 it's not a practical line, and that's in that first
16 highlighting, in the text around it tells you,
17 that's not a standard that's going to work. Then
18 they go down to the bottom and they say well, in
19 some other context we tried to talk about a
20 distinction between praising -- laudation is the
21 term, and discussion for general advocacy versus
22 praising versus discussion.

23 And again, in that second highlight, they make
24 a point, those aren't workable standards
25 (indiscernible) set angle this thing praises a

1 candidate and therefore can be regulated. That's
2 not workable. It doesn't give you that razor clear
3 definition that the law requires. So then they
4 tell us on the right-hand side of this page what
5 the constitution does require and this is giving us
6 the rule that we're relying on right out of the box
7 to say that this complaint doesn't define a
8 violation and indeed doesn't trigger the
9 commission's jurisdiction.

10 First of a period they say constitute from
11 deficiencies described in Thomas v. Collins,
12 referring back to the previous discussion, can be
13 avoided only by reading the statute as limited to
14 communications that include, and I quote, explicit
15 words of advocacy of election or defeat of a
16 candidate -- explicit words of advocacy of the
17 election or defeat of a candidate.

18 Now if that's the only thing the Supreme Court
19 had said, we would be here today making precisely
20 the argument we're making here today, but it's not.
21 If you move down to the end of the paragraph, they
22 want to make sure that nobody missed the point they
23 were just making. So the second highlighting in
24 that column say that is in order to preserve the
25 provision, skipping a little bit, that the statute

1 must quote, apply only to expenditures for
2 communications that, quote, in express terms
3 advocate the election or defeat of the candidate.

4 So you need explicit words of advocacy. You
5 need express terms of advocacy, so they've said it
6 twice. Well, if that's all they've done, we surely
7 would be here feeling -- the message must be clear
8 at this point, because the Supreme Court didn't
9 want to be misunderstood, and so you'll notice it
10 dropped a footnote 52. Now our opponent's papers
11 acted as if this whole theory that we're relying on
12 came out of a footnote. That's not right.

13 The Supreme Court said it twice in text two
14 different ways clearly, and then but for those of
15 you who may not understand what we are clearly
16 saying, here's our third try. And they tell us in
17 the footnote, here's what we mean, the construction
18 that we're adopting would restrict only, quote,
19 communications containing expressed words of
20 advocacy of election or defeat, such as vote for,
21 elect, support.

22 So they told us three times in that discussion
23 what they meant, and I think frankly, they were
24 pretty clear. I think Hoosier common sense tells
25 us that they were not trying to say here if there

1 is a clear implication that that's good enough.
2 Now I want to skip the next page for a minute --
3 I'm going to come back to it, but there's another
4 place in Buckley where the same issue came up, and
5 this will be the last page of the handout, and
6 they're discussing what do we mean by that test
7 that we set up -- well, we're going to apply it to
8 (indiscernible).

9 In there they tell us well, what we mean is
10 we're going to reach only, quote, communications
11 that expressly advocate, a footnote sign, the
12 election or defeat of a clearly identified
13 candidate. And when you go to the footnote sign,
14 that says go back to Footnote 52 -- if you flip
15 back to where we were before and that's where it
16 says you've got to have words, like support, vote
17 for or elect.

18 So over and over again, in the Buckley case,
19 they've told us what the test was, and I'm going to
20 come back to those words in a minute. I just want
21 to point out to you the words in the footnote are
22 all very direct, in terms of advocacy. Support
23 Congressman Jones, vote for Congressman Jones,
24 elect congressman Jones.

25 That becomes relevant with respect to MCFL,

1 but for right now the point is you've been told do
2 not point to words that explicitly and expressly
3 advocate election or defeat. It's not just -- it's
4 not enough, we've been told so far. To say that
5 the ad advocates election or defeat, that's not a
6 good enough standard. You've got to have explicit
7 words that express such as. Now --

8 VICE CHAIR A. LONG: It's your position
9 that they -- that any ad, that unless it had
10 words expressly, using those words, any ad
11 would -- would never be subject to regulation?

12 MR. T. KIRBY: Absolutely not. The
13 footnote says words such as -- not those
14 particular words but words fully equivalent.

15 VICE CHAIR A. LONG: You then believe that
16 a group could engage in express advocacy even if
17 it didn't use those words?

18 MR. T. KIRBY: You cannot. You can engage
19 in express advocacy without using those words
20 but you can't -- if I were to say Congressman
21 Jones is a good person, put him in office,
22 that's not one of those words, but that's full
23 equivalent to those words. But if I say some
24 things that may lead you to infer that I'd like
25 you to vote for Congressman Jones, that won't

1 work.

2 VICE CHAIR A. LONG: Karen Freeman-Wilson
3 bad judgment for Indiana.

4 MR. T. KIRBY: That's a -- a government
5 official has exercised bad judgment. Now it may
6 be that the voter believes that they vote for
7 her because of that. It may be that you in fact
8 may view that as advocating her election.

9 Remember the Supreme Court, they started off by
10 saying we could have a test, does it advocate
11 the election or defeat of a candidate? That was
12 the first thing they said, we can start there,
13 but then they said no, that's not good enough
14 and then they do all this stuff and it's in this
15 report.

16 And this brings me to the page we skipped
17 before, and I'm going to ask you to turn to the
18 next to the last page in the handout, and this is
19 where the Supreme Court says okay, now that we've
20 defined what kind of speech can and can't be
21 regulated, what kind of speech can be regulated by
22 these restrictions on expenditures?

23 Now we have to decide whether this -- whether
24 this now clearly define the provision, satisfies
25 the First Amendment as a substantive matter, not as

1 a vagueness or precision matter, can they do it?
2 And the Supreme Court at this point says well,
3 first, the only real reason we're going to allow
4 this is to prevent corruption.

5 And when you're talking about independent
6 expenditures, corruption is hard to achieve so
7 there's not much corruption benefit that's going to
8 be achieved. Secondly, they say and --

9 VICE CHAIR A. LONG: Could you explain that
10 for me? I don't understand that.

11 MR. T. KIRBY: Okay. The Supreme Court
12 went to a quid pro quo corruption. You've got
13 dealings with the candidate -- Dale, you vote
14 for us, we'll run this ad for you. That's the
15 kind of corruption they're trying to prevent.
16 If you don't have that kind of dealing with a
17 candidate, then the quid pro quo corruption that
18 Buckley was concerned with is much harder to
19 achieve. Maybe you can do it with a wink and a
20 nod across the room, but it's a much more
21 attenuated risk.

22 VICE CHAIR A. LONG: Wouldn't disclosure --
23 wouldn't disclosure, exposing those
24 contributions to pay for those ads disclose
25 corruption, where otherwise nondisclosure might

1 conceal it?

2 MR. T. KIRBY: It might to some extent, but
3 there's -- you still have that difference if you
4 don't have dealings within it, but I want to be
5 clear here, I'm not referring to this to make a
6 salesman attack on the Indiana session. I'm
7 doing this to explain what express advocacy
8 means.

9 And I think we've all recognized that
10 disclosure can only regulate express advocacy, just
11 like the other things can only regulate express
12 advocacy, and that in fact doesn't contest it.
13 Paragraph 7 of the complaint, alleges express
14 advocacy, so the question becomes what do we mean
15 by that, and that's what this highlighting here is
16 going to tell us.

17 First, they said you don't really have a
18 strong corruption potential, but secondly, they
19 said you're not going to achieve much by regulating
20 this kind of speech. If you look at that first
21 highlight that I got and they explain why, they
22 tell us, and now they're explaining what they meant
23 by that express advocacy standard: So long as
24 persons and groups eschew expenditures that in
25 express terms advocate the election or defeat of a

1 clearly identified candidate, they are free to
2 spend as much as they want to promote the candidate
3 and his views.

4 Now how could the Supreme Court be clearer
5 than saying the test is not does the speech promote
6 the candidate and his views? They are free to
7 spend as much as they want on that. It's only if
8 they use express language, that they cross the line
9 that we're drawing. They say we understand that
10 this line that we're drawing isn't going to
11 accomplish very much and it's going to be a very
12 narrowly defined carve-out, and that's the second
13 highlighted line: It would naively underestimate
14 the ingenuity and resourcefulness of persons and
15 groups desiring to buy influence to believe that
16 they would have much difficulty devising
17 expenditures that skirted the restrictions on
18 express advocacy of election or defeat but
19 nevertheless benefited the candidate's campaign.

20 The Supreme Court understood what it was doing
21 when it was carving out this very narrow area of
22 express advocacy. It understood that when you draw
23 a bright line, you allow people to come right up to
24 the bright line. It understood that when you draw
25 a bright line, conduct on one side of the bright

1 line often is very hard to tell from conduct on the
2 other side of the bright line except for the line,
3 but nonetheless, the Supreme Court drew that line.

4 COMMISSION MEMBER J. PERKINS, JR.: Mr.
5 Kirby?

6 MR. T. KIRBY: Yes, sir.

7 COMMISSION MEMBER J. PERKINS, JR.: You've
8 talked -- my name is Joe Perkins, by the way.
9 You've talked quite a bit about the Buckley case
10 and the line that's been drawn by the Supreme
11 Court in that case. Kind of getting at the
12 heart of your argument, as I understand it, you
13 know, how do you -- Mr. Long has already cited
14 the language that was kind of a tag line at the
15 end of the ad, or one of the ads in question,
16 how do you address the argument that the U.S.
17 Chamber could have gone up to that line and
18 maybe even gotten a little chalk on its toes and
19 you know, is that -- have they crossed the line
20 by saying that -- I mean, how do you -- how do
21 you argue that that hasn't crossed over the
22 line?

23 MR. T. KIRBY: Okay, very simple, because
24 it does not in explicit words expressly advocate
25 any particular action. It does say this person

1 has bad judgment. That may well be information
2 that a voter will take into account in making a
3 decision. Now it may be -- let me take an
4 aside.

5 Far in my past I come from Louisiana. I love
6 Louisiana dearly. Louisiana had the unfortunate
7 circumstance some years ago in its gubernatorial
8 race boiling down a choice between a felon and a
9 racist, and there were bumper stickers that said
10 vote for the crook, other saying Edwards is
11 (indiscernible).

12 Now you would think that saying someone is a
13 crook would be an attack on that person's
14 candidacy. In fact, in the unfortunate
15 circumstance of that race, that was the best --
16 viewed as the best race.

