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This White Paper provides background and commentary on the current state of the law and proposed revisions of it, relating to minors' ability to make contributions to political campaigns. It is in specific response to the request of the Federal Election Commission ("FEC") for comments on the proposed 11 CRF 110.19.

I. Introduction

A. Ban on Minors' Contributions Declared Unconstitutional

The Bipartisan Campaign Reform Act of 2002 ("BCRA") sought to reform the campaign finance process to allow greater input from ordinary citizens. In so doing, the Act restricted the political input rights from one group of citizens – minors. In its section 318, it outlawed minors' right to donate to campaigns or parties:

Prohibition of Contributions by Minors

[. . .] An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee or a political party.

BCRA, § 318.

In McConnell v. Federal Election Commission, 124 S.Ct. 619 (2003), the United States Supreme Court struck down the ban on campaign donations by minors. The Court premised its ruling on two well-established constitutional precepts. First, the right to contribute to a campaign is a free speech right, falling under the First Amendment's freedom of expression and association provisions. Second, these free speech rights apply to minors, citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511- 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) which proclaims that minors do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court employed a heightened standard of review: for a statute such as Section 318, which significantly interferes with associational rights, to survive constitutional scrutiny, it must be 'closely drawn' to match a 'sufficiently important interest.' " Id., quoting Federal Election Comm'n v. Beaumont, 539 U.S. 146, ----, 123 S.Ct. 2200, 2210-2211, 156 L.Ed.2d 179 (2003)).

The Court evaluated Section 318 under both prongs of the Beaumont test. First, the Court examined the government's stated purpose for the provision: to prevent adults from evading

campaign donation limits by donating in the name of a minor child. Section 318 did not involve a “sufficiently important interest” because the government had failed to provide any evidence showing that this was a problem which could not be dealt with by Section 320 of the Federal Election Campaign Act of 1971 (“FECA”), which prohibits any individual from “mak[ing] a contribution in the name of another person” or “knowingly accept[ing] a contribution made by one person in the name of another,” *Id.*, quoting 2 U.S.C. § 441f. Second, the Court reasoned, even *if* the interest was important, the provision was not “closely drawn” to implement that interest. The Court found the provision to be overinclusive, precluding campaign contributions from minors who were clearly contributing of their own accord. Thus, the Court agreed that Section 318 “sweeps too broadly,” and therefore affirmed the District Court decision declaring the provision unconstitutional. *Id.*

B. The Federal Election Commission’s Proposed Rule and Comments Request

The FEC has the responsibility of conforming BCRA to the McConnell decision and, as noted above, has elicited public comment. In seeking to comply with McConnell, the FEC has taken two somewhat conflicting positions in its proposed rule contained at 11 CFR 110.19 (“Rule”), and in its request for comments regarding the Rule. First, the Rule sets no age limit on contributions, but requires the following for a minor’s contribution to be accepted:

- (a) The decision to contribute is made knowingly and voluntarily by that individual;
- (b) The funds, goods, or services contributed are owned or controlled exclusively by that individual, such as income earned by that individual, the proceeds of a trust for which that individual is the beneficiary, or a savings account opened and maintained exclusively in that individual's name; and
- (c) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

Sec. 110.19 Contributions and donations by minors.

Thus, the Rule requires that the minor makes the decision to donate “knowingly and voluntarily,” that the funds coming from the minor are “owned or controlled exclusively by that individual,” and that “the contribution is not made from the proceeds of a gift” which is made “to provide funds to be contributed.”

Second, the FEC requested comments on:

1. Whether the FEC should prohibit individuals below a certain age from making contributions, recognizing that those individuals lack the capacity to manage their finances and dispose of property and therefore could not knowingly and voluntarily contribute on their own behalf? What would be the appropriate

minimum age? Should the Commission instead establish a rebuttable presumption that individuals below a certain age could not make contributions? If the Commission chooses this approach, what should the Commission require from that individual and his or her parents or guardian to rebut that presumption? Or should the Commission combine a categorical prohibition with a rebuttable presumption similar to the approach adopted by some jurisdictions with regard to the tort liability of children?¹; and

2. Should the Commission require exclusive ownership or control at all considering that in many jurisdictions a minor may not be able, for example, to open a bank account without a parent's or guardian's signature or manage an investment account without adult direction?

FEC [Notice 2004-8], May 6, 2004, Contributions and Donations by Minors.

