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Mr. Brad C. Deutsch, Assistant General Counsel
Federal Election Commission
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BY ELECTRONIC MAIL

PRESIDENT
NAN ARON
CHAIR
JAMES D. WEILL

**Statement in Support of Rulemaking Petition: Exception for Certain
“Grassroots Lobbying” Communications From the Definition of
“Electioneering Communications” (Notice 2006-4)**

Dear Mr. Deutsch,

Alliance for Justice¹ writes to urge the Commission to act swiftly to craft a rule exempting grassroots lobbying from the definition of electioneering communications under the Federal Election Campaign Act (“the Act”).² This position will come as no surprise to the Commission. Alliance for Justice was one of the original petitioners in this matter; we filed an amicus brief in support of Wisconsin Right to Life in the Supreme Court case that prompted this petition;³ and we sought a grassroots lobbying exemption in our comments and testimony on the original electioneering communications rulemaking following the passage of the Bipartisan Campaign Reform Act (“BCRA”).⁴ Alliance for Justice now encourages the Commission to move quickly to promulgate this grassroots lobbying exemption, noting that:

- There are corporations and unions that are effectively forbidden from engaging in legitimate legislative lobbying because of the broad restrictions on electioneering communications;

¹ Alliance for Justice is a national association of environmental, civil rights, mental health, women’s, children’s, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. While most of the Alliance’s members are charitable organizations, a significant number also work with or are affiliated with social welfare and advocacy organizations that engage in political activity.

² 2 U.S.C. § 431 *et seq.*

³ Brief of Alliance for Justice, as Amicus Curiae in Support of Appellant, Wisconsin Right to Life, Inc. v Federal Election Commission, 126 S. Ct. 1016 (2006) (brief available online at www.harmoncurran.com/AFJ-WIRTLAmicus.pdf).

⁴ Comments of Alliance for Justice (Aug. 21, 2002). Comments from various groups and individuals cited here are comments that were filed in response to Federal Election Commission Notice of Proposed Rulemaking 2002-13: Electioneering Communications.

- The Supreme Court has authorized – even urged – the Commission to use its statutory authority to act in this matter;
- The parties on all sides of the campaign finance reform debate support such an exemption;
- The litigation and enforcement actions likely to arise absent a regulatory exemption are a potential quagmire for the Commission; and
- Every passing week as we approach the 2006 elections puts more restrictions on the public’s right to advocate in the waning days of this congressional term – the period when Congress is most likely to act on legislation of vital national importance.

Need for the Rulemaking

The current question before the Commission is whether there are organizations that need immediate protection for their issue advocacy communications. The Commission is seeking these comments only to determine whether or not to proceed with a rulemaking, not to evaluate the merits of the rule proposed in our Petition for Rulemaking (or any other proposal, for that matter). The decision to proceed with a rulemaking should be based on the fact that there are organizations making non-electoral communications that will have to silence their voices as the primary and general elections approach. Deciding which of these organizations and what communications will fall within any regulatory exemption is a question for the rulemaking. Important at this time is whether there are enough organizations in need of a rulemaking to justify this use of the Commission’s resources. We suggest that there are.

Alliance for Justice is one such organization. In the spring of 2005, Alliance for Justice aired a television advertisement featuring Senator Harry Reid of Nevada decrying stated plans by some Senators to change Senate rules and prevent filibusters during consideration of judicial nominees (ironically, the same issue that moved Wisconsin Right to Life to air ads opposing this position). The ad was vital to our strategy. The issue of filibusters in judicial nomination fights was at a crisis point, and it was important for our organization to bring this complicated issue before the public in time for them to weigh in with their Senators. The impact and immediacy of broadcast advertising was the most effective way to reach the general public. Furthermore, Senator Reid was the best spokesperson to address the public about the issue. Not only was he the leader of the Democratic senators who were opposing the efforts of the majority to silence debate on nominees, but Senator Reid also represented a moderate voice from a Western state – a voice likely to resonate with people who had not yet taken a position on this issue.

Some will point out that this ad would not have been constrained by the electioneering communications law. It is true that this ad aired outside the restricted window defined by BCRA and that it did not air in Senator Reid’s home state of Nevada. Yet these facts are simply driven by – and highlight – the vagaries of the policy process. For even as the ad began to air, the expected filibuster crisis was avoided by a bloc of Republican and Democratic senators – the so-called “Gang of Fourteen.” At the last minute, we pulled additional airings of the ads to preserve resources for future legislative battles. Had the issue come to a head, though, we were prepared

to air this and other ads around the country, constrained only by the resources in our coffers. Should the issue again arise, this time closer to a federal election, Alliance for Justice would likely wish to pursue a similar broadcast strategy.

