Rosalind Gold <RGold@naleo.org> on 04/09/2004 07:42:10 PM

To: politicalcommitteestatus@fec.gov
cc:

Subject: Proposed Rulemaking on Political Committee Status

April 9, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E. St., NW
Washington, DC 20463

Dear Ms. Dinh:

Attached is a Word document containing comments on the Commission's proposed rulemaking on political committee status. These comments are submitted by Arturo Vargas, Executive Director, on behalf of the NALEO Educational Fund. Mr. Vargas' e-mail address is avargas@naleo.org, and his postal service address is NALEO Educational Fund, 1122 W. Washington Blvd., Third Floor, Los Angeles, CA 90015.

Please do not hesitate to contact me or Mr. Vargas if you have any questions about the attached document, and we very much appreciate the opportunity to submit these comments to the Commission.

Sincerely,

Rosalind Gold
Senior Director, Policy, Research and Advocacy
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· comments on FEC rules 04-04fin.doc

April 9, 2004

Via Electronic Mail

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments Concerning Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dinh:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, we are submitting these comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission on March 11, 2004 (hereinafter "NPRM").

The NALEO Educational Fund is the leading organization that empowers Latinos to participate fully in the American political process, from citizenship to public service. We are organized as nonprofit corporation in the District of Columbia and are exempt from federal income taxation under sections 501(c)(3) of the Internal Revenue Code ("IRC").

One of our major activities is our *Voces del Pueblo* voter engagement program, a national non-partisan effort to mobilize Latino voters who do not yet fully participate in the electoral process. One of our *Voces* strategies is to engage Latinos by using traditional "get-out-the-vote" techniques, such as direct mail and telephone contact. We provide voters with information about the importance of participation and the mechanics of voting. Our *Voces* activities do not involve any support or opposition to candidates, or any advocacy on policy issues. We are scrupulous in our efforts to avoid even the appearance of partisanship or electioneering in the program. Our organization engages in advocacy on policy issues, but we conduct our policy work through a program that is completely separate from our *Voces* activities.

We believe the FEC's promulgation of the NPRM is no ordinary rulemaking. If adopted in anything like the form in which they have been

proposed, the provisions in the NPRM would cause countless nonprofit organizations to drastically curtail their current programs or significantly alter the way in which they raise funds and conduct their activities. The proposed rules would seriously impair vigorous free speech and advocacy, as well as voter participation now and in the future. They would double, triple, or even quadruple the number of citizen organizations whose activities are subject to pervasive regulation by the Commission. Most importantly, the NPRM is an ill-conceived attempt to fit a square peg (nonprofit organizations) into a round hole (the rules applicable to political party committees) that not only vastly exceeds the FEC's authority but also would usurp Congress' proper role in this area. The Commission should **withdraw** the NPRM.

I

The NPRM Would Have A Devastating Impact on the Issue Advocacy and Voter Participation Activities of Nonprofit Organizations

The proposals in the NPRM will have a devastating effect on two critical and constitutionally protected areas of nonprofit activity: issue advocacy and voter participation.

1. The NPRM Will Seriously Impede the Ability of Nonprofit Organizations to Engage in Issue Advocacy

The proposals in the NPRM ignore well-established principles in our nation that protect robust and uninhibited debate on public issues by restricting the ability of nonprofit organizations to mention the names of federal officeholders while speaking out on public issues, a practice long approved by the Internal Revenue Service ("Service") and now ingrained in the fabric of political discourse in this country. Several specific proposals in the NPRM suffer from this as well as other related defects.

(A) The NPRM would expand the regulatory definition of "expenditure" to include any public communication that refers to a clearly identified candidate for federal office, and promotes or supports, or attacks or opposes any candidate for federal office, or promotes or opposes any political party. Because nonprofit and other corporations are prohibited by existing Federal Election Campaign Act ("FECA") rules from making "expenditures," the result could be to exclude nonprofits from significant public debate and advocacy. For example, under the proposed rules, nonprofits could be virtually prohibited from criticizing or praising a policy espoused by any incumbent member of Congress or President Bush until after the November election.

Insofar as this provision would expand the FECA's prohibition on corporate expenditures to include communications that do not expressly advocate the election or defeat of a clearly identified candidate, it is completely unauthorized by the statute. For twenty plus years, the

statute has been limited to communications that in express terms advocate the election or defeat of a clearly identified federal candidate. Moreover, contrary to the suggestion in the NPRM, nothing in *McConnell v. FEC,* 124 S. Ct. 619 (2003) requires or even permits the Commission to prohibit corporate communications merely because they support, promote, attack or oppose a candidate or political party.