This White Paper addresses both of these issues, because how this rule develops is critical to the free speech of minors, in Section II., below.

C. The Right to Contribute to a Campaign or Party is Protected by the First Amendment

The Supreme Court addressed First Amendment protections for campaign contributions in the landmark case of Buckley v. Valeo, 96 S.Ct. 612 (1976). The Court found that campaign regulations operated “in an area of the most fundamental First Amendment Activities.” Id. at 632. The Court reiterated that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.” Id. The First Amendment provided broad protections for political speech in order to “to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” Id., quoting Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957).

The Court in Buckley also found that the right to donate to a campaign or party was implicit in the First Amendment’s freedom of association guarantee. The Court cited NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958) for the proposition that the right to group association “undeniably enhanced” effective advocacy. Among those associational rights is the “(t)he right to associate with the political party of one's choice.” Id. at 633, quoting Kusper v. Pontikes, 414 U.S. 51, 56, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973), quoted in Cousins v. Wigoda, 419 U.S. 477, 487, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975).

¹ The Notice quotes from Restatement (Third) of Torts Sec. 10 cmt. b (Tentative Draft No. 1, 2001) (“[F]or children above 14 there is a rebuttable presumption in favor of the child's capacity to commit negligence; for children between seven and 14, there is a rebuttable presumption against capacity; children under the age of seven are deemed incapable of committing negligence”).

The Court then linked both the free speech right with group association and the associational right itself to the right to donate money to a political campaign or party. The Court rejected the District Court’s opinion that campaign donations constituted merely “conduct” rather than “speech.” The Court found that regulations on campaign donations affected speech because “some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.” *Id.*

Given the importance of campaign contribution rights to both the First Amendment freedom of speech and the First Amendment freedom of expression, the question raised by the Rule: how can Section 318 of the BCRA be implemented by rule to protect the First Amendment rights of persons under the age of 18 (“minors”).

II. Argument

A. Appropriate Ages to Set for Campaign Donations

As explained above, young people face a unique situation when it comes to their rights vis a vis government and politics. In America in 2004, persons under eighteen are generally not allowed to vote or hold office. Few if any sit on corporate or nonprofit boards. Minors are almost completely unrepresented among journalists and producers in major broadcast or print media outlets. As a result, donations to political candidates or parties are one of the few methods minors have to impact the world of government and politics.²

For reasons discussed below, the enactment of a minimum age below which minors may not contribute would lead to arbitrary results. While we agree with the tort analogy described by the FEC in its Notice, we urge the FEC to reject the archaic approach expressed in the draft Restatement (Third) Torts, which is inconsistent with the modern trend in case law and fails to recognize the importance of youth free speech rights in an environment where young people lack virtually **any** voice in government or politics.

1. The FEC should NOT Set An Irrebuttable Presumption of Incapacity for Minors Under Seven

In its Notice, the FEC quotes from a draft of the Restatement (Third) Torts, which suggests: “children under the age of seven are deemed incapable of committing negligence.” This position echoes the law in states which have adopted the long held “Illinois Rule.” Under the Illinois Rule, there is a conclusive presumption that minors under the age of seven cannot commit negligence or contributory negligence. Several states continue to hold this view. See, *e.g.*, Curreton v. Philadelphia School Dist., 798 A.2d 279 (Pa.Cmwltl.App. 2002); and Fire Ins. Exchange v. Diehl, 520 N.W.2d 675 (Mich. App. 1994). The Illinois Rule means that no minor under seven, no matter how intellectually brilliant, life experienced or skillful and cognizant can

²Minors, of course, regularly participate in political campaigns by giving services. The issue presented by the Rule is whether that participation should be subject to greater restrictions when money is involved.

commit negligence or contributory negligence. Thus, the facts of a particular case or a child's own abilities are meaningless as a matter of law: solely because of chronology, negligence allegations against a six year old will be thrown out automatically, while an equally intelligent seven year old may find negligence assessed against her based on a jury's factual findings.

The origin of the Illinois Rule goes back to old criminal law precepts, where a child was considered irrebuttably incapable of committing a crime under the age of seven, rebuttably incapable between the ages of seven and fourteen, and rebuttably capable over the age of fourteen. See Restatement (Second) of Torts, Section 283, Comment b. While the Illinois Rule held sway in most states in the early part of the Twentieth Century, over time its arbitrariness began to wear on courts. Furthermore, the changing life of American children made the irrebuttable aspect of the rule seem archaic.