It would not be legitimate to argue that, because we failed to flout the restrictions on electioneering communications, these restrictions impose no burden. Of course almost all corporations and unions will comply with the law, even at the price of exercising their constitutional rights. The Voting Rights Act was not necessary because African-Americans were voting in violation of poll taxes, literacy tests, and other Jim Crow laws. The Voting Rights Act was necessary because these laws were preventing Americans from exercising their right to vote.

A similar argument is true in the case of this rulemaking: A grassroots lobbying exemption is necessary because certain organizations are prevented from exercising their rights to speak and petition the government through the use of broadcast media. It is exactly that exercise of First Amendment rights that justifies this rulemaking. In our amicus brief in the *Wisconsin Right to Life* case, we presented a selection of organizations that have used broadcast ads featuring federal officeholders to speak out on important issues of public policy. For example:

- In 2002, Senator John McCain of Arizona, a chief sponsor of BCRA, appeared in television advertisements produced by Arizona's Clean Elections Institute, a 501(c)(3) organization supporting Arizona's public financing system for state elections.⁵ Arizona's public financing system had been adopted through a state referendum in 1998, and the McCain ads were designed to encourage Arizonans to support the program with voluntary contributions. Senator McCain was not up for reelection in 2002; however, he was facing the voters in 2004 when opponents of the Arizona public financing system tried to put a measure repealing the system on the ballot. A court decision prevented the measure from appearing on the ballot, making unnecessary possible advertisements by Senator McCain in further support of the public financing system during the electioneering communication blackout period.⁶
- In 2005, both Focus on the Family Action and FRC Action (affiliates of the 501(c)(3) organizations Focus on the Family and the Family Research Council) ran radio advertisements in states represented by more than twenty moderate Republican and Democratic senators in an effort to stop the use of the filibuster as part of the Senate's consideration of a handful of nominees to the federal bench.⁷ The Senators named in the ads were perceived by organizations on both sides of the issue as key votes in determining whether an effort to end such filibusters would succeed.

⁵ See www.azclean.org/documents/PR-McCainPSA.pdf (press release describing the ad) (last visited April 17, 2006). It has not been possible for Alliance for Justice to determine when or even whether every one of the broadcast messages cited here actually aired, however we have no reason to doubt that all of them were broadcast and that they aired outside of BCRA-restricted blackout periods.

⁶ See *Clean Elections Institute, Inc. v. Brewer*, 99 P.3d 570 (Ariz. 2004) (keeping the measure off the ballot).

⁷ See www.focusaction.org/Activities/A000000027.cfm (describing and providing links to the radio ads as well as a coordinated print ad campaign) (last visited April 17, 2006).

- In 2005, as the House of Representatives considered legislation to permit drilling for oil in the Arctic Wildlife Refuge, the nonprofit organizations Defenders of Wildlife, the Alaska Coalition of New Jersey, and the New Jersey Chapter of the Sierra Club ran television ads that were capable of being received by more than 50,000 people in the districts of each of the five specific members of Congress from New Jersey.⁸ The members of Congress featured were perceived as likely swing votes on the issue.
- Congressman Barney Frank of Massachusetts recorded a broadcast advertisement for the 501(c)(3) Family Pride Coalition in the Spring of 2005 that criticized U.S. Department of Education Secretary Margaret Spellings for threatening to cut funding for a PBS children's television show that featured the child of a lesbian couple.⁹

These are but a small sample of the types of broadcast advertisements used in public education and grassroots lobbying campaigns. While it was not necessary for these organizations to air these ads during the electioneering communications period, there is every reason to believe that a lobbying effort requiring such ads could occur within the prohibition window. Indeed, even as the prices for both ad production and ad placement began to drop to the point that television, radio, and cable TV advertising began to fall within the reach of even moderately resourced organizations, BCRA's electioneering communications restrictions came into force. The ads may have been useful during the periods restricted by BCRA, they may have been – for the first time – affordable, but they were effectively prohibited, and thus there are few examples of true issue ads that would have been subject to the electioneering communications restrictions.

In short, there are many advocates currently constrained by the overbroad electioneering communications restrictions and in need of a rulemaking from the Commission before the next prohibition window – and such advocates are growing in numbers.

Authority to Promulgate the Exemption

BCRA wisely included a provision allowing the Commission to correct at the regulatory level any potential for the electioneering communications provision to sweep in speech that the law was never intended to regulate. Alliance for Justice – and the Supreme Court – urge the Commission to use this authority to create an exemption for lobbying communications.