17 The point the Supreme Court made is it's all
18 right to praise a candidate and presume that praise
19 says something about a candidate that voters may
20 take into account in voting for that candidate. I
21 suppose it's all right to praise a candidate. It's
22 all right to criticize a candidate.

23 But the line that the Supreme Court drew, and
24 it drew it carefully and drew it advisably, and
25 that's been the point of this last ten minutes, is

1 you can praise, you can criticize, you can applaud,
2 but you can't say vote for or vote against or words
3 that mean that.

4 COMMISSION MEMBER J. PERKINS, JR.: Do
5 the words -- do the words --

6 MR. T. KIRBY: I'm sorry.

7 COMMISSION MEMBER J. PERKINS, JR.: Do the
8 words bad for Indiana or bad -- you know, bad
9 judgment for Indiana --

10 MR. T. KIRBY: No.

11 COMMISSION MEMBER J. PERKINS, JR.: -- or
12 whatever it was, does that advocate voting for
13 or against one of the candidates?

14 MR. T. KIRBY: It does not. It says that a
15 person who happens to be a candidate and you
16 note the ad doesn't mention she was a candidate,
17 doesn't mention that there's a race, it says
18 that there's a person out there during the
19 manning of Indiana office who has bad judgment.
20 That's what I meant when I started off. I
21 always said was you've got an official with bad
22 judgment and that the First Amendment protects.

23 It's illustrated in the next Supreme Court
24 case, Massachusetts Citizens for Life.

25 MR. D. SIMMONS: Excuse me, Mr. Chairman.

1 I don't know if you wanted us to let you know
2 when we're coming up on a half hour or not, but
3 some of the questions have been asked and
4 answered.

5 VICE CHAIR A. LONG: We've exploited, yeah.

6 MR. T. KIRBY: Don't let me -- don't let me
7 go to the point where -- where I'm putting
8 people to sleep because I've been on that side
9 of the table often enough to know that's not
10 productive.

11 MR. D. SIMMONS: We just got to the point
12 where there's a couple of minutes. I thought
13 you needed to know.

14 MR. T. KIRBY: Okay. Well, I'll try and
15 move this along.

16 VICE CHAIR A. LONG: I want to ask one
17 question that's been lurking with all of these
18 ads -- ads or papers that you all have
19 presented. What's the purpose of these ads?

20 MR. T. KIRBY: And that's the exact
21 question you can't ask.

22 VICE CHAIR A. LONG: I just did.

23 MR. T. KIRBY: I'm not saying physically
24 you can't ask it, I understand you can ask it,
25 but the Supreme Court in Buckley said look, you

1 can't make the status of ads turn on the intent
2 of the person speaking. That's simply
3 forbidden, and if there -- and not only did the
4 Supreme Court tell us that, but there was a
5 recent case -- I believe it's out of the Fourth
6 Circuit, and I believe we provided it to the
7 commission -- if we didn't, we certainly cited
8 it, where you had somebody that could come in
9 and said the purpose of our ads was to cause the
10 defeat of this candidate. That's what the
11 purpose of our ads were. They've gone around
12 and given speeches. Our ads are to elect this
13 guy and defeat this guy, and somebody went after
14 him on that and said well, if we don't need
15 explicit words of express advocacy where
16 somebody's admitting what the intent was.

17 VICE CHAIR A. LONG: Could you give us a
18 couple of seconds your opinion on this Furgatch
19 decision?

20 MR. T. KIRBY: Furgatch (indiscernible).
21 It overlooked the MCFL decision which had just a
22 matter of days earlier had been decided and
23 strongly reinforced Buckley. Secondly, even if
24 Furgatch is right, we're still -- even if that
25 were the standard, this ad doesn't need -- start

1 off with -- in Furgatch, the court tells us,
2 this is a very close case, okay. So however far
3 Furgatch goes is about as far as you can go.
4 They tell you this is a very close case we're
5 wrestling here.

6 There you had an ad that involved Jimmy
7 Carter, and I forget who his vice presidential
8 candidate was, but it was basically an attack on
9 Jimmy Carter. It started off saying don't let him
10 do it. Don't let him succeed. And then they said
11 what does success mean? They said if he succeeds,
12 it gives him four more years to continue to do this
13 bad stuff. Don't let him do it, okay.

14 Well, now words addressed to a voter, the
15 Ninth Circuit said how do you keep him, a
16 presidential candidate from getting four more
17 years, and the Fourth Circuit said that's an
18 explicit call, keeping a presidential candidate
19 from having power for four more years -- very
20 close, but that just puts us over the line into
21 express advocacy. That's their hope in Furgatch.

22 Compare it to the ad we have here: An
23 existing Indiana official has bad judgment and has
24 shown bad judgment for Indiana. There's no
25 reference to four more years which is very close

1 to -- everybody knows that's a presidential term
2 after you get out of second grade, it doesn't say
3 don't let him do it. It doesn't say prevent the
4 candidate from having the four more years.

5 VICE CHAIR A. LONG: Does everybody know
6 that this lady's up for re-election? If
7 everybody knows that the president is running
8 for four more years, since they got out of the
9 fourth grade, do they not know that this is the
10 third highest ranking office in the State of
11 Indiana that's up for election, the governor,
12 the lieutenant governor and the attorney
13 general?

14 MR. T. KIRBY: That's -- yes, but that's
15 not the question. The question is what does the
16 ad explicitly tell you to do. In the case of
17 President Carter, it said keep him from having
18 four more years. Now I agree with you. I think
19 it falls on this side of the line, and I'll tell
20 you, that there have been 11 United States
21 courts of appeal decisions in this area since
22 Furgatch was decided and not one has accepted
23 the Furgatch analysis, not one.

24 Six courts of appeals, 11 decisions, and the
25 reason is everybody knows that Furgatch is sort of

1 an embarrassment where the panel unfortunately
2 overlooked the just issue, the MCFL decision, and
3 they thought they had some leeway to play with
4 Buckley.

5 VICE CHAIR A. LONG: Doesn't the Indiana
6 Supreme Court adopt Furgatch and BAPAC?

7 MR. T. KIRBY: No, sir.

8 VICE CHAIR A. LONG: They quote it.

9 MR. T. KIRBY: They do quote it. I've seen
10 court of appeals' decision quoting
11 (indiscernible).

12 VICE CHAIR A. LONG: It would seem to me
13 the citation, I haven't read the whole case, but
14 the citation that the Democratic Party graced us
15 with there, it seems that they quoted it with
16 favor.

17 MR. T. KIRBY: Furgatch makes a number of
18 points. They dispute Furgatch for one of those
19 points, and it appears in the foot -- okay, this
20 is not a holding of the case. This is dicted in
21 a footnote, and in the footnote, they're making
22 a passing point and they quote Furgatch not for
23 the -- not for the position that the Democrats
24 but for a different position.

25 They quoted at a time when you didn't have

1 this overwhelming rejection to Furgatch by all the
2 other U.S. courts of appeals. But that citation to
3 Furgatch is just fine. We're not quarreling with
4 the point for which they cited Furgatch. I think
5 if you told the Indiana Supreme Court whenever you
6 cite a case for any proposition, you have married
7 that case for all propositions that the Indiana
8 Supreme Court would tell you with all respect, you
9 were wrong.

10 So we -- we don't have any problem with
11 their -- with the fact that Furgatch decided on
12 that point, particularly given that it was cited at
13 that time. I'm happy to answer any other
14 questions, but I think the thrust of my argument is
15 clear and I'm also happy to sit down and hear
16 what's said and actually respond.

17 CHAIRMAN D. CRUEA: Okay.

18 VICE CHAIR A. LONG: Nice presentation.

19 MR. T. KIRBY: Thank you.

20 MR. S. FRIEDMAN: Good morning.

21 CHAIRMAN D. CRUEA: Good morning.

22 VICE CHAIR A. LONG: Good morning.

23 MR. S. FRIEDMAN: Shaw R. Friedman, general
24 counsel for the Indiana Democratic Party. I
25 want to also introduce other members of our team

1 over here today.

2 Chris Worden who is the Parliamentarian for
3 the State Party; Steve Eicholtz with the firm of
4 Locke Reynolds, who you'll be hearing from further,
5 and also I'm going to introduce briefly in just a
6 few minutes Robin Winston, the Chairman of the
7 Indiana Democratic Party.

8 MR. S. EICHOLTZ: Good morning.

9 CHAIRMAN D. CRUEA: Good morning.

10 VICE CHAIR A. LONG: Good morning.

11 MR. S. EICHOLTZ: Mr. Perkins, Mr. Cruea,
12 Mr. Long, Mr. Morgan, let me introduce myself,
13 my name is Steve Echoltz, and I'm going to argue
14 on behalf of the Indiana Chamber of Commerce.

15 We're here today to ask you to allow us to
16 proceed. We're here today to ask you to
17 investigate what happened last year in November.
18 And let's make one thing clear right now, there has
19 not been an investigation as of today.

20 To my knowledge, the Election Commission
21 hasn't had the opportunity to investigate what took
22 place, go into the relationships, issue subpoenas,
23 take depositions, nor have we.

24 CHAIRMAN D. CRUEA: Mr. Eicholtz, I just
25 have one quick question --

1 MR. S. EICHOLTZ: Sure.

2 CHAIRMAN D. CRUEA: -- for clarity on the
3 record. I think you had a little slip of the
4 tongue. Are you -- you're arguing on behalf of
5 the Democratic Party?

6 MR. S. EICHOLTZ: Correct.

7 CHAIRMAN D. CRUEA: I think you said on
8 behalf of U.S. Chamber of Commerce so...

9 MR. S. EICHOLTZ: I'm sorry. I've heard
10 them so much that...

11 CHAIRMAN D. CRUEA: I just wanted to make
12 sure that that was clear on the record.

13 MR. S. EICHOLTZ: On behalf of the
14 Democratic Party.

15 VICE CHAIR A. LONG: I was getting ready to
16 call Robin back. He's had a -- he's had a
17 defection.

18 MR. S. EICHOLTZ: There hasn't been an
19 investigation. I mean, we've got -- gotten
20 along famously, he is correct. We, in
21 accordance with your order, attempted to do an
22 investigation, to develop more facts, and did an
23 informal discovery request that went into the
24 express advocacy issue because there's cases
25 that say in some of these ads, the U.S. Chamber

1 has run throughout the country, they refer to a
2 website, and when you go to the website, there's
3 express advocacy on the website.

4 So we've asked them to provide us with the
5 website pages that ran during the time of this
6 election because there is a reference to that same
7 website in these ads. We have not received those.
8 So there has been no investigation. And I think
9 it's critical before we make any decision, before
10 this group makes any decision, that someone
11 investigate.

