COMMENTS OF SOUTHEASTERN LEGAL FOUNDATION, INC., REGARDING THE FEDERAL ELECTION COMMISSION'S NOTICE OF PROPOSED RULEMAKING ON "ELECTIONEERING COMMUNICATIONS," 67 FED. REG. 51137

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Southeastern Legal Foundation, Inc. ("SLF"), respectfully submits the following comments concerning the Notice of Proposed Rulemaking issued by the Federal Election Commission ("Commission") regarding the so-called "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). *See* Electioneering Communications, 67 Fed. Reg. 51131 (proposed Aug. 7, 2002) (to be codified at 11 CFR Parts 100, 104, 105, and 114).

1. The Commission's proposed regulations concern certain provisions of the BCRA banning corporations and unions from making disbursements for "electioneering communications," and requiring individuals spending more than a specified amount on "electioneering communications" to make certain disclosures to the Commission. *See* new 2 U.S.C. § 434(f), amended 2 U.S.C. § 441b(b)(2). As is relevant for purposes of the proposed regulations, the statute defines "electioneering communications" as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office" and

is made within 30 days of a primary or 60 days of a general election. *See* new 2 U.S.C. § 434(f)(3).

2. SLF is a Georgia non-stock corporation exempt from federal income tax under I.R.C. § 501(c)(3). SLF was founded for the purpose of promoting limited government, individual economic freedom, and the free-enterprise system. SLF engages in issue advocacy and litigation in support of these principles. In particular, SLF engages in issue advocacy by taking advertisements in the news media, and has run radio advertisements referring to elected officials and candidates in order to promote legislative initiatives. In addition, SLF promotes its favored issues over its Internet site (www.southeasternlegal.org). SLF receives private financial support from individuals, associations, and corporations. SLF is a plaintiff in *McConnell v. FEC*, the consolidated lawsuit challenging the constitutionality of the BCRA that is currently pending before a three-judge panel of the United States District Court for the District of Columbia.

3. The Commission's proposed "electioneering communications" regulations are of obvious interest to SLF in its capacities as an organization engaging in issue advocacy. As a corporation exempt from federal income tax under I.R.C. §501(c)(3), SLF is already banned from "participat[ing] in, or interven[ing] in . . ., any political campaign on behalf of (or in opposition to) any candidate for public office." Under the BCRA, SLF will additionally be subject to the ban on "electioneering communications." Moreover, SLF is interested in the Commission's proposed regulations as a friend of the First Amendment and as a litigant challenging the constitutionality of the BCRA. SLF believes that the statutory provisions concerning "electioneering communications" are plainly unconstitutional, and that these

provisions therefore may not be saved from unconstitutionality by the FEC's proposed regulations.

4. SLF believes that three aspects of the proposed regulations are especially problematic. We address each of those aspects in turn.

EXEMPTIONS FROM "ELECTIONEERING COMMUNICATIONS"

5. *First*, the Commission has proposed four alternative "exemptions" from the statutory definition of "electioneering communications," to be codified at 11 C.F.R. 100.29(c)(6). In a tacit concession that the broad statutory definition of "electioneering communications" may raise constitutional concerns, the Commission stated that the four alternative exemptions are designed to protect "communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue." 67 Fed. Reg. 51136. Alternative 3-A excludes any communication that is "devoted exclusively to urging support for or opposition to" particular pending legislation, where the communication only requests recipients to contact an official without "promoting, supporting, attacking, or opposing" a candidate or indicating the candidate's position on the legislation in question. 67 Fed. Reg. 51145. Alternative 3-B excludes any communication that "[c]oncerns only" pending legislation, and in which the only reference to a federal candidate is a "brief suggestion" that the candidate be contacted and there is "no reference" to a candidate's "record, position, statement, character, qualifications, or fitness for an office" or to an election, candidacy, or voting. *Id.* Alternative 3-C excludes any communication that refers either to a specific piece of legislation or to a "general public policy issue" and contains contact information

for the person that the ad urges the audience to contact. *Id.* And Alternative 3-D excludes any communication that "urges support of or opposition to" any legislation or policy proposal and only refers to contacting a clearly identified incumbent candidate to urge the legislator to support or oppose the matter, without "referring to any of the legislator's past or present positions." *Id.*

6. As a threshold matter, none of these alternatives cures the obvious unconstitutionality of the "electioneering communications" provisions of the BCRA. The Supreme Court has made clear that Congress cannot regulate expenditures other than expenditures for communications that constitute "express advocacy," which the Court has defined as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Because all of the Commission's proffered alternatives sweep in expenditures for speech that does not constitute "express advocacy," they, like the underlying statute, are unconstitutionally overbroad, and must be invalidated even if they would otherwise be entitled to deference. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