We understand that, until recently, the Commission may have seen the need for the exemption sought here but felt that BCRA prevented the Commission from promulgating this important rule to protect the advocacy rights of independent organizations. The statutory authority for Commission to provide exemptions does prohibit the Commission from crafting a regulation allowing a communication that “promotes or supports” or “attacks or opposes” (PASO) a “candidate.”¹⁰ In the original rulemaking on electioneering communications, the

⁸ See www.savearcticrefuge.org/ads.html (links to the ads and coordinated print ads) (last visited April 17, 2006).

⁹ See www.familypride.org/site/apps/nl/content2.asp?c=bhKPI7PFImE&b=551485&ct=704195 (press release describing the ad) (last visited April 17, 2006).

¹⁰ 2 U.S.C. § 434(f)(3)(B)(iv).

Commission considered several possible exemptions to carve out exemptions for lobbying, and a number of commenters – including Alliance for Justice – supported such an exemption.¹¹ Yet the Commission chose not to create a lobbying exemption, finding that all the proposals before it permitted communications that might PASO a candidate.¹²

With the Supreme Court’s decision in *Wisconsin Right to Life*, however, the Commission must now clearly see that it has the authority – in fact, the mandate – to act to create a lobbying exemption. In a decision announced only six days after oral arguments in the case, the Supreme Court held that there might be true issue ads that could not constitutionally fall under the electioneering communications restrictions.¹³ Pointedly, the Supreme Court noted the Commission’s power to resolve the issue:

Although the FEC has statutory authority to exempt by regulation certain communications from BCRA’s prohibition on electioneering communications, at this point, it has not done so for the types of advertisements at issue here.¹⁴

Thus, the Supreme Court’s decision not only made it clear there might be legitimate issue ads in need of constitutional protection, it is also made it clear that it is possible for the Commission to create this exemption.

We suggest that the Commission’s error in rejecting a lobbying exemption in 2002 was the mistaken idea that BCRA’s “no PASO” requirement applied to promoting, attacking, supporting, or opposing both officeholders and candidates. As we suggest in our Petition and look forward to expanding upon in a rulemaking on this issue, we believe that the Commission may legitimately define a class of broadcast lobbying communications as not “PASOing” a *candidate*, even when the communications might be said to PASO an *officeholder* or the officeholder’s position on a pending policy issue.

Support for the Exemption

Although there are honest disagreements about the nature and scope of a lobbying exemption, there is near unanimity among BCRA’s sponsors, supporters, opponents, and even former Commissioner Scott Thomas (during the BCRA rulemaking while he was serving on the Commission) that some type of lobbying exemption is appropriate. The disagreement over how the exemption is structured will be resolved in a rulemaking, but the consensus among these key stakeholders demands that the exemption rulemaking take place.

The assortment of individuals and groups that have supported a lobbying exemption of some kind is striking. We know of no other issue of campaign finance law on which all of these significant participants in the debate agreed:

¹¹ Comments of Alliance for Justice at 7-9.

¹² Final Rule, “Electioneering Communications,” 67 Fed. Reg. 65190, 65201-2 (Oct. 23, 2002).

¹³ 126 S.Ct. 1016 at 1018.

¹⁴ *Id.* (citation omitted).

- The sponsors of BCRA – Senators McCain, Feingold, Snowe, and Jeffords, and Congressmen Shays and Meehan – filed joint comments during the original BCRA rulemaking suggesting a proposed lobbying exemption.¹⁵
- The advocacy groups that led the charge to pass BCRA likewise filed comments in which they suggested an exemption for lobbying.¹⁶
- Other commenters in the original rulemaking, including Alliance for Justice, AFL-CIO, ACLU, the American Taxpayers Alliance, Independent Sector, OMB Watch, and more, all supported a lobbying exemption during the original electioneering communications rulemaking.¹⁷
- Commissioner Scott Thomas offered a proposal for a lobbying exemption during the original rulemaking.¹⁸

These proposals are all in addition to the four separate proposals that the Commission and its staff developed for the Notice of Proposed Rulemaking.

We do not mean to minimize the differences between these various exemption proposals – although they are fewer than might be imagined – but to have such a disparate group all speaking in common support of a lobbying exemption is a strong argument for undertaking this rulemaking at this time.