12 It's not just -- it's not just the Democratic
13 Party that believes it's important to investigate
14 claims of improper Campaign Finance Act. Recently,
15 co-counsel in this case complained bitterly,
16 Mr. Baran complained bitterly when the Federal
17 Election Commission decided not to pursue any
18 charges against the AFL-CIO on the issue of
19 coordination, and they pursued because there had
20 been no depositions taken and no discovery allowed.
21 So it's not just the party that recognizes the
22 importance of investigation, it's our opponents.

23 With that being said, one of the issues raised
24 in the complaint and why are we here? We have, as
25 pointed out by counsel, raised three basic issues.

1 First, did the U.S. Chamber violate Indiana's
2 campaign contribution limits? That is Count I, and
3 it deals with the issues of what's a contribution,
4 what's acceptance, and whether or not coordination
5 is an element of acceptance.

6 The second issue is whether or not a
7 corporation which has as its stated purpose
8 elected -- electing business friendly judges and
9 attorney generals and which expends in excess of
10 \$200,000 to defeat a candidate for attorney
11 general, can that organization be held under
12 Indiana laws to be a political action committee
13 subject to all of Indiana's reporting and
14 disclosure requirements.

15 The third issue we've raised in our complaint
16 is does Indiana law require an organization to
17 report its expenditures; in this case, expenditures
18 which were made in opposition to Karen
19 Freeman-Wilson during the course of a campaign for
20 attorney general.

21 With respect to each of these matters, we say
22 yes -- yes, they have violated the contribution
23 limits; yes, they are a PAC; and yes, they must
24 report their expenditures.

25 But how did we get here today? I think we've

1 seen things on paper. Let's refresh everybody's
2 memory of what was going on just a year ago.

3 CHAIRMAN D. CRUEA: Do you intend to show
4 the video?

5 MR. S. EICHOLTZ: Yes.

6 CHAIRMAN D. CRUEA: Okay. Now this is an
7 evidentiary hearing, or not an evidentiary
8 hearing. We're here to hear oral arguments on
9 the pleadings.

10 MR. S. EICHOLTZ: Correct.

11 CHAIRMAN D. CRUEA: Is this part of your
12 oral argument?

13 MR. S. EICHOLTZ: Yes, it is, just the
14 same.

15 CHAIRMAN D. CRUEA: Okay.

16 (Whereupon, a video was played before the
17 Commission.)

18 COMMISSION MEMBER J. PERKINS, JR.: As just
19 a, I guess a procedural matter, Mr. Eicholtz,
20 I'd recommend to the chairman that the playing
21 of the video be considered -- as you've noted,
22 it's not an evidentiary -- this is not an
23 evidentiary hearing going on, to hear arguments
24 on the pleadings, I would recommend that -- to
25 the chairman that we consider this as part of

1 your oral argument rather than evidence being
2 submitted to...

3 MR. S. EICHOLTZ: Absolutely. It's part of
4 the oral argument. It's just a visual of what's
5 attached to our complaint. It is no more
6 evidence in this case than are there statements
7 that Steve Carter adamantly denied participation
8 in. That's not evidence in this case either.

9 VICE CHAIR A. LONG: Mr. Chairman, I would
10 agree with that observation, that -- while a
11 video is very difficult to attach to a brief, we
12 have the transcripts and that's how I will
13 consider this, as a part of the argument, as a
14 supplement to the brief.

15 CHAIRMAN D. CRUEA: Okay.

16 MR. S. EICHOLTZ: You've heard some terms
17 today and you'll see some terms, as you read the
18 case, and this case is about those terms.
19 You've heard the term "express advocacy." This
20 case is about express advocacy. You've heard
21 the term "issue advocacy." This issue is about
22 issue advocacy.

23 A term you haven't heard but a term that's out
24 there in the literature you'll hear is "sham issue
25 ad." This case is about a sham issue ad. Sham

1 issue ads are added that are clearly political ads,
2 but they're crafted in such a fashion as to
3 circumvent most state and federal campaign laws.

4 Everyone here knows what this ad's purpose
5 was. Everyone knows what the purpose of the U.S.
6 Chamber is. Now it's not evidence today and
7 there's not a lot of evidence because we haven't
8 done an investigation yet, you haven't done an
9 investigation yet, but if allowed to do an
10 investigation, you'll find that the purpose of the
11 U.S. Chamber as stated by their president in a
12 recent article in the Wall Street Journal, probably
13 which most of us did not read because it appeared
14 on September 11th of this year, they talk about the
15 purpose of the U.S. Chamber and the purpose of
16 these ads where over \$5 million was spent in
17 numerous states, and it's to elect business
18 friendly judges, business friendly attorney
19 generals. Nobody can really dispute the purpose of
20 these, and if we're allowed to do an investigation,
21 we will prove that purpose to you.

22 These ads are for one purpose. These ads were
23 to expressly defeat Karen Willman (sic) -- Karen
24 Freeman-Wilson in the attorney general's race. You
25 know, you may decide that these sham ads will work,

1 that -- you're going to hear the arguments on
2 express advocacy and you may say well, gosh, he's
3 right. There are these magic words. There is that
4 bright line and we're going to follow the magic
5 words. We're going to follow the bright line and
6 you may decide that we can't do anything.

7 You may have a personal sense of frustration
8 and a personal sense of outrage, if that's the
9 decision you have to make, and I think you will.
10 But I want to share with you a couple of thoughts.
11 I don't want you to feel bad because think of these
12 numbers. According to the Justice -- Center for
13 Justice -- Brennan Center for Justice, in 2 -- the
14 year 2000, \$456 million was spent in unregulated
15 soft money contributions. Of that number,
16 \$173 million was spent on campaign ads masquerading
17 as issue ads. An additional \$43 million was spent
18 by groups like the U.S. Chamber on unregulated sham
19 issue ads.

20 So what can we do? What can you do to stop
21 the proliferation of this type of ad in Indiana?
22 First, you can deny the motion to dismiss. Second,
23 you can allow an investigation to go forward to
24 determine was there coordination? Are they a
25 political action committee? Should they report?

1 You may determine all of those negative to the
2 state party, but the fact of the matter is a
3 negative determination will be important because it
4 will tell the U.S. Chamber or local organizations
5 that we're looking -- yes, there's a bright line.
6 We're going to make sure you don't step over it.
7 If you don't step over it, fine -- I can live with
8 that if you find that they don't step over it, but
9 at least let's investigate. Let's find out what
10 they did. Let's ask some questions about the U.S.
11 Chamber.

12 I want to touch briefly on a couple -- on
13 three things that have been raised before we get
14 into the express advocacy issue. First of all, the
15 issue of coordination and the issue of contribution
16 and acceptance. We have alleged that they spent
17 over \$200,000 just in the air time for those ads
18 and just in the Indianapolis market. Further
19 investigation may develop that they spent well over
20 that sum throughout the State of Indiana.

21 It is quite clear, Indiana law requires for a
22 matter to be a contribution, it must be accepted.
23 Indiana law also prohibits corporations from
24 spending more than \$5,000 in statewide races, or to
25 their political parties, \$5,000. It is our

1 position, however, that if there is coordination of
2 an ad campaign with a candidate or with the party,
3 that coordination can only mean that the party or
4 the candidate that acted in concert with the
5 advertiser accepted the contribution.

6 If they accepted the contribution through
7 coordination, then the expenditure of \$200,000 is a
8 violation of Indiana's campaign finance laws. Not
9 because of its expenditure, because it becomes a
10 contribution. Another significant factor about
11 this count: If you find that there was
12 coordination and that there was a contribution,
13 express advocacy does not come into play. Buckley
14 does not come into play. Brownsburg does not come
15 into play. That would be a violation of the
16 contribution limits, a clear violation of the
17 \$5,000 limit, and those matters don't come into
18 play. That's something I want you to keep in mind.

19 What have we alleged? We have alleged what we
20 have been able to discover through public records
21 and their statements. We have the ad. We know the
22 U.S. Chamber was a corporation. We haven't been
23 able to do any discovery. We can't issue subpoenas
24 without your authority. We've attempted to do
25 limited discovery, it's been resistant, and now

1 they say dismiss the case because they haven't
2 alleged anything.

3 What we've been able to discover since filing
4 this complaint is that the chairman of the U.S.
5 Chamber happens to be a businessman from Indiana
6 who has a number of corporations in Indiana. Those
7 corporations and the chairman and that gentleman
8 and other officers of those corporations have made
9 substantial contributions to the Republican Party
10 and the Republican State candidates. That's all we
11 know. That's all we've been able to discover at
12 this stage without taking depositions, without
13 doing interrogatories, without doing motions to
14 produce.

15 So the point is: Have we established
16 coordination in there? I would concede, no, we
17 have not. Have we raised enough that this matter
18 should be investigated? Should this commission
19 want to find out more? Should you ask questions
20 about the U.S. Chamber and ensure to yourself that
21 nothing improper was done -- yes, you should.
22 That's why you should let the investigation go
23 forward -- be it us through this process or be it
24 this commission, someone needs to investigate these
25 relationships and these expenditures to ensure the

1 integrity of the election and Indiana's campaign
2 finance laws.

3 CHAIRMAN D. CRUEA: Let me -- let me
4 address one of the points you're making there
5 about reporting, investigating expenditures.
6 The -- the Indiana State legislature has
7 repealed a few years ago the Indiana statute
8 that required reporting of independent
9 expenditures. With that repeal being in place
10 and then the law that required that reporting no
11 longer being part of Indiana law, what is
12 our -- why should -- why should this commission
13 investigate expenditures that are done by the
14 U.S. Chamber of Commerce?

15 MR. S. EICHOLTZ: A very good question.
16 The reason is because if coordination is
17 established, and that's what I'm talking about
18 right now, those do not become expenditures.
19 They are contributions, and if they're
20 contributions, they have then violated the
21 corporate limits. That's why we need to make
22 sure that there isn't coordination and
23 investigate the allegations.

24 CHAIRMAN D. CRUEA: Okay.

25 MR. S. EICHOLTZ: The second issue I want

1 to briefly address, they say we cannot be a PAC
2 because we're a corporation, and corporations
3 are excluded from being a PAC. I disagree with
4 that. When you look, first of all, at the
5 definition of PAC, it starts off with the term
6 an organization. The definition of organization
7 includes a corporation.