Courts now have another option, and a majority now choose to take it.³ Under the so-called Massachusetts Rule, the presumption of an under-seven aged minors' incapacity is rebuttable. Bush v. New Jersey & New York Transit Co., 30 N.J. 345, 153 A.2d 28, (N.J. 1959). Such minors are judged as compared to children of like age, intelligence and experience. Restatement (Second) of Torts, Section 283, Comment b. Thus, a child's capacity is one for the fact finder (usually a jury) to decide, rather than automatic incapacity to commit a tort based solely on a minor's age.

One of the first states to revolt against the Illinois rule and embrace the Massachusetts Rule was the state of Minnesota in Eckhardt v. Hanson, 196 Minn. 270, 272, 264 N.W.2d 776, 777, 107 A.L.R. 1, 2 (1936). The Eckhardt court attacked the arbitrariness of the Illinois Rule. While the rule was "easy to apply" it was "arbitrary and always open to the objection that one day's difference in age should not be the dividing line as to whether a child is capable of negligence or not." Id. Furthermore, even as of that time, the Eckhardt court believed that young people were growing more sophisticated and safety conscious:

There is much opportunity for [children] to observe and thus become cognizant of the necessity for exercising some degree of care. Compulsory school attendance, the radio, the movies, and traffic conditions all tend to have this effect. Id.

By arbitrarily insulating children from tort liability solely based on their age, "a child may be guilty of the most flagrant violation of duty and still not be precluded from recovering damages for injuries suffered partly because of such [contributory negligence]." Id. Subsequently, numerous other states have followed Minnesota's lead in moving to the fact based inquiry of the Massachusetts Rule. See, e.g., Dillman v. Mitchell, 13 N.J. 412, 99 A.2d 809 (1953) (New Jersey adopts the Massachusetts Rule, requiring a rebuttable rather than an irrebuttable presumption of incapacity in children under seven); and Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982) (South Carolina rejects prior state case law supportive of the Illinois Rule and accepts the Massachusetts Rule).

³ Restatement (Second) Torts, § 283(a) Children, Comment b.

The Eckhardt court's argument based on minors' growing sophistication has become even stronger in recent years. In Toetschinger v. Inhot, 312 Minn. 59, 250 N.W.2d 204 (1977), the Minnesota Supreme Court reaffirmed Eckhardt, focusing on its even more evident validity in our advanced, modern society:

In the 41 years which have elapsed since the Eckhardt decision was written, the exposure of young children to the hazards of daily living and to the opportunities for instruction has been increased by such developments as preschool instruction and kindergarten; television; the proliferation of toys, including toy vehicles designed for the enjoyment of children under 7; and games. To our mind, it is not accurate to say that young children are less alert to and less trained concerning many dangers which they face today than they were at the time of Eckhardt.

Toetschinger, 312 Minn. at 68-69.

It has become so clear that the Illinois Rule is archaic, arbitrary and unfair, that it has even been criticized in its "home state," Illinois. In Appelhans v. McFall, 325 Ill.App.3d 232, 757 N.E.2d 987, 259 Ill.Dec. 124 (2001), a five year old child was accused of negligence for injuries caused to a pedestrian struck by the minor's bicycle. The plaintiff encouraged the court to reject the Illinois Rule, citing Eckhardt and Toetschinger and focusing on the arbitrariness of the rule ("the use of an arbitrary age leads to 'ridiculous' results because a child does not 'magically' know to exercise due care after his seventh birthday") and minors increasing sophistication ("the judiciary that crafted the [Illinois] rule did not envision 'cable-television, video games, the internet, pre-teen gangs, and violent crime'"). Id. 325 Ill.App.3d at 237. The court agreed with plaintiff's arguments, finding them "persuasive." But the court could not overrule the Illinois Rule because of the doctrine of stare decisis, which required the court follow an "arguably antiquated rule" but one which would have to be changed by the state legislature, rather than the judiciary.