Apart from the facial invalidity of this proposal, it raises other critical problems. For example, the NPRM makes no effort to define the "promote, support, attack or oppose" standard, a failure which will make it impossible for the regulated community and the agency itself to understand the kinds of communications that are prohibited and could have a significant chilling effect and other constitutional problems as applied in this context. In the Bipartisan Campaign Reform Act ("BCRA"), Congress permitted the Commission to promulgate exceptions to the definition of "electioneering communication," so long as such exceptions did not allow corporations to promote, support, attack or oppose a candidate. However, in its 2002 rules on electioneering communications, the Commission recognized the unlimited scope of this standard. It proceeded to reject every exception proposed because they would have protected *some* communications that fell within this broad standard. As the Commission stated, "[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner."

In issuing its 2003 regulations on coordinated communications as directed in BCRA, the Commission similarly considered a "promote, support, attack or oppose" content standard, but rejected it "[a]fter considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission's regulations ...." Since the Commission's stated goal in defining the content standards for coordinated communications was "to limit the new rules to communications whose subject matter is reasonably related to an election," it is difficult to explain how its earlier determination that the "promote, support, attack, or oppose" standard was unworkable should not apply with equal force here.

(B) Even if the Commission were to drop the "promote, support, attack or oppose" standard from an expanded definition of "expenditures," the definition of "political committee" proposed in the NPRM would also have a devastating impact on issue advocacy conducted by nonprofit organizations. By importing the definition of "federal election activity" from BCRA's provisions regulating political party committees, the NPRM incorporates the "promote, support, attack or oppose" standard for determining whether a nonprofit organization is a federal political committee. While not as far-reaching as the blanket prohibition on corporate expenditures that promote, support, attack or oppose a federal candidate, the definition of political committee could force many nonprofits either to raise and spend funds in accordance with the source and

amount limitations of the FECA, which would be next to impossible, or to forego or significantly curtail the kinds of issue advocacy that would cause them to be treated as political committees.

Furthermore, the other elements of the expanded definition of political committee are so expansive that a huge number of IRC §501(c) organizations are likely to be so categorized and thus brought within the FECA's rules. For example, an IRC §501(c)(3) or (c)(4) organization which takes out a single full-page ad in the New York Times urging a Member of Congress or the President to take a particular action on a policy issue, at current rates, could qualify as a political committee under the proposed $50,000 threshold. And so would a good-government organization which spends more than $50,000 to research and publish a report listing the Members of Congress who accept campaign contributions from corporations, unions or other disfavored sources. In each such instance, it would be of no consequence under the NPRM's proposed rule that the organization in question had never endorsed any candidate for federal office and never maintained a federal political committee to make contributions or expenditures in support of candidates.

2. The NPRM Will Restrict the Ability of Nonprofit Organizations to Conduct Nonpartisan Voter Participation Activities

Since before the civil rights movement of the 1950's and 60's, nonprofit organizations have undertaken extensive activities to encourage citizens to participate in the democratic process by registering to vote and voting. Latinos are now the nation's second largest population group, and our democracy cannot be truly representative without full Latino participation. Voter engagement efforts are particularly critical for our community, because voting and registration rates still lag behind those of non-Latinos.

In the past, the Commission has also recognized the benefits of voter participation activities by expressly approving nonprofit corporations to engage in them. Indeed under an earlier version of its regulation, the Commission determined that for-profit corporations and unions could only support voter participation activities if they were conducted by nonprofit organizations. Tragically, the proposals in the NPRM would significantly curtail, if not eliminate, these invaluable voter participation activities.

(A) The NPRM includes an amended definition of nonpartisan voter registration and get-out-the-vote activity which could bar almost all forms of voter participation activity now undertaken by nonprofit organizations. In contrast to the current regulation, under which voters may be encouraged to register or to vote using any message that does not expressly advocate the election or defeat of a federal candidate, the proposed amendment would prohibit any voter participation activities in which the message "promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party." Since, in this instance, the regulation does not even require a reference to a clearly identified candidate, virtually any message that urges citizens to vote out of concern for a particular issue could violate the FECA's

ban on corporate expenditures if the message might be construed as promoting or opposing a federal candidate in some fashion.