8 Well, they then go back and say okay, well
9 there's this provision down there that says when
10 corporations or labor unions that make
11 contributions and expenditures can't be a PAC,
12 can't be political action committees. Well, if you
13 read all those things that they're saying and you
14 read what the statute says, it's obvious that some
15 of these things are not precisely drafted.

16 And the Chamber says the corporation which
17 makes a contribution, makes an expenditure cannot
18 be considered a PAC, but an expenditure is only an
19 expenditure if it's made by a PAC. So what they're
20 saying is we can't be a PAC, we're a corporation
21 making expenditures, but our spending on the
22 Freeman-Wilson ad is not an expenditure because
23 we're not in one of these listed in the definition
24 of expenditures.

25 For us to make an expenditure, we must be a

1 PAC, but a corporation that makes an expenditure
2 isn't a PAC. So for a corporation that spends
3 money on expenditures that we don't have a PAC,
4 then it follows that we must not meet the
5 definition of a PAC. That's what they're saying,
6 and I don't think that's right, and I don't think
7 you think that's right, because on Page 66 of the
8 election division campaign finance manual, you
9 indicate if a political action committee is
10 incorporated -- you recognize a political action
11 committee is incorporated so...

12 VICE CHAIR A. LONG: Let me ask a question.

13 MR. S. EICHOLTZ: Sure.

14 VICE CHAIR A. LONG: It's been troublesome
15 to me.

16 MR. S. EICHOLTZ: Pardon me?

17 VICE CHAIR A. LONG: This troubles me.

18 MR. S. EICHOLTZ: Sure.

19 VICE CHAIR A. LONG: Mr. Perkins raised a
20 point, the repeal of the independent expenditure
21 reporting requirement, does that mean that
22 unless there's an acceptance or coordination, a
23 corporation can expend money to any limit it
24 wants to to advocate issues or expressly
25 advocate the election or defeat of a candidate

1 without any regulation?

2 MR. S. EICHOLTZ: That would be one school
3 of thought, yes, and there are those --

4 VICE CHAIR A. LONG: And what's your --
5 what's your position on that?

6 MR. S. EICHOLTZ: -- that hold that
7 independent expenditures that do not expressly
8 advocate the defeat of a candidate can be
9 unlimited, yes.

10 VICE CHAIR A. LONG: So that if, and I hate
11 to use the Chamber, we've beat up on them, but
12 they're the one before us, so you know, any
13 organizations has memberships and these
14 memberships have vested financial interests in
15 election of candidates of a particular mindset
16 so long as they don't coordinate with the
17 candidate or receive an acceptance from a
18 candidate, they can spend \$5 million here in
19 Indiana saying vote for Joe Smith, vote against
20 Joe Jones without any --

21 MR. S. EICHOLTZ: That could be --

22 VICE CHAIR A. LONG: -- regulation?

23 MR. S. EICHOLTZ: That could be the case
24 under -- they would not have to have been
25 reported under the statute that has been

1 repealed. It is our position that in this case,
2 there still must be reporting because A) they're
3 a PAC, and B) under the other section we have
4 cited, they are required to report expenditures.

5 VICE CHAIR A. LONG: And they're a PAC why?

6 MR. S. EICHOLTZ: They are a PAC because,
7 and we have to get into the issue advocacy
8 argument now which deals with they are an
9 organization which expends money for the
10 purposes of expressly supporting or defeating a
11 candidate, and I'm paraphrasing the statute --
12 if we can prove those things, then they are a
13 PAC. If they spend money to do those things,
14 they are a PAC.

15 VICE CHAIR A. LONG: But I thought we
16 just -- from response to my previous question
17 was that if it's an organization, and I don't
18 hold much argument that the corporation can be a
19 PAC, I think any entity can be a PAC, it'd
20 probably include an individual, but -- but if
21 you say that an organization can expend
22 unlimited money advocating a candidate so long
23 as there is not cooperation without being
24 regulated, how then can you say that they're a
25 PAC and must be regulated for doing the same

1 thing?

2 MR. S. EICHOLTZ: Because Indiana Code
3 3-5-2-37 defines what a PAC is.

4 VICE CHAIR A. LONG: So then it would be
5 that -- are you saying then that an entity
6 cannot expend unlimited money and express
7 advocacy --

8 MR. S. EICHOLTZ: If they're --

9 VICE CHAIR A. LONG: -- because --
10 because -- without being regulated, and
11 that -- maybe that was where I -- my question
12 failed, there is -- do you believe this is
13 regulation under the PAC statute once they start
14 express advocacy?

15 MR. S. EICHOLTZ: I think that's correct,
16 yes, they can become a political action
17 committee as defined as defined by 3-5-2-3 so --
18 and then there would be --

19 VICE CHAIR A. LONG: Reporting.

20 MR. S. EICHOLTZ: -- reporting requirements
21 and disclosure requirements, absolutely.

22 VICE CHAIR A. LONG: Okay.

23 MR. S. EICHOLTZ: I'd like -- I know I'm
24 running short on time to address the major
25 argument here. I'll try to go through the

1 express advocacy matter relatively quickly
2 because there's a lot to be said, but when it's
3 all said and done, there's really only three
4 cases that matter in the State of Indiana:
5 Buckley, which is the Supreme Court decision,
6 MCFL, which is a Supreme Court decision, and
7 Brownsburg, which is an Indiana State Supreme
8 Court decision.

9 His 11th circuits, my cases from other state
10 courts, they're not binding precedent, and all the
11 lawyers on this board understand that fact.
12 They're very -- they're supportive, they're
13 argumentative, but we're not bound towards the
14 Indiana State Supreme Court by any of those
15 decisions.

16 The Indiana Supreme Court has adopted an
17 express advocacy standard. According to the
18 Indiana Supreme Court, express advocacy means a
19 communication that in express terms advocate the
20 election of a clearly identified candidate.

21 Now, we both agree express advocacy is
22 important here. What we disagree on is what that
23 means. The Chamber and those that follow Buckley
24 say it means a bright line. It means magic words.
25 That makes me think a little bit of George Carlin,

1 what are the eight things you can't say in a
2 political ad? You can't say vote for. You can't
3 say elect. You can't say support and you can't say
4 cast your ballot for.

5 The Indiana Supreme Court did not adopt a
6 bright line magic word test, but they did adopt a
7 standard for express advocacy, and in a footnote
8 they explain what they meant just like the U.S.
9 Supreme Court in a footnote said what it meant.

10 The court -- they've cited Buckley the court's
11 use of such as suggest it did not intend for this
12 to be an exhaustive list. A group could engage in
13 express -- express advocacy even if it did not use
14 these buzz words. The Indiana Supreme Court --

15 CHAIRMAN D. CRUEA: You're -- you're citing
16 Brownsburg?

17 MR. S. EICHOLTZ: Brownsburg, yes, sir.

18 CHAIRMAN D. CRUEA: Okay.

19 MR. S. EICHOLTZ: And that's in their
20 footnote. The Indiana Supreme Court looked with
21 favor to Furgatch and they want to say well,
22 that -- how could they do that? The fact of the
23 matter is there were a number of these other
24 decisions by other jurisdictions at the time the
25 Supreme Court made its decision in Brownsburg

1 and they chose purposely to highlight Furgatch.

2 I think the Supreme Court was sending this
3 message.

4 MR. D. SIMMONS: Excuse me, Mr. Chairman,
5 we're about 35 minutes (indiscernible).

6 CHAIRMAN D. CRUEA: Okay.

7 MR. D. SIMMONS: Since he was wrapping up,
8 I thought I'd let you know since I left, you
9 know, when Mr. Kirby (indiscernible).

10 MS. K. ROBERTSON: And are we okay on the
11 tape?

12 CHAIRMAN D. CRUEA: Yes.

13 MR. S. EICHOLTZ: Let me just try to close
14 by addressing the ads in question. I know you
15 asked what does the ad mean? Is that ad express
16 advocacy? I am going to submit to you today
17 that under either test, the first ad is express
18 advocacy, and I'm going to do that -- if they
19 want bright lines and they want words, let's use
20 words -- you know, words can do a lot of things.

21 The fact of the matter is I've gone to Merriam
22 Thesaurus. In the Thesaurus I looked up the word
23 "judgment." Judgment -- related words for judgment
24 are decision, determination, ruling, belief,
25 conviction and opinion. I've looked up the word

1 "vote." Related words for vote are choose and
2 decide. I've looked up the word "judge" which
3 would be a noun of judge, or the verb of judgment,
4 and the related word is decide.

5 In each of those three words, there's a common
6 word there, decide or decision. So let's use
7 words. Let's use related words and synonyms, what
8 do they say? In the bottom of their ad, they said
9 Karen Freeman-Wilson, bad judgment for Indiana.
10 That becomes Karen Freeman-Wilson, bad decision for
11 Indiana, which could become Karen Freeman-Wilson,
12 bad vote for Indiana.

13 Am I playing word games? Maybe. Are they
14 playing word games? Absolutely. The question
15 becomes all right, if we're talking express
16 advocacy, didn't they draw a line? Have you
17 crossed the line? If you want to look at words,
18 those are the words, Karen Freeman-Wilson, bad vote
19 for Indiana. If that is not expressly advocating
20 that the voters of Indiana not vote for Karen
21 Freeman-Wilson, I don't know what is. I've got a
22 lot more I can say. I think that's the heart of
23 what it is. I'll be happy to answer questions.
24 The materials are on our papers and I thank you for
25 your time.

1 CHAIRMAN D. CRUEA: Thank you.

2 VICE CHAIR A. LONG: Nice job.

3 MR. T. KIRBY: May I respond briefly, Mr.
4 Chairman?

5 VICE CHAIR A. LONG: I have no problem with
6 giving him a few...

7 MR. D. SIMMONS: You guys want to set up
8 some ground rules for rebuttal on time limits?

9 CHAIRMAN D. CRUEA: Let's give them five
10 minutes.

11 VICE CHAIR A. LONG: That's fair.

12 CHAIRMAN D. CRUEA: Five minutes.

13 MR. D. SIMMONS: Five minutes, okay.

14 MR. T. KIRBY: Did you hear what you were
15 just told? You can take a word and go to the
16 thesaurus and find a bunch of related words.
17 You could take one of those words and go to the
18 thesaurus and find a bunch of related words.
19 You could find a word, go to the thesaurus and
20 find another word, and then say whoa, that's
21 express advocacy or you don't know what it is.

22 And remember, you're being told that when the
23 whole reason we have the express advocacy
24 test -- remember, the first highlights I had in
25 Buckley was the First Amendment required a clear

1 and precise line so the people will know when
2 they're speaking, from what they are saying,
3 whether or not they've crossed it.