Given the modern trend towards the Massachusetts Rule, an analogy to tort law suggests that any presumption of incapacity for minors under seven should be rebuttable rather than irrebuttable. This begs the question, however, as to whether there is some minimum age below which minors are truly incapable of the necessary awareness for negligence and by analogy may be incapable of "knowingly and voluntarily" making a contribution to a political campaign. Even under the Massachusetts Rule, a court may find a minor incapable of negligence as a matter of law if the child is "so young or the evidence of incapacity is so overwhelming that reasonable minds could not differ on the matter." Kerr v. Celeste Co., Inc., 1995 WL 530667, *2 (D. Kan. Aug. 3, 1995), quoting Honeycutt v. City of Witchita, 247 Kan. 250, 264, 796 P.2d 549, 559 (1990).

But for a court to find incapacity in law based solely on age (rather than in concert with the minor's experience) the minor must be extremely young. See, e.g., Kerr, supra, (nine month old baby can not be contributorily negligent) and Mastland, Inc. v. Evans Furniture, Inc., 498 N.W.2d 682 (two year old incapable of negligence); but see, Yun Jeong Koo v. St. Bernard, 89 Misc.2d 775, 392 N.Y.S.2d 815, 818 (N.Y. 1977) (child four years and ten months capable of contributory negligence); Lester v. Syales, 850 S.W.2d 858, 866 (Mo. 1993) (whether a four and

one-half year old is capable of negligence is a fact question for the jury); and *even Galloway v. McDonald's Restaurants of Nevada, Inc.*, 102 Nev. 534, 728 P.2d 826, 831, 832 (Nev. 1986) (affirming a lower court's finding of contributory negligence on the part of a child three and one-half years old).

2. Minors between the ages of seven and fourteen should be presumed capable of contributing to a political candidate, but that presumption should be rebuttable.

For older minors, the concept of a rebuttable presumption of incapacity makes less sense in light of minors' increasing exposure to the media and the political process at an earlier age. Older minors engage in more sophisticated activities, including taking themselves to school, using public transportation, and sometimes taking care of themselves at home while their parents or guardians are at work.⁴ Recognizing pre-teens' increased responsibility, as well as their growing sophistication, more states are presuming youth to be capable rather than incapable of negligence. Cases have suggested that minors as young as thirteen *Sorrells v. Miller*, 218 Ga. App. 641, 462 S.E.2d 793 (1995), or even twelve (*Government Employees Ins. Co. v. Davis*, 266 F.2d 760 (5th Cir. 1959) (applying Louisiana law) may be presumptively capable of committing contributory negligence. Other cases have taken the bar even lower. Although they do not explicitly state that the presumption of incapacity has shifted to a presumption of capacity, these cases explicitly find the child capable of contributory negligence, without even discussing a presumption of incapacity. See, e.g., *Gladney v. Curer*, 440 So.2d 938, 939 (La. 1983) (nine year old "with reasonable intelligence, is capable of negligence and contributory negligence"); and *Ruiz v. Faulkner*, 12 Ariz.App. 352, 355, 470 P.2d 500, 503 (Ariz.App. 1970) ("a child of six or seven years of age may be found to be contributorily negligent by a trier of fact if the issue is properly plead").

Furthermore, even state courts that still hold to a rebuttable incapacity for minors between the ages of seven and fourteen interpret this rule in such a way as to recognize the growing maturity and sophistication of minors as they approach the age of fourteen, and not in the arbitrary fashion in which some courts have imposed the doctrine of irrebuttable incapacity for minors under the age of seven. Therefore, the closer a child is to seven years old, the stronger the presumption of incapacity. See, e.g., *Leonard v. Davies*, 369 A.2d 868 (Pa. Super. 1977). On the other hand, the closer a child is to fourteen, the weaker the presumption of incapacity. See, e.g., *Berman by Berman v. Philadelphia Bd. of Educ.*, 310 Pa. Super. 153, 456 A.2d 545, 9 Ed. Law Rep. 575 (1983). Therefore, state law appears to recognize the growing level of intelligence, experience, skill and sophistication among minors between the ages of seven and fourteen.