In addition, whereas under the current regulation, corporations and unions have been prohibited from determining the party or candidate preferences of *individuals* before encouraging them to register to vote or to vote, the NPRM proposes to add a new section prohibiting groups from using any information "concerning likely party or candidate preference" to determine who it will encourage to register or vote. Under this proposal, a nonprofit organization might be prevented from targetting its voter participation activities on particular communities or demographic groups, including African-Americans or Latinos, even though such groups have historically been excluded from participating in the democratic process, if data showed that such groups were "likely" to prefer the candidates of one party or another. They similarly may not be able to target their voter participation activities by gender, even though women have been under-represented in the democratic process and may be more likely to support issues of concern to some organizations, if data showed that one gender is more "likely" to prefer, for example, a female candidate, a younger candidate, or a married candidate.

Finally, under this proposal, groups that are concerned with particular issues, such as protecting the environment, reforming our tax laws, or eliminating poverty, may not be able to target voters who have indicated support for these issues, if data show that individuals who favor, or disfavor, such issues are more likely to prefer candidates of one party or the other or one candidate over another. In each of these instances, under the NPRM, as long as data are available showing "likely" voting preferences by particular groups, an organization could not safely undertake a voter participation program aimed at such groups without risking a full FEC investigation into whether it was aware of such information and took it into account in making decisions about its program, an investigation which would involve the most sensitive details of the organization's decision-making process and in which the organization would always be faced with proving a negative. Few nonprofit organizations will be willing or able to take this risk.

(B) As in the case of issue advocacy, even if the Commission were to drop the new definition of nonpartisan voter registration and get-out-the-vote from the definition of prohibited "expenditures," the NPRM's proposed definition of "political committee" would nevertheless make it virtually impossible for nonprofits to engage in voter participation activities, no matter how nonpartisan they may be. Under the Commission's existing regulations, any "voter registration activity" conducted in the period beginning 120 days before a regularly scheduled primary or general election and ending on the date of the election falls within the definition of "federal election activity." In addition, "voter identification," "generic campaign activity," and "get-out-the-vote activity," in connection with any election in which one or more candidates for federal office appears on the ballot fall within the definition of "federal election activity" if such activities are conducted at any time after January 1 of an even-numbered year or after the date of the earliest filing deadline for access to the primary election as determined by state law. While these rules were adopted by Congress only for state and local political committees, the NPRM

would apply them to independent, non-party groups by incorporating them into the definition of federal "political committee." The result would be to require that virtually all voter participation activities, whether undertaken by IRC §501(c) organizations or IRC §527 organizations, be financed entirely with hard money.

Since many nonprofits rely on grants from private foundations and donations from individuals to support their voter participation activities, such a rule would virtually put them out of business. For example, even a foundation-funded nonpartisan voter registration drive conducted by a non-profit organization beginning on July 4, 2004, would be illegal under the proposed rules.

II

The Expansive Proposals In The NPRM Far Exceed the FEC's Regulatory Authority or Capability and Usurp Congress' Proper Role

Under the FECA, the Commission has been delegated authority only to "prescribe rules, regulations, and forms *to carry out the provisions of this Act . . .*"[1] This provision not only grants authority to the Commission, it also serves as a limitation on the scope of that authority, for any regulation that is not authorized by the Act itself is beyond the power delegated to the agency by Congress. As shown above, the NPRM's proposal to abandon the express advocacy definition of "expenditure" and replace it with the "promote, support, attack or oppose" standard is not authorized by the FECA as authoritatively and consistently construed by the Supreme Court. The other proposals in the NPRM are similarly beyond the Commission's authority or capability. Congress has spoken to the core issues raised in the NPRM and has stopped well short of enacting the kinds of broad rules under consideration. Furthermore, even if the agency were acting on a blank legislative slate, which it is not, it does not have the administrative tools and has allowed itself insufficient time to examine properly the complex issues underlying the NPRM. Finally, in a government characterized by the constitutional separation of powers, Congress and not the Commission is the proper institution to balance the competing political interests at stake in the NPRM.

1. Congress Has Addressed the Core Issues Raised in the NPRM and It Stopped Far Short of the Radical Proposals Now Being Considered.

As the Supreme Court recognized in *McConnell*, under the BCRA, "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications.)"[2] Congress' decision to stop short of applying its soft money regulations to independent interest groups forecloses the far-ranging proposals in the NPRM.