4 I think the argument that you just heard
5 established more eloquently than I can so let me
6 (indiscernible) over myself -- I simply haven't
7 argued the express advocacy point anymore. If
8 that's the best they can do and that is not the
9 kind of clear precise guidance the Supreme Court
10 required.

11 This whole thing started off by you were being
12 told we just want discovery, we just want
13 discovery, but the whole point of the express
14 advocacy test is you don't discovery because our
15 subjective intent doesn't matter. The question is
16 what does the ad say? I made no objection when
17 that ad was played. I think (indiscernible) notice
18 by this commission, and that ad simply answers the
19 express advocacy point. You don't need any
20 discovery.

21 Now the only issue that was left, I think, was
22 coordination, and you were told we go ahead and
23 investigate whether there's coordination -- well,
24 why? Can it really be the rule that every time
25 somebody engages in protected First Amendment

1 independent expenditure advocacy, they're going to
2 then have to expose their internal workings of
3 participants and that kind of thing. Is that
4 really a basis for investigation?

5 They said we never talked about the standards.
6 The standards are a complaint has to set up
7 substantial reason to believe a violation has
8 occurred, and if -- and if Indiana standards didn't
9 require that, FEC versus Machinists Non-Partisan
10 Political Union tells us before you can go poking
11 into First Amendment activity, you have to have a
12 threshold, have a substantial reason to believe
13 that a violation has occurred.

14 Now, I think they basically told you they
15 don't have any reason to believe a violation has
16 occurred. What did they tell you they knew? Money
17 was spent by an organization. The organization has
18 a head who owns some companies in Indiana and he
19 has a history of supporting Republican causes.

20 So are we to be told that whenever a prominent
21 Republican supports, whenever he's with an
22 organization, engages in independent speech, that's
23 a basis for getting into the files of an
24 organization, crying out oh, they're contributors
25 and supporters and that kind of thing? Is that

1 substantial reason to believe that a violation has
2 occurred? Obviously, it's not.

3 What's really going on here is the other
4 statement that was made, they don't like anonymity.
5 But if the Supreme Court has told us anything, it's
6 that there is a fundamental constitutional right to
7 anonymous political speech.

8 Suppose you're a corporation in Indiana, you
9 have some things you want to say, but you know
10 those things may be very unpopular with somebody
11 who may end up as, I think the point was made,
12 third most powerful person in the state?

13 Shouldn't you be able to say those things
14 without putting yourself in the position that if
15 that person gets elected, they then have enormous
16 (indiscernible). And you have to balance against
17 that, the concern about corruption, and that's what
18 Buckley was doing, was balancing -- allowing
19 independent expenditures freely and worrying about
20 corruption, and they said where you actually have
21 this interaction, this direct interaction with the
22 candidate, then we're going to regulate things.
23 Otherwise, if you actually engage in express
24 advocacy, we're going to allow some regulation, but
25 otherwise, there's going to be this big, big realm

1 of speech that where the First Amendment says
2 Congress shall make no (indiscernible).

3 Now I close with two thoughts. You heard a
4 lot back and forth about Hoosier common sense and I
5 believe Hoosier common sense exists. But if part
6 of Hoosier common sense is that when the Supreme
7 Court tells you over and over again its got to be
8 explicit and it's got to be expressed, they weren't
9 trying to tell you an implication will do.
10 Hoosiers know better than that, I suggest.

11 And when the Indiana Supreme Court adopts a
12 test that says there's got to be expressed
13 advocacy, I don't think any Hoosier would use the
14 word "express advocacy" to mean "implied advocacy."
15 There are places where people would
16 (indiscernible). The other thing I think that's
17 important to talk about is -- is a sense of
18 fairness that I think we've got here as far as
19 (indiscernible) -- we're an organization trying to
20 operate within the rules, and was told you, the
21 Supreme Court is part of the rules that we operate
22 here.

23 We have what -- well, you have to have very
24 fair guidance and we adhere to the rules that were
25 laid out for us. To come in now and to try to put

1 some new spin on those rules, I suggest to you is
2 contrary to the concept of fairness. It's
3 fundamental here. You were asked to beat cynicism
4 by avoiding a 2-2 vote. I think behind those
5 comments there is some political aspects of this
6 little thing that I don't understand and I'm not
7 going to get into it, but I hope, too, that this is
8 not a 2-2 vote.

9 I hope, too, the members of this commission
10 will say these people had guidance from the highest
11 court in the land. They had guidance from our
12 Supreme Court. They acted within that guidance,
13 and whether or not we like what they did, it was
14 law.

15 And we hope this commission would not say
16 whether or not it was lawful and whether or not we
17 have reason to -- substantial reason to believe
18 there was a violation, we're going to let the
19 Democratic Party go poking around in their files
20 because they come from out of state and we want to
21 teach them a lesson.

22 CHAIRMAN D. CRUEA: Mr. Kirby, --

23 MR. T. KIRBY: Yes.

24 CHAIRMAN D. CRUEA: -- before you step --

25 step aside, I do have one question that was

1 addressed in Mr. Eicholtz's argument which was
2 the U.S. Chamber of Commerce is a PAC under
3 Indiana statute that defines what a PAC is. How
4 do you address the argument that the U.S.
5 Chamber is a PAC?

6 MR. T. KIRBY: I address it from the
7 language of the statute. Let me just turn to
8 that, if I may -- that was where he made that
9 big swirly argument, but looking at the
10 definition of political action committee, which
11 is 3-5-2-37, you're told that a political action
12 committee is an entity first off that purposes
13 to input. That keys you back, as he
14 acknowledged, to the express advocacy campaign.

15 We weren't intending to engage in express
16 advocacy and I think that we've shown that we very
17 carefully were not engaging in express advocacy,
18 then we can't be a PAC, all right. But beyond
19 that, we're told to be a PAC, you have to make
20 certain kinds of expenditures, okay, and then we're
21 told a corporation or labor organization that makes
22 those kind of expenditures or contributions is not
23 a PAC.

24 So if you start with the statute, it's very
25 simple. Most kinds of organizations, if they make

1 the right kinds of contributions or expenditures
2 end up being a PAC but in the case of corporations
3 and labor unions, even if they do that, they don't
4 end up being a PAC. That's -- that's the very
5 simple answer.

6 CHAIRMAN D. CRUEA: Okay.

7 MR. T. KIRBY: The reference to your
8 manual -- first off, your manual can't change
9 the law, but secondly, your manual doesn't say
10 what they say it says. The manual doesn't say
11 if a PAC incorporates, it then is regulated as
12 both a PAC and as a corporation. It doesn't say
13 that at all.

14 If you look at the -- and I -- look at the
15 manual sentence that they quote, I think it's on
16 Page 66, it says if a PAC incorporates, it then is
17 regulated as a corporation, not (indiscernible)
18 continuing to be regulated as a PAC.

19 The whole argument you heard from the Supreme
20 Court to the Indiana legislature to this group's
21 manual, time after time you're told, well, yes,
22 they said that, but that's not what they meant to
23 say. In the area of the First Amendment where
24 people are planning their behavior, we're entitled
25 to take seriously the guidance that we're given.

1 Thank you.

2 MR. S. EICHOLTZ: A brief summary. Thank
3 you again for the time afforded the Indiana
4 Democratic Party in making its arguments. I
5 think you heard briefly -- again, the rub comes
6 down to that desire by the U.S. Chamber of
7 Commerce to preserve that veil of secrecy.

8 You heard counsel indicate earlier, if this
9 goes forward, it may discourage my client's
10 supporters from contributing. That was a direct
11 quote. Why would that be the case? In the case of
12 full disclosure and full reporting, every
13 contributor ought to be known to the voters of the
14 State of Indiana. That's the rub, and therein lies
15 the rub of this particular case.

16 We don't have to prevail, again, a motion to
17 dismiss. What we have to be able to show is that
18 on any of those three counts that we at least have
19 asserted enough and made enough sufficient claims
20 to go forward with an investigation.

21 If you find that there is the possibility of
22 coordination, the notion of a contribution, then it
23 deserves further investigation. That's No. 1. If
24 you find No. 2, that this was an organization,
25 separate and apart from being a PAC, but in Count

1 II, an organization, subject to expenditure limits,
2 again, there is sufficiency to proceed forward.
3 And third, if there is information denoting the
4 prospect or possibility that they may well have
5 been a PAC, it needs to go forward.

6 Remember, the burden on the motion to dismiss,
7 it tests the facial sufficiency of the complaint
8 and we believe we've done that. Express advocacy,
9 as counsel's indicated, overlays all three counts.
10 And what we've indicated to you, that while a
11 number of federal circuits have adopted the magic
12 words theory, the authority is not binding on the
13 commission.

14 In fact, the commission may follow the
15 superior context sensitive approach favored by our
16 Indiana Supreme Court, taken up by the Ninth
17 Circuit Court of Appeals. They hate Furgatch, and
18 I understand. They hate that decision by Judge
19 Wingate that we brought your attention in December.
20 Judge Wingate's decision, which does not appeal to
21 the Fifth Circuit, because of the fact that you've
22 got cases on both sides, and in fact Judge
23 Wingate's decision in Mississippi specifically
24 adopted the Furgatch approach and allowed for this
25 commission, like others, to adopt Hoosier common

1 sense.

2 And to make a context sensitive determination
3 coming, in terms of the time, the approach, what
4 tone, what verbal content was used, and to make a
5 determination as to whether or not that was express
6 advocacy? We've stated our case and believe we've
7 met the burden to overcome the motion to dismiss
8 and we respectfully request a finding against the
9 Chamber on the motion to dismiss.

10 COMMISSION MEMBER J. PERKINS, JR.: I do
11 have a question.

12 MR. S. EICHOLTZ: Sure.

13 COMMISSION MEMBER J. PERKINS, JR.: You
14 mentioned Mississippi?

15 MR. S. EICHOLTZ: Yes, sir.

16 COMMISSION MEMBER J. PERKINS, JR.: Does
17 Mississippi have the law which Indiana repealed
18 on reporting independent expenditures?

19 MR. S. EICHOLTZ: Separate and apart from
20 the independent expenditures' requirement was a
21 contribution of donor limits -- it's same thing
22 here, same thing here, and what Judge Wingate
23 found was that the expenditures needed to be
24 reported, that if in fact -- and there's no
25 question that the express advocacy standard

1 overlays all three counts.