Additionally, a strong argument can be made that many young people become more interested in politics and political issues between the ages of seven and fourteen. First, they are beginning to

⁴ One study estimated that 20% of minors aged 5-14 are caring for themselves while their parents were at work, although most of these children were older minors. See, Laurent Belsie, "Ranks of Latchkey kids Approach Seven Million", Christian Science Monitor, October 31, 2000.

learn about government and politics in the school setting. In addition to the standard curriculum, which may include lessons in history or government under the social studies rubric, many school districts have adopted a program called Kids Voting USA (“Kids Voting”). Started in 1998 in Arizona, Kids Voting combines an in-depth study of politics, government, and the electoral process and culminates in a chance to vote at the polls in a mock election occurring at the same time as a real local, state or national election. The curriculum is particularly comprehensive, and examines: (1) major and minor political parties; (2) the key issues of the day; (3) how the electoral process works; (4) a history of past discrimination in voting; and (4) activism both inside and outside the electoral process.⁵ The program begins in pre-school or kindergarten, and stretches through high school. As a result, young people obtain age-specific governmental and political knowledge which grows more complex and nuanced as they age. Currently, Kids Voting operates in only 30 states, due to financial difficulties, but still reaches 4.3 million students, 200,000 teachers and 80,000 volunteers in nearly 11,000 schools and 20,000 voter precincts.⁶

So how does the Kids Voting program impact minors’ contribution presumption? The program increases minors’ interest in politics and government by teaching them about the electoral process and the workings of government. Studies conducted by Stephen Chafee of Stanford University revealed that the Kids Voting program had increased students’ knowledge of candidates’ backgrounds and led to a more active reflection on the news. As a result, Kids Voting increased political discussions between children and their parents.⁷

With greater discussion between parents and their children, and more knowledge of the political process, it seems likely that some minors between the ages of seven and fourteen will seek to contribute to a political candidate or party. Consistent with the policies set forth in McConnell and Buckley, the FEC should make the process as simple as possible by setting a presumption of capacity for minors between the ages of seven and fourteen rather than a presumption of incapacity.

3. Minors over the age of fourteen should be considered irrebuttably capable of making their own campaign donations, absent evidence of violations applicable to adults.

Minors over the age of fourteen (“Older Minors”) are practically adults, and should be treated as such by the FEC’s proposed rule. We will focus on three areas in which Older Minors becoming more like adults: (1) employment and taxes; (2) the criminal justice system; (3) politics.

⁵ For more information on the Kids Voting curriculum, see the Kids Voting web site at <http://www.kidsvotingusa.org/education/curriculum.asp>

⁶ “Amazon.Com Selects Kids Voting USA to Receive Proceeds from Transaction Fees from Special Presidential Campaign Contribution Feature”, <http://www.kidsvotingusa.org/news/pressRelease/pr-20040128.asp>

⁷ Johnson, Thomas J. Editor. Engaging the Public: How Government and the Media can Reinstantiate American Democracy. Rowan & Littlefield Publishers, Inc. (Lanham, Maryland, 1998), 160.

a. Older Minors are Employed in Large Numbers and Thus Have Access to Their Own Funds to Contribute

Older Minors have entered the work force in large numbers. According to a comprehensive U.S. Department of Labor study, over 57% of teens surveyed reported having a job at age 14, and 64% at age 15.⁸ Nearly 20% of 14 year olds, and almost 30% of 15 year olds continued to work during the school year.⁹ While most of these jobs were “freelance” positions (*e.g.*, babysitting or yard work), they still put money into minors’ pockets and thus increased their available resources to give to a political candidate or party. Overall, an estimated 80% of all teens work at some point during their high school years.¹⁰ Another survey found that some 72% of teens 13-18 planned to work during the school year.¹¹

This increased employment is reflected by the Internal Revenue Service’s (“IRS”) treatment of money earned by Older Minors. A minor is required by law to file his or her own tax return, if income from employment exceeds the minimum threshold.¹² Furthermore, after age fourteen, minors’ interest income can no longer be filed with their parents’ return.¹³ These IRS provisions recognize that most Older Minors make their own money, and often may spend it how they please, including giving to a political party or candidate.

b. Older Minors are Increasingly Treated Like Adults in the Criminal Justice System

America has substantially changed its treatment of Older Minors who have been charged with a serious crime. More minors are now transferred from juvenile courts to adult courts. Caused in part by a 62% rise in juvenile violent crime arrests between 1988 and 1994, forty-four states and the District of Columbia enacted legislation expanding the right to request a juvenile be transferred to an adult court.¹⁴ These reforms have been accomplished by increasing the number

⁸ “A Detailed Look at Employment of Youths Aged 12 to 15”, from The Report on the Youth Labor Force, November 2000, at <http://www.bls.gov/opub/rylf/pdf/chapter3.pdf>.

⁹ Id.

¹⁰ Judy Davis, “Illinois Crops Doing Better than Those in Indiana, Kentucky,” Evansville Courier, 2003 WL 13069753, (August 10, 2003).