The Burden of Ongoing Litigation and Enforcement

Wisconsin Right to Life may have been the first as-applied challenge to BCRA's ban on broadcast lobbying ads to make its way through the courts, but it will not be the last. The Commission would be misguided if it seeks to preserve its resources by not undertaking a rulemaking at this time, since far more time and effort are likely to be consumed in dealing with advisory opinion requests, enforcement actions, and litigation related to lobbying communications broadcast during the electioneering communications window. The most efficient way – and the way most likely to yield useful results for all parties in the regulated community – is to craft a clear regulatory exemption to the electioneering communication restrictions for grassroots lobbying communications.

The Supreme Court's decision in *Wisconsin Right to Life* has already been followed by a similar lawsuit. This new case, brought by the Christian Civic League of Maine, seeks injunctive

¹⁵ Comments of Senators John McCain, Russell Feingold, Olympia Snowe, and James Jeffords, and Congressmen Christopher Shays and Marty Meehan at 10 (Aug. 23, 2002).

¹⁶ Comments of Common Cause and Democracy 21 at 12 (Aug. 22, 2002); Comments of the Campaign and Media Legal Center at 10 (Aug. 21, 2002); Comments of the Center for Responsive Politics at 5-6 (Aug. 21, 2002). (We note that all of these commenters offered a proposed lobbying exemption that was substantially identical to the lobbying exemption proposed by BCRA's key sponsors and the proposal offered by Commissioner Thomas.)

¹⁷ Comments of Alliance for Justice at 7-9; Comments of AFL-CIO at 12-15 (Aug. 29, 2002); Comments of ACLU at 4-5 (Aug. 29, 2002); Comments of American Taxpayers Alliance at 6-8 (Aug. 29, 2002); Comments of INDEPENDENT SECTOR at 4-5 (Aug. 21, 2002); Comments of OMB Watch at 3-5 (Aug. 21, 2002);

¹⁸ Agenda Doc. 02-68-A submitted for Commission Meeting of 9/26/02.

relief allowing it to broadcast a grassroots lobbying advertisement featuring Maine Senators Olympia Snowe and Susan Collins.¹⁹ The ad would support pending federal legislation to deny same-sex partners the right to marry – legislation that the Christian Civic League expects to come before the Senate in early June, which is also within 30 days of the primary in which Senator Snowe will face the voters.²⁰

Nor is the litigation likely to stop with these two cases. The Supreme Court in *Wisconsin Right to Life* approved as-applied challenges to BCRA's electioneering communication provisions.²¹ Furthermore, the statutory requirements of BCRA provide for expedited treatment of such cases.²² Absent a regulation making these cases unnecessary, more lawsuits can be expected to clog the courts (and to compete for the Commission's attention and resources) as the 2006 elections approach.²³

Those organizations without the time, resources and expertise required to seek vindication of their constitutional rights in the courts can be expected to seek individual exemptions for their planned lobbying activities under the Commission's advisory opinion process. FECA requires the Commission to act promptly on any such advisory opinion request.²⁴ Of course, a few corporations and unions – some unsophisticated, uninformed, or ill-advised, and some perhaps courting constitutional litigation – may simply assume their right to air lobbying communications and will face the Commission's enforcement process, putting a further drain on the Commission's resources.

Even if the wasted resources by both the Commission and the affected organizations could be ignored, defining the scope of a lobbying exemption through litigation, advisory opinions, and enforcement actions would produce guidance that is significantly less useful than a carefully considered regulation. Unlike a regulatory exemption, a court decision would be based only on the facts of a single case, and bad facts may make bad law. Nor would a court ruling have the benefit of input from the affected stakeholders (except insofar as some sought to participate through friend of the court briefs). Furthermore, a court ruling in favor of a lobbying exemption would be designed to provide relief to the plaintiff, not necessarily a general rule that other groups might follow and that the Commission could be expected to enforce. The advisory opinion and Commission enforcement process share similar problems.

¹⁹ Christian Civic League of Maine v. Federal Election Commission, D.D.C., Civil No. 06-614 (filed April 3, 2006).

²⁰ *Id.*

²¹ 126 S.Ct. 1016 at 1018.

²² Pub.L. 107-155, 116 Stat. 113, § 403 (providing that constitutional challenges to BCRA shall be heard before a three-judge panel on an expedited basis and then appealed directly to the U.S. Supreme Court. This process applies to all actions filed before December 31, 2006, and to any subsequent plaintiff who elects the expedited process.

²³ We note that the Commission has already rejected an opportunity to settle, or at least delay, the Wisconsin Right to Life case by not agreeing to promulgate an exemption such as we suggested in our Petition for Rulemaking. (See Kenneth P. Doyle, "Court Considers Schedule in WRTL Case As New Suit Filed by Maine Organization" BNA MONEY & POLITICS REPORT, April 11, 2006, reporting Commission decision of April 4 not to accept Wisconsin Right to Life's settlement offer.) It is possible that the Commission may yet be able to moot or settle wasteful litigation by conducting a rulemaking that ends with a regulatory exemption acceptable to those who are now or may in the future seek relief through the courts.