7. Moreover, to the extent that these alternatives create substantial exceptions to the definition of "electioneering communications" contained in the BCRA, they are unlikely to receive deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, where the statute is clear with respect to a specific issue, the interpreting court must follow that statutory text; where the statute is silent, the court must decide whether the agency's construction of the statute is a reasonable one. *See id.* at 842-43. In the BCRA, Congress delegated to the Commission the power to make further exemptions to the definition of

"electioneering communications" for the purpose of "ensur[ing] the appropriate implementation" of the statutory provisions, but conditioned the FEC's authority by providing that a communication may not be exempted by regulation if it "refers to a clearly identified candidate for Federal office . . . and . . . promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." New 2 U.S.C. § 431(20)(A)(iii); new 2 U.S.C. § 434(f)(3)(B)(iv). The various alternatives proposed by the FEC arguably are contrary to these provisions because they exempt from the definition of "electioneering communications" certain communications that "promote or support" or "attack or oppose" candidates for office. Alternatively, even if not expressly precluded by these statutory limits on the FEC's rulemaking authority, the proposed alternatives are likely to be deemed unreasonable by the courts as contrary to "ensur[ing] the appropriate implementation" of Congress' purposes.[1]

8. What is more, even if one or more alternative exemptions were deemed to constitute reasonable interpretations of the underlying BCRA provisions, that would not cure the constitutional infirmity of BCRA's "electioneering communications" provisions. Even if the exemptions solved all of the BCRA's constitutional problems (and, for the reasons stated above in paragraph 6, they do not), they could be modified or repealed by the Commission at any time since there is no plausible argument (and the proposed regulations make none) that the various alternatives are actually *required* by the statutory text. Entities wishing to engage in constitutionally protected activity permissible under the proposed exemptions thus would be subject to future Commission rules or interpretations that cut back or abolish the exemptions and

[1] The same set of considerations would apply if the Commission were to make specific proposals exempting communications regarding ballot initiatives and referendums. *See* 67 Fed. Reg. 51136.

thereby cause the protected activity to fall once again within the scope of BCRA's prohibitions. Especially in the context of the First Amendment, where the chilling of constitutionally protected speech is of paramount concern, this state of affairs is impermissible. The right to engage in activities protected by the First Amendment cannot be left to the whim of an administrative agency by a statute that is readily susceptible to unconstitutional construction.

9. Finally, the alternative exemptions, by their own terms, exacerbate the problems with vagueness already inherent in the statutory provisions, thereby giving the Commission even further discretion in deciding how and when to enforce those provisions. Alternative 3-A, for example, will require the Commission to determine when an advertisement is devoted "exclusively" to "urging support for opposition to" particular pending legislation, and also whether the ad "promot[es], support[s], attack[s], or oppose[s]" an elected official. 67 Fed. Reg. 51145. Alternative 3-B will require the Commission to determine whether an ad contains a "brief suggestion" that a candidate be contacted, and also whether there is any "reference" to a candidate's "record, position, statement, character, qualifications, or fitness for an office" or to an election, candidacy, or voting. *Id.* Alternative 3-C, while less rife with vagueness, nevertheless will require the Commission to determine whether a communication refers to a "general public policy issue." *Id.* And Alternative 3-D similarly will require the Commission to determine whether an ad "urges support of or opposition to" any legislation or policy proposal, and also whether the ad "refer[s] to any of the [incumbent] legislator's past or present positions." *Id.* The discretion afforded the Commission by these ambiguous provisions is especially problematic in the First Amendment context because it places the Commission in the position of a speech censor, with would-be speakers effectively forced by the vague regulatory text to seek

an advisory opinion from the Commission before engaging in constitutionally protected core political speech.

THE WELLSTONE AMENDMENT AND *MCFL* CORPORATIONS

10. *Second*, the Commission has proposed regulations that would exempt so-called *MCFL* corporations from the ban on "electioneering communications" by corporations and labor unions. *See* proposed 11 C.F.R. 114.2(b)(2)(iii). As the Commission itself recognizes, the BCRA contains flatly contradictory provisions regarding whether corporations organized under I.R.C. §§ 501(c)(4) and 527 may engage in expenditures for "electioneering communications." As discussed above in paragraph 5, the BCRA bans all corporations and labor unions from making expenditures for "electioneering communications" during the relevant time periods. *See* amended 2 U.S.C. § 441b(b)(2). The BCRA appears to except §§ 501(c)(4) and 527 corporations from this ban, provided that they pay for any "electioneering communications" exclusively out of funds provided directly by individuals. *See* new 2 U.S.C. § 441b(c)(2). That provision, however, is nullified by the so-called Wellstone Amendment, which withdraws the exception for §§ 501(c)(4) and 527 corporations in the case of expenditures for what are called "targeted communications" — which, by definition, includes all "electioneering communications." *See* new 2 U.S.C. § 434(f)(3)(A)(III); new 2 U.S.C. § 441b(c)(6)(A)-(B).