¹¹ “Short Cuts,” Rocky Mountain News, 2003 WL 6374830 (September 15, 2003). Poll from Harris Interactive Surveys.

¹² See, <http://www.irs.gov/publications/p929/ar02.html#d0e259>.

¹³ Id.

¹⁴ Christine Chamberlin, Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System, 42 B.C.L. Rev. 391, 399 (March, 2001).

of crimes for which a prosecutor can file a transfer motion, or lowering the minimum transfer age. States have lowered this age to twelve (in Missouri) and ten (in Indiana). As of 1997, twenty-two states and the District of Columbia had *no minimum age* to request a transfer.¹⁵ Furthermore, some states, including California, have enacted legislation allowing minors as young as 14 to be tried as adults without a judge approving a transfer request: the prosecutor could simply file the case directly in adult court for murder and other serious crimes.¹⁶ This change further reflects the fact that society is treating Older Minors more like adults.

c. Older Minors are Increasingly Becoming Involved in Politics

Older Minors are engaged in many politically-related activities. In part due to exposure to school and parental discussions about politics, as well as programs like Kids Voting, Older Minors are increasingly becoming involved in the political process. National political organizations like the Young Democrats allow minors as young as 14 to join.¹⁷ Third parties such as the Green Party or the Libertarian party often have no minimum age to join state or national parties.¹⁸ Furthermore, Older Minors are active in various causes outside of the party system. On issues ranging from education and the environment to war and peace, Older Minors are involved in organizing, boycotting, protesting and (sometimes) successfully lobbying for issues of concern to them.¹⁹ Additionally, minors have been involved in leading efforts to become directly involved in the political process by trying to lower the voting age at the local, state and national level.²⁰

Older Minors are behaving more and more like adults and are treated as such in the eyes of the law. They are working in increasing numbers, filing and paying taxes, and are increasingly being tried as adults for the crimes they commit. Furthermore, they are actively involved in

¹⁵ Id.

¹⁶ Jennifer Taylor, Note, California's Proposition 21: A Case of Juvenile Injustice, 75 S. Cal. L. Rev. 983, 990 (May 2002).

¹⁷ See, e.g., California Young Democrats web page-By laws, at <http://www.youngdems.org/bylaws/>.

¹⁸ See, e.g., Idaho Green Party web Page, at http://www.idahogreens.org/IGP/FAQ/FAQ_Membership.php and Wyoming Libertarian Party web page at <http://www.wyolp.org/join.html>.

¹⁹ For an illustration of some of the activities minors have recently become involved in, go to the Youth Activism web page at <http://www.youthactivism.com/content.php?ID=1>

²⁰ For information on the role minors are playing in this growing movement, please see the following articles: Mike Clary, "For Sweet 16 Gift, Boca Girl Wants Right to Vote" (16 year old seeks to amend Florida's constitution to lower voting age) and "Cambridge Floats Lower Voting Age", The Providence Journal (March 26, 2002) (student led movement succeeds in passing bill to lower voting age to 17 in Cambridge, Massachusetts local elections); See *also*, National Youth Rights Association voting age web page, <http://www.youthrights.org/votingage.shtml>.

political activism, seeking to bring about change both inside of and outside of the electoral process.

The increasing sophistication of minors of all age should be recognized by the FEC. Rather than an archaic irrebuttable presumption and consistent with the modern trend in tort law, minors under seven should be given the opportunity to prove that their campaign donation is voluntarily made, based on a legitimate interest in a candidate or a political party and not as a subterfuge to avoid campaign limits by parents, guardians or other adults. Minors aged seven to fourteen should be presumed capable of voluntarily selecting a candidate who supports their concerns, given their growing level of knowledge about politics and government, brought about by parents, school, and programs like Kids Voting USA. The donations of minors over the age of fourteen should be treated like those of adults, unless there is evidence of bribery, fraud or some other improper motive, including evasion of campaign limits by parents, guardians or other adults. Many of these Older Minors work, pay taxes, drive and are more and more often treated like adults in the criminal justice system.