Questions about the application of federal election law to independent non-profit interest groups are not new and have been addressed on numerous occasions by both the courts and Congress. In *FEC v. Nat'l Right To Work Comm.*, 459 U.S. 197, 201 (1982), for example, the Supreme Court noted that in enacting the FECA §441b, Congress had allowed "some participation" by nonprofits in the federal electoral process by allowing them to establish and pay for separate segregated funds which may be used for political purposes. And, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 93 (1986), the Court found that certain nonprofit "political associations" do not pose the same danger of corruption as business corporations, and it held, therefore, that even when incorporated, such groups constitutionally may not be barred from using their treasury funds to expressly advocate the election or defeat of federal candidates. Finally, in its recent decision in *McConnell,* in considering the application of BCRA's ban on electioneering communications to nonprofit corporations, the Court found that the nonprofit exception adopted in *MCFL* was part of the background on which Congress enacted BCRA and that it was presumed to have incorporated the special treatment of such entities into the specific provisions which it adopted.

Protection of *MCFL* entities is not the only way in which BCRA addresses nonprofit interest groups. The Thompson Committee investigation that provided the empirical basis for the BCRA reforms had touched on the activities of certain nonprofit organizations during the 1996 federal elections,[3] and Congress responded to the Committee's findings in a number of limited ways. In a section entitled "Tax-Exempt Organizations," for example, BCRA provides that no political party committee and no agent acting on behalf of a political party committee may "solicit any funds for, or make or direct any donations to," an organization established under any provision of section 501(c) of the Internal Revenue Code that makes expenditures or disbursements in connection with an election for federal office, or to any non-party political organization established under IRC §527 organization other than a registered political committee. Similarly, although BCRA generally prohibits federal candidates and officeholders from soliciting or spending soft-money for any purpose, the statute expressly permits candidates and officeholders to make general solicitations of soft money without limitation for any IRC §501(c) organization other than one whose principal purpose is to conduct certain federal election activities, and even to make limited specific solicitations of soft-money to support such election activities by these organizations.

Nonprofit organizations were also addressed in BCRA's provisions dealing with electioneering communications. While the Snowe-Jeffords amendment initially excepted both IRC §501(c)(4) and §527 entities from the ban on corporate and union electioneering communications,[4] the Wellstone amendment eliminated this exception, but only with respect to certain "targeted communications."[5] And, the Commission itself has recognized that the purposes of these provisions are not served "by discouraging charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested....".[6]

Two conclusions relevant to the pending NPRM are evident from these provisions. First, in enacting BCRA, Congress was concerned with the activities of nonprofit entities primarily as they related to the larger issue of soft-money contributions to federal candidates and political party committees. Congress evidently did not believe that the election-related activities of IRC §501(c) organizations presented the same risk of soft-money abuse as had been documented for political parties, and it stopped short of prohibiting nonprofit entities from engaging in such activities.

Second, the debate over the Snowe-Jeffords and Wellstone amendments makes clear that Congress understood the role of nonprofit entities in sponsoring issue advertisements and, while it prohibited many of them from disseminating the narrowly defined category of broadcast communications, it again stopped far short of prohibiting nonprofit organizations from engaging in a much wider range of public communications. The distinction between political parties and interest groups was fully aired. Indeed, it was the continuing ability of independent interest groups "to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications),"[7] on which the political-party plaintiffs in *McConnell* based their equal protection challenge to the statute.[8] While the Supreme Court acknowledged "this disparate treatment,"[9] it nevertheless rejected the equal protection argument because Congress "is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation."[10]

In sum, the Commission is not considering the current NPRM on a blank slate. Both in BCRA and in specific legislation addressing IRC §527 organizations, Congress has recently considered the extent to which it is willing to limit the campaign-related activities of independent nonprofit interest groups and in each instance it has stopped far short of the radical proposals in the NPRM. The Commission cannot ignore these judgments and proceed without regard to the course that Congress itself has refused to take.

2. The Commission Lacks the Administrative Tools To Examine the Issues Raised in the NPRM And, In Any Event, There Is Insufficient Time To Carry Out This Examination Under the Current Expedited Schedule

Even if Congress had not spoken to the issues raised in the NPRM and stopped far short of the far-ranging provisions now before the Commission, the Commission lacks the administrative tools to examine these proposals properly. As the Supreme Court described in *McConnell*, Congress adopted the BCRA reforms only after receiving a six-volume report summarizing the results of a year-long investigation into campaign practices in the 1996 federal elections. As described in the Thompson Committee's 9575-page report, the committee's hearings occupied 32 days over a period of three and one-half months and included testimony from 72 witnesses. The Committee also subpoenaed and received thousands of pages of documents from 31 different organizations and conducted interviews with numerous other individuals. In contrast, the Commission has no power to hold evidentiary hearings, compel the

production of documents and witnesses, or take the other steps necessary to consider adequately the factual issues raised in the NPRM. In addition, the few reports filed with the Commission and the IRS since BCRA took effect at best provide only a partial glimpse at the activities which the NPRM addresses; and the Commission itself has virtually no enforcement experience in this area.