²⁴ 2 U.S.C. § 437f.

The absence of a rule will simply waste time and money for everyone involved and will tie up the courts and the Commission (not to mention the would-be advocates themselves), only to produce an inferior product. A prompt rulemaking offers a far better use of the Commission's resources and a far better ultimate result for the regulated community.

The Ticking Clock

It is important for the Commission to act now. For one thing, further delay encourages more litigation such as that discussed above. More fundamentally, though, the restrictions on electioneering communications are already in force in the eight states scheduled to hold congressional primary elections between today and May 17, and more states enter the restricted 30-day window every week. Just after Labor Day of this year – less than five months away – electioneering communications restrictions go into effect across the entire country, effectively banning broadcast lobbying by corporations and unions unwilling to squander funds raised for actual electioneering.²⁵

The time period regulated by the electioneering communications provisions are among the busiest time for congressional action. Eager to finish work and return home to campaign for reelection (hopefully with significant legislative achievements to tout), members of Congress take up many important pieces of legislation in the later days of an election-year session.

The 60-day period prior to an election, during which broadcast communications featuring candidates are considered electioneering communications, is frequently a period of intense legislative activity. Between September 4 and Election Day in 2004, over 100 roll call votes were taken in the United States House of Representatives.²⁶ The Senate took nearly 50 roll call votes.²⁷ The issues addressed during that time included important or high-profile issues of public policy, such as welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations. The disproportionate legislative activity that occurs during the black-out periods imposed by BCRA is also evident from the numbers of bills enacted into law by the United States House of Representatives and Senate during election and non-election years: 300 in 2004 versus 198 in 2003; 241 in 2002 versus 136 in 2001.²⁸

Thus, at the critical point when legislation of vital interest is facing passage, BCRA deprives corporations and unions of an essential tool: broadcast media communications urging

²⁵ Of course, BCRA permits unions and corporations to make electioneering communications using funds a connected political committee (2. U.S.C. § 441b(c)), but political committee funds may also be used to make contributions and expenditures under the Act. The ability to spend these funds for otherwise prohibited uses and the relative difficulty in raising these funds lead most organizations to preserve the funds for partisan uses rather than legislative lobbying.

²⁶ See http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited November 7, 2005).

²⁷ See http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm (last visited November 7, 2005).

²⁸ See 149 Cong. Rec. D456 (daily ed. May 6, 2003) (Résumé of Congressional Activity – First Session of the One Hundred Seventh Congress); 149 Cong. Rec. D457 (daily ed. May 6, 2003) (Résumé of Congressional Activity – Second Session of the One Hundred Seventh Congress); 151 Cong. Rec. D96 (daily ed. February 15, 2005) (Résumé of Congressional Activity – First Session of the One Hundred Eighth Congress); 151 Cong. Rec. D97 (daily ed. February 15, 2005) (Résumé of Congressional Activity – Second Session of the One Hundred Eighth Congress).

members of the public to contact specific policymakers and influence policy decisionmaking. Unless the Commission promptly conducts a rulemaking to craft a lobbying exemption, advocates will be crippled this fall when Congress is likely to be considering important legislation concerning the war in Iraq, immigration reforms, domestic spying, energy policy, taxes and more

Conclusion

Although the merits of competing exemption proposals may be debated, there is no question that the Commission should act, and act swiftly, to promulgate a regulatory exemption exempting grassroots lobbying from BCRA's definition of electioneering communications. To empower the many groups that use the power of broadcast media to educate and lobby, to fulfill the Commission's clear charge from Congress and the Supreme Court, to take advantage of remarkable consensus among all concerned with campaign finance laws, to preserve precious time and money while crafting a better rule, and to ensure that advocates are not handicapped during the most important time of the congressional session, we urge the Commission to immediately undertake and expedite this rulemaking.

Alliance for Justice continues to strongly support an exemption for lobbying to end the unconstitutional restriction on corporate and union use of the airwaves for lobbying in the days preceding federal elections. BCRA's electioneering communications provision sweeps so broadly that it restricts communications that fall far outside of the scope of federal elections, wrongly restricting the fundamental right of individuals to band together to speak out on matters of important public policy. We look forward to a rulemaking where we can bring before the Commission the strong arguments in favor of the exemption for grassroots lobbying proposed in our petition for this rulemaking.

Sincerely,



Nan Aron, President