11. As discussed above in paragraph 6, the "electioneering communications" provisions of the BCRA are facially unconstitutional. As applied to certain §§ 501(c)(3), (c)(4), (c)(5), (c)(6), and 527 corporations, however, the "electioneering communications" provisions are unconstitutional for yet another reason. The Supreme Court has held that certain corporations may engage not only in issue advocacy, but even in express advocacy, provided that

they meet three conditions: they were formed for the express purpose of promoting political ideas, and do not engage in business activities; they have no shareholders or other persons affiliated so as to have a claim on their assets or earnings; and they were not established by a business corporation or a labor union and do not accept contributions from such entities. *See FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 263 (1986). These corporations are colloquially known as *MCFL* corporations.

12. The Commission's effort to create a regulatory exception for § 501(c)(4) *MCFL* corporations[2] flies in the face of the language of new 2 U.S.C. § 441b(c)(6), which sweeps *all* §§ 501(c)(4) and 527 corporations within the ambit of the prohibition on expenditures for "electioneering communications." The sponsor of the relevant provision of the BCRA, Senator Paul Wellstone, repeatedly made clear that the purpose of the provision was to close a "loophole" that would allow all "interest groups," regardless of their status, to run "sham issue ads." *See, e.g.*, 147 Cong. Rec. S2846 (Mar. 26, 2001) (statement of Sen. Wellstone). Notably, even *supporters* of the BCRA recognized that the Wellstone Amendment would present constitutional problems in the wake of the Supreme Court's decision in *MCFL*. *See, e.g.*, 147 Cong. Rec. S2883 (Mar. 26, 2001) (statement of Sen. Edwards). Congress nevertheless approved the Wellstone Amendment and subsequently enacted it into law with the rest of the BCRA. Under *Chevron*, it seems undeniable from the statutory text that Congress intended to ban even *MCFL* corporations from making expenditures for "electioneering communications."

13. The Commission's proposed regulation would gut the Wellstone Amendment, and therefore would be unlikely to receive *Chevron* deference. Moreover, even if it were otherwise,

[2] Notably, the Commission makes no effort to account for § 527 *MCFL* corporations, much less § 501(c)(3), (c)(5), or (c)(6) *MCFL* corporations, all of which are evidently covered by the BCRA's ban on "electioneering communications."

the proposed regulation cannot cure the constitutional infirmity of the Wellstone Amendment, since the regulation could be modified at any time. *See supra* paragraph 8. In short, although the Commission rightly recognizes that the Wellstone Amendment "may go further than allowed by *MCFL*," 67 Fed. Reg. 51137, the Commission cannot save the statute from facial invalidity simply by promulgating directly contradictory regulations.

QUALIFIED § 501(C)(4) CORPORATIONS

14. *Third*, in creating an exception pursuant to *MCFL* for certain § 501(c)(4) corporations from the "electioneering communications" provisions of the BCRA, the Commission has reaffirmed its prior, unconstitutionally narrow regulatory definition of what constitutes an exempt corporation for purposes of *MCFL*. *See* proposed 11 C.F.R. 114.2(b)(2) (incorporating 11 C.F.R. 114.10). In relevant part, the incorporated regulation defines a qualified § 501(c)(4) corporation as one that "[d]oes not directly or indirectly accept donations of anything of value from business corporations, or labor organizations," 11 C.F.R. 114.10(c)(4)(ii), and that does not "engage in business activities," 11 C.F.R. 114.10(c)(2), where such activities are defined as, *inter alia*, "[a]ny provision of goods or services that results in income to the corporation," 11 C.F.R. 114.10(b)(3)(i)(A).

15. By defining a qualified § 501(c)(4) corporation so narrowly, the Commission's regulations violate the First Amendment. Numerous lower courts have already held that a § 501(c)(4) corporation may obtain First Amendment protection under *MCFL* even if it receives *de minimis* contributions from corporations or labor organizations. *See, e.g., FEC v. National Rifle Ass'n*, 254 F.3d 173, 192-93 (D.C. Cir. 2001); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir.

1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994). Moreover, lower courts have likewise rejected the Commission's arguments that engaging in certain incidental "business activities," such as the sale of magazines and fraternal items, strips a § 501(c)(4) corporation of *MCFL* protection. *See, e.g., National Rifle Ass'n*, 254 F.3d at 190; *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-31 (8th Cir. 1997); *Day*, 34 F.3d at 1363. Absent a less stingy definition of what constitutes a qualified § 501(c)(4) corporation, the Commission cannot cure the evident unconstitutionality of the "electioneering communications" provisions as applied to such corporations.

Respectfully submitted,

/s/

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