The lack of adequate administrative tools has been compounded by the Commission's decision to complete its work on the NPRM on an expedited schedule that will leave it only a few weeks to consider the voluminous comments likely to be submitted by the public. There is insufficient time for the Commission to conduct even a truncated investigation into the need for the reforms it is now considering under this schedule, and there is no need for it to rush to do so. Congress has not mandated that the Commission reconsider its policy on political committees, let alone that it do so by a date certain. Furthermore, even under the Commission's expedited schedule, any new regulations the Commission may decide to issue will not take effect until the middle of the current federal election season, forcing the Commission either to choose between delaying the effective date of its regulations or changing the rules in the middle of the campaign.

The inability of the Commission to compile a full empirical record regarding the issues in the NPRM has critical legal consequences. Most importantly, because the proposed regulations impact directly on freedom of speech and freedom of association, the Commission must be able to demonstrate that its rules are required by a compelling governmental interest and are narrowly tailored to serve those interests.[11] As the Supreme Court noted in *McConnell*, "'[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or the plausibility of the justification raised.'"[12] Here, the notion that independent groups with no connection to federal candidates or political parties are subject to the same risk of corruption as party committees is not only novel and implausible, but, as discussed above, it also disregards Congress' own recent legislative judgments on the same subject. The Commission cannot attempt to meet this constitutional burden with little more than "mere conjecture,"[13] which is all it can possibly offer on the record before it.

In addition to these constitutional concerns, the Commission must also create an adequate empirical record to meet its obligation under the Regulatory Flexibility Act, to demonstrate that the proposals in the NPRM will not have an unnecessary impact on small entities, including small nonprofit organizations. The NPRM does not include an initial regulatory flexibility analysis because the Commission concluded that the rules will not have a significant economic impact on a substantial number of small entities. This conclusion was based, however, on the specific finding that "all but a few of the 527 organizations that may be affected by the proposed rules have less than $6 million in average annual receipts and therefore qualify as small entities under the North American Industry Classification System."[14] The NPRM did not, however, indicate the empirical basis for this finding, which so far as can be determined has no basis whatever in the public record. Moreover, in assessing the impact on small entities, the NPRM only considered the impact on non-federal 527 organizations which would be reclassified as

federal political committees under the NPRM, without taking into account the hundreds, if not thousands, of other nonprofit organizations that also would be classified as political committees under the proposed definition. In addition, in assessing the impact of the NPRM, the Commission erroneously stated that organizations will not be economically impacted by the new rules because, while the rules "limit the types of funds that may be used to pay for certain activities," organizations can still spend unlimited amounts on those activities that do not fall within the expanded definition of "expenditure." This conclusion ignores the fact that most nonprofits will not be able to raise hard money at all and they are prohibited from engaging in many of the other activities that do fall within the definition of expenditures. Unless the Commission demonstrates a good faith effort to consider these issues on the record, the entire NPRM will be subject to challenge by the numerous small nonprofit organizations that will be affected by its proposals.

Finally, although the issues raised in the NPRM have received some limited attention in the media, these reports, which consist largely of a few, oft-repeated anecdotes about a tiny number of so-called 527 entities, are insufficient to satisfy any of these legal requirements. At least one of the groups mentioned in the media already appears to be covered by the rules announced very recently in AO 2003-37.[15] And the limited information about the other groups mentioned in these new stories hardly amounts to an empirical record on which to base important policy decisions. As Thomas E. Mann and Norman Ornstein recently wrote, "[m]ost of the reports about shadow political party organizations reeling in large soft-money donations from corporations, unions and wealthy individuals – money that previously went to the parties – *are based more on hype than fact.*"[16] This observation has special force because Mann and Ornstein are well-recognized social scientists who have studied the impact of campaign finance regulations for many years and who helped develop the factual record supporting BCRA before Congress and in the courts.

In sum, it will be impossible for the Commission to conclude on the basis of the record to be compiled in this truncated rulemaking that BCRA's provisions are being routinely circumvented by the activities of independent interest groups, let alone that the drastic remedies proposed in the NPRM are necessary or practical.