2 But if you reach that express advocacy, that
3 what they did walked like a duck, talked like a
4 duck, that it in fact constituted express advocacy
5 even without the reference to the magic words, that
6 it then invokes other parts of your statute, the
7 expenditure requirements and the disclosure
8 requirements. That's why we think Judge Wingate's
9 decision is important.

10 Frankly, we have a hard time coming before
11 you. If we weren't able to cite the Indiana court,
12 other circuits like Furgatch and the district
13 courts like Judge Wingate, but we believe that
14 we've cited to you enough authority to overcome the
15 motion to dismiss and would ask this to move
16 forward.

17 COMMISSION MEMBER J. PERKINS, JR.: I'll
18 ask one more, if that's okay, Mr. Chairman?

19 CHAIRMAN D. CRUEA: No. Go right ahead.

20 COMMISSION MEMBER J. PERKINS, JR.: Earlier,
21 I challenged Mr. Kirby on the issue of crossing
22 the line, and asked him the question about of,
23 you know, whether or not the U.S. Chamber
24 crossed the line in this? I guess I want as to
25 ask kind of the flip side of the question now to

1 you and challenge, and I would address it either
2 to you, Mr. Friedman or to Mr. Eicholtz, whoever
3 is appropriate to address it, but you know,
4 help -- help, I guess, the commission
5 understand, if you adopt -- if we adopt the U.S.
6 Supreme Court standard in Buckley or the Indiana
7 Court standard, where is the line crossed here?

8 MR. S. EICHOLTZ: In the tone that we've
9 heard, let's ask ourselves questions about Karen
10 Freeman-Wilson. Let's ask ourselves about
11 judge -- coming in the context of -- it was not
12 two years out, it was coming in the final ten
13 days, you are permitted under Furgatch and other
14 comparable decisions to inquire what is the
15 context sensitivity of that particular ad?

16 They would have you say that it is devoid of
17 that, that Buckley is devoid of that. Fortunately,
18 with Furgatch and others like Brownsburg say helps.
19 You don't have to stop or check your common sense
20 at the door. You're allowed to inquire as to the
21 context of that ad. Did the Chamber in any kind of
22 similar issue advocacy a year out? Did they have
23 any discussion about the AG or anything else?

24 We think the evidence is appropriate to go
25 forward to demonstrate exactly what kind of

1 advocacy had they done before ten days out prior to
2 an election, and candidly, under Furgatch and
3 Brownsburg, you're allowed to inquire and to make a
4 context sensitive determination as to what is
5 advocacy? That's allowed certainly under
6 Brownsburg. And Furgatch not only was adopted by
7 the Indiana Supreme Court and the Ninth Circuit
8 Court of Appeals, several federal district courts,
9 the FEC and other state courts, and again, we're
10 waiting on the outcome of the Moore decision going
11 up to the Fifth Circuit.

12 You're allowed to not have to check that
13 common sense at the door. Counsel would have you
14 do that. We say to you that under Furgatch and
15 others, no, you can make that context
16 determination. And the only way for us to be able
17 to do that is to go forward and allow discovery and
18 allow us to get in with -- and probe further, and
19 that's why we would ask the case to go forward.

20 VICE CHAIR A. LONG: May I ask one
21 question, then I'll shut up.

22 CHAIRMAN D. CRUEA: Go ahead.

23 VICE CHAIR A. LONG: I wouldn't do that.
24 I'm going to ask him more questions.

25 CHAIRMAN D. CRUEA: Don't make a promise

1 you can't keep.

2 VICE CHAIR A. LONG: Do you think it's
3 significant that the ad refers to a website to
4 get more information?

5 MR. S. EICHOLTZ: Absolutely. And in fact,
6 you'll notice the tag line, right at the bottom
7 of the ad is indicated there. We believe that
8 that is a (indiscernible) for as well. And
9 you'll note in looking to the Mississippi
10 decision, Judge Wingate noted that the ad that
11 was run down there was also directed to the
12 website of the sponsoring agency; in this case,
13 one of the subchapters of the -- of the Chamber,
14 the Institute for Legal Advocacy.

15 The fact that it is not sitting there by
16 itself but in fact directs viewers to a website was
17 at least found probative by Judge Wingate in the
18 federal decision in Mississippi. It doesn't stand
19 by itself. In fact, it goes off to a website which
20 specifically articulates various postures on issues
21 pending before the federal courts and the
22 prosecutors and what have you.

23 So no, do we think that's probative?
24 Absolutely? Absolutely. And was it looked at as
25 so as part of Judge Wingate's decision? No

1 question about it.

2 MR. T. KIRBY: May I respond just to the
3 website?

4 CHAIRMAN D. CRUEA: Sure.

5 VICE CHAIR A. LONG: I would advise --
6 yeah, sure. I didn't -- in fairness, didn't ask
7 you that specific question.

8 MR. T. KIRBY: That was an interval part of
9 the ad. Where is the allegation in the
10 complaint that there was any expressed advocacy
11 at that website? I assume people of Indiana
12 started looking at it. The Indiana Democratic
13 Party has access to computers. They saw those
14 ads. They supposedly didn't even bother.

15 They've had an opportunity to come here and
16 plead their case. There is no allegation of any
17 content on that website with respect to your
18 analysis one way or the other. I have lots of
19 other arguments. It's why if there had been, it
20 wouldn't matter, but I would just point out we're
21 asking here have they pled substantial reason to
22 believe that a violation has occurred and they have
23 given you no facts with respect to that website.

24 VICE CHAIR A. LONG: Can I take you to the
25 next step to that? Assume for the sake of the

1 question, and I don't know what's on the website
2 either, I -- as a matter of fact, I -- (end of
3 tape). What would your answer be?

4 MR. T. KIRBY: I don't think it would work
5 because I think the Supreme Court has -- looks
6 at the words of the ad. Now in fact, what
7 typically happens is, and what happened down in
8 Mississippi is this, the sponsors of the ad
9 listed their website, and if you went to their
10 website, then one of the buttons, one of the
11 links was to find out more about candidates. If
12 you click on one of those buttons, you then had
13 a choice of various candidates -- if you clicked
14 on one of those buttons, you then went to the
15 candidate website, and when you went to the
16 candidate website, you then had a mix of
17 materials. Some of the materials were flat out
18 express advocacy. Some of the materials were
19 informative stuff...

20 VICE CHAIR A. LONG: But you don't think --
21 you don't think referring to, and that's why I
22 limited my question --

23 MR. T. KIRBY: I understand.

24 VICE CHAIR A. LONG: -- to such a very
25 narrow, that to refer you to a site that would

1 you know questionably expressed, you would agree
2 that if the website said vote against Karen
3 Freeman-Wilson, that would be an expressed...

4 MR. T. KIRBY: The website, I don't
5 think --

6 VICE CHAIR A. LONG: And you don't think
7 that would raise -- and I'm not implying by my
8 question, I just think it's an interesting point
9 that...

10 MR. T. KIRBY: I don't mean to deny that
11 there's not room for discussion on -- on that
12 interesting point. I think the test as it
13 stands and until it changes, you look at the
14 words of the ad, the speech in question, but I
15 would emphasize to you for purposes of this
16 case, you don't have to reach that very
17 interesting question because there has been no
18 allegation as to the content of that very public
19 website.

20 VICE CHAIR A. LONG: Thank you. I
21 appreciate you taking time to answer those.

22 CHAIRMAN D. CRUEA: Who are the parties in
23 the Mississippi case? I read that. I don't
24 remember.

25 VICE CHAIR A. LONG: In the handout they

1 had, I believe they did -- somebody attached...

2 MR. T. KIRBY: Well, the parties were the
3 Secretary of State and attorney general of
4 Mississippi on the one hand, who had
5 responsibility for enforcing the Mississippi
6 statute and the Chamber of Commerce who brought
7 the declaratory judgment action in federal
8 district court concerning Mississippi ads.

9 There were -- and when you say the Mississippi
10 case, though, it's little complicated because Judge
11 Wingate put his decision out on Thursday. On a
12 Friday, various candidates and voters got a series
13 of state injunctions based on Judge Wingate's
14 decision. On Saturday, I asked the U.S. Supreme
15 Court to fix this, and on Monday, the U.S. Supreme
16 Court issued emergency stays, including those
17 injunctions from going into effect. So those are
18 all sort of part of the Mississippi case.

19 Still in Mississippi, there is an appeal of
20 the Mississippi Supreme Court of one of those
21 injunctions and there is an appeal pending before
22 the United States Court of Appeals for the Fifth
23 Circuit from Judge Wingate's decision itself.

24 COMMISSION MEMBER J. PERKINS, JR.: I'll
25 ask that other question. I'll ask one more

1 question actually to any of the lawyers: In
2 that Mississippi case, does anyone know whether
3 there was an administrative process before it
4 went into the court system; was there a hearing
5 before the -- say the Mississippi Election
6 Commission?

7 MR. T. KIRBY: No, there was not. What
8 happened there was that the secretary of state
9 and attorney general responsible for enforcing
10 the statute, they made public statements
11 indicating they were contemplating enforcement
12 action.

13 The Chamber of Commerce wanted a quick
14 decision -- obviously, I wasn't involved in this
15 decision, but the Chamber of Commerce brought a
16 declaratory judgment action that got produced and
17 it was all done within the two days. Judge
18 Wingate's decision came out just a few days after
19 the declaratory judgment complaint was filed.

20 COMMISSION MEMBER J. PERKINS, JR.: Okay.

21 MR. S. FRIEDMAN: Most of the cases --
22 that's a lot of the cases that we argue. They
23 come up because someone, rather than face an
24 administrative action, has taken action to
25 enjoin enforcement of some provisional campaign

1 finance act. And one of the things that we're
2 here today -- I mean, this is an unusual process
3 for this -- for this board, but you know, what
4 we're finding out and defining what is the role,
5 function and duty of this board, in terms of
6 enforcing the Campaign Finance Act?

7 We've kind of been placed in the position of
8 how the proceedings are going, of undertaking that
9 role, and you know, maybe that's a question that
10 needs to be asked: Is this the proper procedure or
11 should it be you undertaking the investigation --
12 we're happy to take that role. We just want the
13 tools to do it.

14 MR. S. EICHOLTZ: We should indicate, too,
15 and perhaps counsel addressed this, but the U.S.
16 Supreme Court declined to enter into the now
17 pending complaint before the Fifth Circuit back
18 in May of this year. So the U.S. Chamber of
19 Commerce complaint to the U.S. Supreme Court was
20 denied without comment on May 29th of 2001. So
21 the appeal goes forward in the -- in the Fifth
22 Circuit.

