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November 8, 2002

Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice 2002-19, Bipartisan Campaign Reform Act of 2002; Reporting Federal Register Vol. 67, No. 203 64555-64568 (October 21, 2002)

Dear Mr. Vergelli:

The following comments on the FEC's proposed regulations concerning reporting requirements under the Bipartisan Campaign Reform Act of 2002 ("BCRA") are submitted on behalf of the National Abortion and Reproductive Rights Action League ("NARAL"). NARAL is joined in these comments by the Alliance for Justice (see attached letter).

NARAL is a District of Columbia nonprofit corporation recognized as tax exempt under section 501(c)(4) of the Internal Revenue Code. It is a membership organization with 180,000 members who pay annual dues and enjoy the right to elect members of NARAL's Board of Directors. NARAL works within the political and legislative systems to advocate for comprehensive reproductive health policies and to secure reproductive choice for all Americans. NARAL's mission is to develop and sustain a constituency that uses the political process to guarantee every woman the right to make her own decisions regarding the full range of reproductive choices, including preventing an unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL defends the right to choose and works to make abortion less necessary. NARAL is a qualified nonprofit corporation ("QNC") described in 11 C.F.R. § 114.10, and has filed the requisite notice of this status with the FEC.

As a preliminary matter, we would like to take this opportunity to commend the FEC for its recently-completed rulemaking on electioneering communications, in which the Commission recognized the need to permit QNCs to spend their treasury funds for electioneering communications. This conclusion is consistent both with the legislative history of BCRA and with the Supreme Court's ruling in *Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("MCFL").

We are concerned, however, that the proposed regulations that are the subject of this rulemaking would create reporting obligations for QNCs inconsistent with the holding of *MCFL*. Specifically, QNCs would be forced to choose between reporting the names and addresses of all donors who give over $1000 to the organization, undertaking the administrative burden of establishing a special segregated account out of which to make expenditures for electioneering communications and limiting disclosure and reporting those who give over $1000 to that account, or refraining from that particular type of political speech. This choice unconstitutionally burdens these organizations' speech rights. The Commission has already acknowledged its obligation to interpret BCRA to be consistent with the constitutional precedent enunciated in *MCFL*, and should therefore remedy this discrepancy regarding reporting obligations.[1]

Disclosure of donors to QNCs imposes an impermissible burden on the exercise of First Amendment rights.

Mandatory disclosure of the identity of all donors of over $1000 to a QNC imposes a burden on the organization's right to speak out about matters of public concern. In addition to the administrative burden of tracking and reporting such donors, this compulsory disclosure is even more burdensome to the speech and associational rights of the organization's members. In fact, it conflicts with constitutional law established almost 50 years ago:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). This principle was reaffirmed specifically in the context of the campaign finance laws, where the Court noted, "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

Mandatory disclosure of donors' identities is constitutionally permissible only in narrow circumstances. There has been found to be a compelling governmental interest in disclosure of

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[1]NARAL took no position on BCRA as a legislative matter, and has publicly affirmed that it intends to comply fully with the law and any implementing regulations, but it believes it is appropriate to weigh in on this point that so critically affects the rights of the organization itself and its members and supporters.

the contributors to candidates and political committees, but that interest is far lower with regard to the supporters of an ideological organization that is by definition not primarily engaged in electoral advocacy. Citizens support such groups for a variety of reasons, which may have nothing to do with influencing elections. The bulk of NARAL's membership solicitations and the vast preponderance of the information about NARAL's work on its website and published through other venues is non-electoral; thus, NARAL assumes that members most commonly join because of general support for the right to choose and respect for NARAL's broad range of advocacy on behalf of that public policy issue. By definition, as a QNC and a 501(c)(4) organization, NARAL's primary purpose is not to influence elections. Thus, disclosure of NARAL's donors is not narrowly tailored to provide the public with information about the source of funds for political candidates.