3. Congress And Not The Commission Is The Appropriate Institution To Resolve the Delicate Political Issues At the Core of the NPRM

Even if Congress had not already spoken to the issues raised by the NPRM, and even if the Commission were able to compile an adequate empirical record to evaluate those proposals in the limited time available, and even if the new rules would not risk serious disruption in the middle of an election year, the Commission is not the proper institution within our government to resolve the issues at stake. The proposals in the NPRM pose, at their core, fundamental policy questions concerning the appropriate role of independent interest groups in our political system. Just as the role of corporations, unions and political action committees was central to the original

legislative debates over the FECA, and the relative role of political party committees was central to Congress' consideration of BCRA, determining the appropriate role of independent, non-party groups in our political system requires a delicate balancing of deeply felt and competing interests which is beyond the mandate or competence of this Commission.

These observations have even greater power here because the NPRM involves the regulation of protected forms of speech and association. Since any rule adopted by the Commission regulating the campaign-related activities of nonprofit organizations will necessarily burden First Amendment rights, it is critical that the rule be based on choices made by Congress and not by the Commission acting without any legislative guidance. As Professor Kenneth Culp Davis, one of the country's most respected students of the administrative process, has written, "[g]overnmental action at the borderland of constitutionality can reasonably be held unconstitutional if the basic determination is made by anyone but Congress."[17] In our constitutional system of shared governmental powers, it is Congress and not the Commission which should decide whether there is a compelling governmental interest in limiting fundamental constitutional rights and, if so, how such limits should be tailored to serve only those and no other ends.[18]

Conclusion

The proposals in the NPRM conflict with existing law and go far beyond Congress' legislative determinations on three recent occasions. They would improperly and drastically impede the ability of nonprofit organizations to undertake vital issue advocacy, member communications and nonpartisan voter participation activities. Furthermore, the Commission does not have the administrative tools and has left itself insufficient time to conduct the full empirical inquiry required by the First Amendment and other legal requirements. Finally, the NPRM raises important policy issues regarding the role of independent interest groups in our political system which should be resolved only by Congress. For these reasons, the Commission should withdraw the NPRM without further action.

Sincerely,

Arturo Vargas
Executive Director

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1 2 U.S.C. §438(a)(8) (emphasis added).

2 124 S. Ct. at 686.

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[3] See U.S. Senate, Committee on Governmental Affairs, "Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns," S. Rept. No. 105-167, Vol. III, 105th Cong. 2d Sess., 3993.

[4] See 2 U.S.C. §441b(c)(2).

[5] *See* 2 U.S.C. §441b(c)(6).

[6] Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (explaining exemption in 11 C.F.R. §100.29(c)(6) for any electioneering communication paid for by an IRC §501(c)(3) organization).

[7] As discussed below, two years before Congress enacted BCRA, it amended the Internal Revenue Code to require registration and reporting by IRC §527 organizations. In a brief submitted to the United States Court of Appeals for the Eleventh Circuit, an organization that had supported BCRA and assisted in its development noted that the new provisions were necessary because "even with the enactment of BCRA, IRC §527 organizations will be able to conduct considerable amounts of federal campaign finance activity outside the scope of FECA." *See* Brief *Amicus Curiae* of Campaign Legal Center, *Mobile Republican Assembly v. United States,* No. 02-16283, pg. 27.

[8] *See* 124 S.Ct. at 686.

[9] *Id.*

[10] *Id.* It is also important to note that, apart from the provisions it enacted, Congress did not even direct the Commission in BCRA to reconsider and review its current definition of "political committee" as it did with respect to the definition of "coordinated public communications." *See* Pub. L. 107-155, 116 Stat. 81 (2002), §214(c). If Congress was dissatisfied with the Commission's policies in this area, or if it only considered that the issue was of great importance, it surely would have directed the Commission to consider the issue along with the other issues in the post-BCRA rulemakings. It did not do so.

[11] *See, e.g., Republican Party of Minn. v. White,* 536 U.S. 765, 774-75 (2002); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657 (1990); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978).

[12] 124 S.Ct. at 661 (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 371, 391 (2000)).

[13] *Nixon,* 528 U.S. at 392.

[14] *Id.*

[15] *See* AOR 2004-04 submitted on behalf of America Coming Together.

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[16] Thomas E. Mann and Norman Ornstein, "So Far So Good On Campaign Finance Reform," *Washington Post*, A19 (March 1, 2004) (emphasis added).

[17] 1 Davis, *Administrative Law Treatise,* §3.13 (2d ed. 1978).

[18] *See Kent v. Dulles,* 357 U.S. 116 (1958); Tribe, *American Constitutional Law,* § 5-17, 285 (1st ed. 1978) ("The open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack.")