23 CHAIRMAN D. CRUEA: Okay.

24 MR. T. KIRBY: Not exactly. I understand
25 what you referred to. After the court issued

1 the emergency stays of the state injunctions, we
2 then asked the U.S. Supreme Court to actually go
3 ahead and grant (indiscernible) at that time and
4 deal with the -- the response was filed was
5 look, they've appealed one of these things at
6 the state supreme court, let it have its say
7 before the U.S. Supreme Court gets involved, and
8 the response to that submission by the
9 defendants, the U.S. Supreme Court denied
10 (indiscernible).

11 It was not an attempt to bypass the fifth
12 circuit on a federal matter. It was the question
13 of what do you do with these temporary restraining
14 orders that had been issued on Friday and Saturday
15 morning preventing us from giving a political
16 speech.

17 You're absolutely correct, the U.S. Supreme
18 Court did not explain why having granted the stay,
19 it didn't take the case right then, but I will
20 represent that the opposing papers argue very
21 strongly look, they've asked the Mississippi
22 Supreme Court to look at it first. It would be
23 more orderly for this court to wait until the
24 Mississippi Supreme Court acts before you actually
25 follow through with a policy. That's what

1 happened.

2 COMMISSION MEMBER J. PERKINS, JR.: Thank
3 you.

4 CHAIRMAN D. CRUEA: We're done? Any other
5 questions?

6 VICE CHAIR A. LONG: I don't believe so,
7 unless you've got any questions?

8 COMMISSION MEMBER J. PERKINS, JR.: I
9 don't. Mr. Chairman, I'll just make a comment,
10 if I can. I just want to thank the lawyers on
11 both sides of this issue for being so well
12 prepared and for submitting very well written
13 briefs. I appreciate all the work that both
14 sides have done here.

15 VICE CHAIR A. LONG: I would join in that,
16 that's -- and I think the arguments have been
17 very helpful and informative. There's -- to be
18 candid, there's been things on both sides of
19 this that have been troublesome to me and I
20 think you all have answered some of my
21 questions. I appreciate it. I also thank you
22 for calling me, Your Honor. I've not had
23 anybody do that before.

24 COMMISSION B. MORGAN: It'll be tough
25 working with him now.

1 CHAIRMAN D. CRUEA: Okay. So now what?

2 VICE CHAIR A. LONG: We're done, aren't we,
3 a recess?

4 CHAIRMAN D. CRUEA: So we're essentially
5 taking this under advisement?

6 MR. D. SIMMONS: There's a number of
7 choices I have. I would submit that you have a
8 motion to grant the motion, to dismiss the
9 motion, to deny the motion, take the matter
10 under advisement, or the other -- all the other
11 actions you could take.

12 CHAIRMAN D. CRUEA: Under advice?

13 VICE CHAIR A. LONG: I believe we should
14 make a decision, that's fine. Whatever our
15 decision is, I think we owe it to the parties.
16 I don't think we're going to have any more
17 knowledge about this case than we do right now.
18 When you get old and forgetful like me, Lord
19 knows what I'll think somebody said tomorrow.

20 COMMISSION B. MORGAN: I agree. I think if
21 it's going to move forward, that there needs to
22 be time. I'd like to see something happen with
23 this to get clear definition before the next
24 series of elections, the next election cycle.
25 If we can shed some light on what may be some

1 options that would may cause people to look
2 closer at this type of activity. Something may
3 come from whatever happens after we make our
4 decision today so I'd like to make a decision
5 today.

6 VICE CHAIR A. LONG: I'm okay with making a
7 decision today.

8 CHAIRMAN D. CRUEA: Do you -- I'm not sure.
9 Do we want to do that now? Do we want to take a
10 five-minute break because we've been going a
11 couple of hours or do you want to proceed -- do
12 that now or do you want to do that when we come
13 back from lunch?

14 COMMISSION B. MORGAN: Lunch, after lunch
15 would be good.

16 CHAIRMAN D. CRUEA: Okay. So take a recess
17 til 1:00 p.m.

18 VICE CHAIR A. LONG: With travel plans,
19 does that create a problem for you?

20 MR. T. KIRBY: I will accommodate this
21 commission.

22 VICE CHAIR A. LONG: I mean that's...

23 UNIDENTIFIED SPEAKER: Mr. Chairman, keep
24 in mind that after lunch, we will be moving the
25 meeting to Conference Room A in the conference

1 center as we had originally planned on the
2 agenda because we have other business before the
3 commission and there will be people waiting
4 there for you.

5 CHAIRMAN D. CRUEA: Okay.

6 COMMISSION B. MORGAN: They can't come
7 here?

8 UNIDENTIFIED SPEAKER: Well, it might be
9 easier to take them now. It's a small comment
10 at this point.

11 UNIDENTIFIED SPEAKER: We have a number of
12 attorneys for precinct changes.

13 COMMISSION B. MORGAN: Is there a lot of
14 people?

15 UNIDENTIFIED SPEAKER: Yeah.

16 COMMISSION B. MORGAN: Okay.

17 CHAIRMAN D. CRUEA: Okay.

18 UNIDENTIFIED SPEAKER: I don't know. I
19 don't know if that will be a lot but...

20 CHAIRMAN D. CRUEA: I don't know if there's
21 going to be a lot but...

22 UNIDENTIFIED SPEAKER: (Indiscernible).
23 Counsel will be there for any precinct changes
24 and they haven't been informed of the room
25 change, so if we do that, we'll do it in the

1 afternoon...

2 CHAIRMAN D. CRUEA: Okay.

3 VICE CHAIR A. LONG: I'm -- I can go either
4 way. I mean, I just -- I would suppose that at
5 some point that we open the floor for discussion
6 or comments, and then if we're going to have a
7 motion, motion, or if we just take an up or down
8 vote on the -- on their motion. Either
9 procedure is satisfactory to me.

10 CHAIRMAN D. CRUEA: It doesn't matter to
11 me.

12 COMMISSION MEMBER J. PERKINS, JR.: I'm
13 okay either way.

14 CHAIRMAN D. CRUEA: Do you want to open it
15 up for discussion or are you ready to take a
16 vote, or do you want to --

17 COMMISSION B. MORGAN: We can do it after
18 lunch to...

19 CHAIRMAN D. CRUEA: -- recess and start at
20 12:45?

21 COMMISSION B. MORGAN: Recess, yeah.

22 CHAIRMAN D. CRUEA: Recess til 12:25 and we
23 can...

24 COMMISSION MEMBER J. PERKINS, JR.: Let's
25 do that.

1 VICE CHAIR A. LONG: Did you say...

2 UNIDENTIFIED SPEAKER: 12:45?

3 CHAIRMAN D. CRUEA: 12:45.

4 UNIDENTIFIED SPEAKER: In Conference Room

5 A.

6 CHAIRMAN D. CRUEA: In the conference room.

7 UNIDENTIFIED SPEAKER: It's directly across
8 the street from the Indiana Government Building.

9 CHAIRMAN D. CRUEA: Okay.

10 COMMISSION MEMBER J. PERKINS, JR.: So
11 that's what we'll do.

12 CHAIRMAN D. CRUEA: Okay. We'll recess til
13 12:45.

14 COMMISSION MEMBER J. PERKINS, JR.: Did
15 everybody get that? We're going to -- oh,
16 sorry, go ahead.

17 CHAIRMAN D. CRUEA: We're taking a recess
18 until 12:45, and we'll reconvene in Conference
19 Room A over in the Indiana Government Center
20 South.

21 (A recess was taken.)

22 CHAIRMAN D. CRUEA: Okay. I call to --
23 back to order the meeting of the Indiana
24 Election Commission for Tuesday, or for
25 Thursday, October 25th. First order of business

1 is we're going to have discussion between the
2 four commission members on the motion that's
3 been presented. There will be no more testimony
4 from the public and then we'll take a vote on
5 the motion. So at this time I'll open it up for
6 discussion between the commission members.

7 VICE CHAIR A. LONG: Okay. I've never been
8 at a loss for words. This is an interesting
9 case for me, and because we are four members --
10 four-member body, two nominated by the
11 Republican State chairman and two the Democrat
12 chairman, we come to this with a certain amount
13 of political connections. I imagine most of us
14 have been, to one degree or the other, active in
15 politics for a good part of our lives. I've
16 been troubled for a lot of years for campaign
17 finance reform. I think that the leaders of our
18 nation, Democrats and Republicans that are
19 working toward that goal, are to be applauded.

20 My concern is oftentimes observed in our
21 district -- I'm from the 8th District, and we have
22 a congressman who is certainly less than the friend
23 of the AFL-CIO, and through every election cycle,
24 we see ads that are run there that talk about
25 issues and cast the congressman in less than a

1 positive light because of his position on the
2 issues, and the tag at the end normally says
3 they're paid for by the AFL-CIO, and those viewing
4 those ads know who's paying for them and why they
5 differ from him.

6 Make no mistake, I, in my position, in the
7 Democrat Party, do work against this congressman,
8 but I respect his abilities and his sincerity and
9 criticize our differences and belief.

10 The concern that I have in this case, and all
11 cases involving soft money, is that we don't know
12 who's paying for the ads. I think to read the
13 content of the ad or to watch the commercials that
14 have been presented to us, I just cannot believe
15 that anyone can seriously argue that they were not
16 cast with the pure intention of communicating to
17 the voters of those areas in which they were run to
18 vote against Karen Freeman-Wilson.

19 I don't -- I just -- I see no other
20 interpretation of those. I think that when you run
21 them within the time frame of preceding the
22 election and while no one has argued the point, I
23 would assume that after the second Tuesday in
24 November, they probably stop running, although she
25 continued to be a public official.

1 As a Democrat member of this board, I wish
2 that for selfish reasons that this were a group,
3 perhaps a group of organizations of unions that
4 were challenging a Republican candidate, and then
5 maybe my feelings would not be cast in the sense
6 that I'm speaking from a political vein and a
7 partisan vein.

8 I don't like it when anybody runs ads
9 advocating to me that I should think twice about or
10 vote against, or whatever the words are, a
11 candidate, and I don't know who's paying -- I don't
12 know what the motivation is. I think all we say
13 here -- and by denying this motion to dismiss, is
14 that we believe that our law, and particularly, I
15 think the PAC decision allows this board to
16 recognize clearly if these are express advocacy
17 ads, that they should be subject to reporting so
18 that citizens in Indiana who care can know who's
19 paying and what the motivations might be and judge
20 the credibility of these ads.