The governmental interest in discovering the identities of supporters of a QNC must be balanced against the potential chilling effect on the QNC's speech, and the associational interests of its members in joining together anonymously to give voice to their collective interest in issues of mutual concerns. As the Supreme Court stated in *Buckley*:

> To fulfill the purposes of the Act [the words "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. . . . But when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a "political committee" – the relation of the information sought to the purposes of the Act may be too remote.

424 U.S. at 79. Thus, even as far back as *Buckley*, the Court recognized the unique role of organizations whose major purpose is not electoral. In order to uphold the constitutionality of FECA's disclosure requirements, the Court limited their application so they would not apply to such entities.

The availability of fact-dependent waivers in specific circumstances is not sufficient to cure the constitutional faults of mandatory disclosure of QNC donors.

It would not be sufficient for the FEC merely to provide that organizations may seek an advisory opinion permitting them to withhold disclosure of members who could suffer negative consequences if their support of the organization were made public, as was suggested in the Explanation and Justification of the final rules on Electioneering Communications, Fed. Reg. Vol. 67, No. 205 at 65210 (October 23, 2002). The standard for granting such a waiver has been set high – a showing of a reasonable likelihood that disclosure of contributors' names would subject them to threats, harassment, or reprisals from either government officials or private parties. This is an appropriate standard for waiver of disclosure requirements otherwise applicable to political parties, as the Commission has done in the case of advisory opinions provided to the Socialist Workers Party.

For an ideological nonprofit whose major purpose is not electoral, the chilling effect of donor disclosure may be significant, even absent a showing of possible threats, harassment, or reprisals. Many donors to NARAL, for example, may prefer to remain anonymous for reasons not rising to the level of fear of threats, reprisals, or harassment. Some support NARAL's work because of personal experience with abortion that they choose to keep private. Others may have legitimate concerns about being publicly identified as supporters of reproductive rights because of a desire to keep private their involvement in pro-choice advocacy out of concern for a hostile or unpleasant reactions from friends, families, or co-workers. Mandated disclosure of these people's financial support of NARAL (or other QNCs engaging in advocacy on controversial or unpopular issues) undermines their right to associate with like-minded individuals to advance shared beliefs, even if the likely consequences may fall short of threats or intimidation.[2]

The governmental interest furthered by the disclosure of donors to an organization that happens to make electioneering communications is not sufficient to support the associated invasion of the associational rights of the organizations' members. Only if a contribution is directed specifically towards electioneering communications might such disclosure be constitutionally permissible.

The political speech of QNCs enjoys special protection, and additional procedural hurdles unconstitutionally burden those organizations' speech rights.

The *MCFL* Court recognized the special status of issue-focused nonprofit organizations, which because of their unique characteristics merit heightened protection under the First Amendment. Requirements of form, record keeping, and disclosure that may be imposed upon business corporations or political committees were found to be an unconstitutional burden on the ability of ideological nonprofits to engage in political speech. Although recognizing that MCFL and similar organizations could make independent expenditures by first establishing a separate segregated fund for the purpose, the Court also recognized the significant administrative burden of using such a fund for political speech:

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[2]This is not to say that NARAL would not qualify under the standards for waiving disclosure articulated in existing Advisory Opinions and reiterated in the Explanation and Justification of the final rules on electioneering communications. Ideological organizations opposed to NARAL's views have been knows to threaten boycotts, and there has indeed been a steady campaign of violence and harassment of pro-choice organizations and reproductive health service providers. Indeed, as an organization that works to defend privacy rights, NARAL believes that its members are particularly susceptible to the chilling effect of mandatory public disclosure. Nonetheless, although NARAL should qualify for an exemption from disclosure under the existing standards, we do not believe that any QNC ought to have to make such a stringent showing in order to avoid disclosing identifying information of all donors in excess of $1000.

> The FEC minimizes the impact of the legislation upon MCFL's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending. However, the corporation is *not* free to use its general funds for campaign advocacy purposes. While that is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts. *Id.* at 252.

Similarly, for a QNC to have to establish and administer a special fund for electioneering communications represents a significant burden on the organization's exercise of its First Amendment rights.