5. Suggested Evidence to Show “Knowingly and Voluntarily” Component Under Proposed Section 110.19(a)

How should minors show that their campaign donation is “knowing[] and voluntary[]” as required under Section 110.19(a)? The amount and type of proof needed, in our opinion, should depend upon the age of the minor.

a. Minors Under Seven

As we recommend that minors under seven should be presumed incapable of “knowingly and voluntarily” contributing to a campaign, a minor should be required to provide substantial evidence in order to show compliance with Section 110.19(a). An oral interview with an FEC official may suffice to show that the minor actually intended to make their contribution. If the minor is old enough to have mastered writing, a handwritten note may also be adequate. Additionally, the minor should be required to identify his or her parents or guardians so that the FEC can check to see if those adults have already met campaign limitations. Obviously, the younger the age of the minor, the more serious scrutiny his or her donation should be given. In the event the minor is too young to explain the decision, either orally or in writing, the minor will likely fail to overcome the presumption of incapacity, absent extraordinary circumstances.

b. Minors Seven to Fourteen

A minor aged seven to fourteen should be presumed capable of “knowingly and voluntarily” choosing to make a campaign donation and should be required to submit supporting evidence only in the event that suspicions are raised by the donation itself. Examples of facts which might raise such suspicions include the following: (1) an abnormally large donation from a minor (*e.g.*, more than \$200.00); and/or (2) the fact that the minor’s parent or guardian has reached or is nearing the maximum contribution amount allowed for the particular candidate or party to which the minor seeks to contribute. In the event these suspicions are raised, a minor could rebut the

challenge, and establish that the contribution was knowing and voluntary, in much the same way as in II. A. 5.(A), above: through a written note or an oral interview with an FEC official.

c. Older Minors

As explained in II.A.4 above, campaign donations from minors over the age of fourteen should be treated like adults. Therefore, campaign donations should be found to be “knowing[] and voluntary[]” unless there is evidence of some violation of federal election law applicable to adults. For example, as the Supreme Court mentioned in McConnell, any contributor could violate the FECA’s § 320, which prohibits “mak[ing] a contribution in the name of another person” or “knowingly accept[ing] a contribution made by one person in the name of another,” 2 U.S.C. § 441f. The application of such provisions will provide protection against illegal donations, while protecting Older Minors’ right to be accorded quasi-adult treatment.

B. The Problem of Exclusive Ownership of Funds and Gifts to Minors for the Purpose of Making Campaign Donations

The FEC’s Proposed Rule requires that a minor may make a campaign donation if:

- (b) The funds, goods, or services contributed are owned or controlled exclusively by that individual, such as income earned by that individual, the proceeds of a trust for which that individual is the beneficiary, or a savings account opened and maintained exclusively in that individual's name.
- (c) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

1. Exclusivity Issue

The FEC recognizes that most minors lack a bank account exclusively in their name. Many minors do, however, have their own checking account. And, as explained above, many Older Minors have some type of job. The “exclusivity” requirement that contributing accounts must be exclusively in the name of the minor is not narrowly tailored to address issues of minor contributions without adult influence. The following requirements may prevent a parent or guardian from using a minor’s account to contribute to a political candidate or party.

a. No Contribution for Minors’ Accounts where the Minor Has No Control Over the Account

There is a form of children’s trusts where the minor has no control whatsoever over the account until the minor reaches the age of 18 (or in some states, 21). The Uniform Gifts to Minors Act (“UGMA”) and the subsequent Uniform Transfers to Minors Act (“UTMA”), which in most states has subsumed the UGMA, allow a parent or guardian to set up a gift trust for a minor, and exercise, in the words of the UTMA “all the rights, powers and authority over the custodial

property that unmarried adult owners have over their own property.”²¹ Under both the UGMA and the UTMA, the minor has no control over the trust, and the custodian is simply required to invest the trust’s funds for the benefit of the minor. Only at age 14, may a minor seek a court order requiring the custodian to pay out funds needed for his or her benefit.²² The minor will not obtain full access to the account until he or she reaches the age of 21, unless the state has a lower age of majority.²³ Thus, donations from these accounts should not be permissible.

b. Contributions Should be Permissible from Accounts Co-Signed by the Parents or Guardians if the Minor has Complete Access to the Account

1. Minors’ Checking Accounts

Several banks now offer checking accounts to minors as young as sixteen, even without a parent co-signing, provided the minor has two forms of ID, such as a driver’s license and a school ID.²⁴ Even many of the banks which will not allow a minor to open an account alone will approve a minors’ checking account if a parent or guardian co-signs for the account.²⁵ In such an account, checks are issued only in the name of the minor, and only the minor may sign a check. We believe this type of checking account offers the protection to ensure that the minor is knowingly and voluntarily donating their own funds, from an account that primarily belongs to them.