21 I don't like negative campaigning. I think
22 that to attack any candidate, particularly,
23 personal attacks in the form of these is
24 troublesome, but that is not why I'm against the
25 situation and why I will vote to deny the motion to

1 dismiss.

2 I do because I think when all this is pared
3 away, we have an obligation as public officials in
4 running honest and clean and pure elections that
5 disclosure as to where these large expenditures of
6 money come from is important because we went
7 through the last presidential cycle with all of the
8 adverse publicity and embarrassment to our party, I
9 think, with the disclosures of foreign money that
10 found it way into the national coffers of the
11 Democratic Party, and that was wrong.

12 I say that unless we regulate it, foreign
13 money, and I don't accuse the Chamber of Commerce
14 of being anything other than a very admirable and
15 honorable institution, but the concept is that the
16 secrecy allows monies that none of us would want
17 interjected into our political process and
18 disclosure is the way that we prevent that, so for
19 that reason, I would vote to deny the motion to
20 dismiss. Thank you.

21 COMMISSION MEMBER J. PERKINS, JR.: Mr.
22 Chairman, I would just, I guess, make a couple
23 of comments in response to Commissioner Long. I
24 think if we focus here on the issue of
25 disclosure and the issue of secrecy, I think

1 we've missed the point of what the arguments
2 were about this morning.

3 Both counsel have presented arguments as to
4 whether or not this is issue advocacy or whether
5 this is express advocacy, and while I think -- I
6 don't disagree with some of the issues raised about
7 campaign finance reform, that's not before us.

8 The issue before us is a motion to dismiss
9 this matter and whether or not the -- whether or
10 not under -- really under Indiana law, you know,
11 were these -- were the ads that were run by the
12 U.S. Chamber of Commerce, were they express
13 advocacy that would then require reporting or are
14 they issue advocacy which -- by a corporate
15 organization which does not require reporting?

16 And I think that if -- if this commission --
17 this commission is not charged with the
18 responsibility of deciding whether or not -- I'm
19 kind of losing my train of thought here for is
20 second, whether or not these as independent
21 expenditures, if they are that, need to be reported
22 or whether they're veiled in secrecy or that kind
23 of thing because the Indiana legislature has spoken
24 on that point.

25 The Indiana legislature spoke on that point in

1 1997, and said that, and repealed the statute that
2 required those -- reporting on those kinds of
3 expenditures and ads and that kind of thing. So I
4 mean, I think, you know, it goes to the -- the
5 issues I mentioned before are really what's before
6 us and those are the issues that determine whether
7 or not the motion to dismiss should be granted or
8 be denied.

9 COMMISSION B. MORGAN: Mr. Chairman..

10 CHAIRMAN D. CRUEA: Mr. Morgan.

11 COMMISSION B. MORGAN: The points that are
12 brought up by the attorneys lead me to believe
13 that there is a need for further investigation
14 into this matter. The one good thing about this
15 commission, since I've been on it, has been the
16 ability for the commission members and the
17 co-directors and the staff to really work well
18 together transcend the political partisanship
19 that we're chosen by, and that's been I think a
20 high level mark on all of us.

21 And I agree with the fact that we're here
22 on -- to rule on a particular motion to dismiss,
23 and that's -- there was arguments made on both
24 sides and I would just like to adjust some comments
25 that are somewhat related to the specifics but also

1 just my general observations of what happened
2 during that particular election cycle that caused
3 me to -- to try and use my Hoosier common sense as
4 best I can.

5 I look around the table, but I sit up here,
6 and I know I'm the least educated, and pretty much,
7 that could probably be said through the entire
8 room, so I'm a litmus test for being able to look
9 at that ad and figure out that it's -- it was meant
10 to keep Karen Freeman-Wilson from getting elected.

11 Whether or not it was done within the realm of
12 legalities is something that has to be
13 investigated, and we don't have all the facts
14 before us on that, nor are we being asked to
15 determine that today. But the timing of the ads
16 is -- certainly, leads me to believe that it wasn't
17 by chance.

18 And that if this particular person had these
19 faults or these shortcomings for this office, the
20 time to oppose her, if it wasn't election related,
21 would have been at the time back in January and
22 February of the year 2000, when she was first being
23 appointed to fill the vacancy left -- Jeff Modisett
24 left.

25 And I just think that -- that there is a need

1 to be part of the solution and I think the
2 commission would be part of what solution at this
3 particular time to -- to dismiss and allow the
4 investigation to go on. Thank you.

5 CHAIRMAN D. CRUEA: Thank you. A comment
6 that I would make is that I -- one, I think this
7 board needs to look at maybe going to the
8 legislature and asking them to put back into law
9 the reporting independent expenditures. I think
10 that would solve some problems.

11 One problem I have is I think if we take this
12 on -- one, I'm concerned about staff, whether they
13 have the time, if there's enough staff to be able
14 to handle doing this. My next concern is do we
15 open ourselves up to having every single person who
16 comes in here and wants to question some
17 contributions or expenditures, asking us to start
18 doing subpoenas and other items, and I could see
19 this board being in here almost every day to answer
20 those questions and to take care of that business.

21 And I'm not sure that this shouldn't be up to
22 a court of law to -- to determine the aspects on
23 this case. Any other comments?

24 VICE CHAIR A. LONG: I don't have any.

25 Call the role, is that a fair enough way to do

1 it?

2 CHAIRMAN D. CRUEA: All right.

3 COMMISSION MEMBER J. PERKINS, JR.: Okay.

4 Mr. Chairman, I'll make a motion, since that is
5 our -- always our typical way that this
6 commission rules on any campaign finance
7 enforcement matters. I will move that the
8 motion to dismiss, which has been filed by the
9 U.S. Chamber of Commerce be granted, and I guess
10 that would be the extent of my motion.

11 CHAIRMAN D. CRUEA: Is there a second to
12 that?

13 (No response.)

14 CHAIRMAN D. CRUEA: I'll second that
15 motion. Any discussion?

16 (No response.)

17 CHAIRMAN D. CRUEA: All those in favor,
18 signify by saying aye?

19 COMMISSION MEMBER J. PERKINS, JR.: Aye.

20 CHAIRMAN D. CRUEA: Aye. Opposed?

21 COMMISSION B. MORGAN: No.

22 VICE CHAIR A. LONG: No.

23 CHAIRMAN D. CRUEA: Okay. Any other
24 motions?

25 (No response.)

1 CHAIRMAN D. CRUEA: Okay. Ask the staff
2 attorneys what...

3 MR. D. SIMMONS: Well, at this point, as
4 you know, Mr. Chairman, it does take a 3-1 vote
5 to carry any action on the commission. A 2-2
6 vote, essentially no action at this point, and I
7 don't know if the commission wants to explore
8 further alternatives.

9 I think once the two commission members take a
10 position in a case that we should not go forward
11 and two members take a position in the case it
12 should go forward, any further proceedings may be
13 similarly deadlocked.

14 I don't know if the commission wants to go
15 through mechanisms of coming back and doing that
16 and going through those motions each time a new
17 issue comes up in a case as it proceeds or where
18 whether to conclude the matter now.

19 I know that when the FEC is similarly
20 deadlocked in cases like this, they indicate so,
21 that they are deadlocked and they do not see a
22 future for the case and that they would -- do not
23 anticipate they could take further action that
24 would be meaningful to either party.

25 That has been sufficient under federal law as

1 the parties proceed with those cases to exhaust
2 their administrative remedies. As you know, to
3 take administrative appeal, what you have to show
4 in a court of law before you take that appeal is
5 I've exhausted all of my administrative remedies.

6 CHAIRMAN D. CRUEA: Right.

7 MR. D. SIMMONS: In cases such as that, the
8 court has found that that satisfies that
9 exhaustion requirement and that they can proceed
10 with the appeal in court, that's -- that's one
11 suggestion, and I don't know if anybody, if the
12 commission members want to open that for
13 discussion or have any other suggestions, that's
14 just one suggestion.

15 COMMISSION B. MORGAN: Dale, as it stands
16 now, the motion to dismiss failed; right?

17 MR. D. SIMMONS: It didn't -- it is not
18 yeah, exactly, it cannot -- that particular
19 action from the commission, it takes a 3-1 vote
20 for any action. And just give you another
21 example, if the Democratic Party came in here
22 and asked you to enforce -- they send up a
23 discovery motion and the Chamber files an
24 objection after that, that would have to pass,
25 you would have to enforce that again, take

1 official action by a 3-1 vote. Again, if you
2 vote 2-2 on that action, that particular motion
3 would fail.

4 VICE CHAIR A. LONG: I'd like to hear from
5 the parties what they would -- if we're in a
6 deadlock here or what their -- if they have any
7 suggestions.

8 CHAIRMAN D. CRUEA: That's fine. We'll
9 give each side five minutes.

10 MR. T. KIRBY: I don't know that we'll need
11 five minutes. I appreciate the careful
12 consideration that was given to the matter. As
13 was indicated, when you have these kinds of
14 balanced commissions, this kind of -- people who
15 will divide a vote, it's not unusual, and
16 certainly, the practice of the FEC as described,
17 and I think it's (indiscernible), when the
18 commission recognizes that going forward is
19 going to be impossible to justify it.

20 Because of course, our view is the commission
21 has not ruled affirmatively if there is
22 jurisdiction. The commission has not ruled
23 affirmatively that this case should proceed. So I
24 would expect -- of course, I'd have to consult with
25 my client, but I'm confident that if any motion

1 were made that requires us to provide information,
2 which we believe would violate our First Amendment
3 Rights, we would refuse, then the issue
4 (indiscernible). If the issue would come to this
5 commission and ask for an affirmative vote to make
6 us do something, the case would just sit here in
7 limbo.

8 Now my impression is that our opponents would
9 like to get a decision on this case, that there are
10 sort of -- there's a key legal issue at the heart
11 of this dispute, and it's not really -- I don't
12 want to get into arguing merits, but it's a key
13 legal issue that really lies at the heart of the
14 deadlock, and it seems to me that the reasonable
15 thing for this commission to do is to take its
16 cue -- its cue from the FEC and simply acknowledge
17 the deadlock and dismiss on that basis, then if
18 there's a desire to pursue this matter in court, I
19 presume that could be done and a judicial
20 determination can be made.

21 But -- but as was indicated with this kind of
22 commission, this is not an unusual situation, and
23 typically, once you have this kind of vote, the
24 fact of the matter is administrative proceedings
25 are over one way or the other, and then if there's