The choice posed in the proposed regulations between added administrative burden and donor disclosure imposes burdens on political speech of QNCs that are not consistent with the holding of *MCFL* and thus not an appropriate interpretation of BCRA.

The proposed regulations present QNCs with a dilemma: sacrifice the associational and privacy rights of their supporters, undertake an added administrative burden in order to exercise certain speech rights while sacrificing the privacy of a smaller number of its supporters, or forego that political speech entirely. Forcing this choice burdens the exercise of these organizations' First Amendment rights in a way that is plainly inconsistent with constitutional limitations enunciated in *MCFL*.

It was not the intent of Congress that BCRA should impose requirements inconsistent with the mandate of *MCFL*. As Senator McCain, one of BCRA's principal sponsors, stated:

> [T]he bill does not explicitly or implicitly purport to depart from the Supreme Court's holding in FEC versus Massachusetts Citizens for Life, Inc., 479 U. S. 238 (1986) ("MCFL"), or any other Supreme Court precedent.

148 Cong. Rec. S. 2141 (March 20, 2002).

The Commission itself has recognized an obligation to interpret BCRA to be consistent with *MCFL*, and in particular that electioneering communications should be treated similarly to independent expenditures:

> [T]he Commission concludes that the legislative history indicates that the intent of BCRA was to treat electioneering communications in a similar manner as independent expenditures. Part of that treatment is the application of *MCFL* to electioneering communications made by these QNCs.

Federal Register Vol. 67 at 65204. Adopting the reporting regulations as proposed would violate this principle, by imposing additional reporting requirements to those approved by the Supreme Court in *MCFL*.

Limited disclosure, similar to that required for independent expenditures by QNCs, would be constitutionally permissible and consistent with MCFL.

This is not to say that no reporting and disclosure requirements may be imposed on QNCs making electioneering communications. However, to remain consistent with the ruling in *MCFL* the reporting should parallel that applicable to independent expenditures. That is, the QNC itself would be required to report expenditures for an electioneering communication, and it would be required to report appropriate information of donors who make contributions for the purpose of furthering the electioneering communication, just as it must now report "the identification of each person who made a contribution in excess of $200 . . . for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.2(a)(1)(vi).[3] The legislative history indicates that Congress intended to treat electioneering communications similarly to independent expenditures, so a consistent approach to reporting the two types of expenditures would be consistent with BCRA's intent.

Donations to a QNC for the general use of an organization are not closely tied to support of candidates or specific electoral work. The governmental interest in compelling disclosure of such donors is correspondingly weak, and the intrusion on the donors' speech and privacy rights significant. In contrast, there is a heightened governmental interest in disclosure of contributions intended to be used for influencing elections. *See Buckley*, 42 U.S. at 79; *MCFL*, 479 U.S. at 262. Thus, the Court in *MCFL* acknowledged that the source of contributions expressly for independent expenditures may be subject to compelled disclosure. Mandating broader donor disclosure for QNCs that make electioneering communications is violative of the First Amendment and inconsistent with *MCFL*.

Furthermore, instituting different reporting requirements for QNCs making electioneering communications from those applicable to QNCs making independent expenditures would lead to results that are at best anomalous. Because independent expenditures are excepted from the definition of electioneering communications, an organization could easily avoid the proposed reporting requirements by ensuring that its messages which would otherwise be considered electioneering communications under BCRA include words of express advocacy, converting them into independent expenditures. Such expenditures would, of course, be reportable, but by making them the QNC would not expose its donors to public disclosure. The proposal thus

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[3]NARAL does not generally accept contributions earmarked for independent expenditures, but it recognizes the obligation to report any such contributions in accordance with existing FEC regulations.

creates an incentive to engage in more express advocacy by mandating more intrusive donor disclosure precisely in the situation when the governmental interest is weakest, that is, in the absence of express advocacy. *See Buckley*, 424 U.S. at 80.

Respectfully submitted on behalf of NARAL, joined by the Alliance for Justice,

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