2. Minors’ Savings Accounts

For minors under the age sixteen, a checking account is not an option. These minors can, however, obtain savings accounts, again co-signed by parents, and often even receive their own ATM card. Furthermore, many states provide minors with full access to accounts, even if they are opened with a parent co-signing. For example, the state of Alabama provides:

A minor may make, in her or his own name, a deposit in any bank, and such deposit may be general or special, and shall be paid only to such minor, or upon his or her order, and

²¹ Uniform Transfers to Minors Act, Section 13(a).

²² *Id.*, Section 14(b).

²³ *Id.*, Section 20(1)-(2).

²⁴ Janet Bodnar “A Checking Account for Your Child: Some Banks are more Willing than Others to Set One Up”, *Kiplinger’s Personal Finance Magazine* (August 1998), at http://articles.findarticles.com/p/articles/mi_m1318/is_n8_v52/ai_20962272

²⁵ *Id.*

not to the parents or guardians of such minor, and such payment shall be valid as against the minor child, his or her parents or guardian.²⁶

(Emphasis added)

The fact that states recognize minors' right to full access to their accounts shows that the minor's account is viewed as their own account, rather simply their parent's account with the minor's name added.

Proving that the funds came exclusively from the minor and not the parent is more difficult for savings accounts. Some indications of the minors' control which the FEC would want to consider in evaluating whether the funds actually came from the minor include: (1) whether the minor has his or her own ATM card; (2) whether the parent or guardian also has an ATM card for the account; and (3) whether the minor can demonstrate that funds deposited into the account largely came from job earnings, allowance or other funds given to the minor to spend or save as desired.

2. Gift Issue

Assuming the minor meets the qualifications listed above, he or she should be able to make a campaign donation. While gifts from relatives, parents or guardians are somewhat problematic, minors' donations should be acceptable unless evidence suggests that the donation is based on a gift for by another for the sole purpose of evading campaign spending limits. Therefore, if a minor's donation is funded by a gift, the minor should be required to identify the gift giver. If the gift giver is nearing the limit of his or her allowable contributions to the particular candidate or party to which the minor intends to give, and that gift was recently received (within the prior six months), this should raise suspicions enough to require the minor to demonstrate that the gift giver did not intend that the funds be used for the contribution, or is otherwise controlled by the gift giver.

III. Conclusion

Rule Section 110.19 needs to recognize, in order to pass muster under McConnell and Buckley, that minors are becoming increasingly intelligent, sophisticated and politically astute at younger ages. Minors under seven should be able to provide evidence to rebut any presumption of incapacity against them. Minors between the ages of seven and fourteen are increasingly

²⁶ Code of Alabama § 5-5-37. See, *also*, Texas Finance Code, § 65.101:

An association or a federal savings and loan association doing business in this state may accept a savings account from a minor as the sole and absolute owner of the account. (b) On the minor's order the association may: (1) pay withdrawals; (2) accept pledges to the association; and (3) act in any other manner with respect to the account.

knowledgeable and interested in politics and government, and their donations should be presumed to have been knowingly and voluntarily contributed, unless specific evidence raises questions about the donation's reliability. Then, minors should be able to rebut any challenge by showing that they were interested in a candidate or party such that the donation was knowing and voluntary. Contributions from minors over the age of fourteen should be treated like contributions from adults. Knowingness and voluntariness should be irrebutably presumed, and the contribution should only be questioned in the event the minor may have violated a federal law provision applicable to adults.

Regarding the FEC's proposed exclusivity of funds requirement, contributions should not be allowed where trusts are in the names of minors, but minors have no access or control whatsoever (e.g., UGMA or UTMA accounts.) Minors should be able to donate from checking accounts where their names are the only names appearing on checks issued. Younger minors should be able to donate from savings accounts where they have access to the account, especially when they have their own ATM card. Minors should be allowed to donate funds from jobs worked, and a pay stub might serve as evidence that a minor has the necessary control needed to ensure that funds contributed are actually coming from the minor, and not the minor's parent or guardian.

By broadening the rules for minors' giving, while retaining common sense limits, the FEC will be able to ensure that the integrity of campaign finance laws is protected, while allowing the voices of minors to be heard in the political process, as the Supreme Court has cautioned in McConnell.