**"Donald Simon" <DSimon@SONOSKY.COM>**

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To <GRLECNOA@fec.gov>
cc <bdeutsch@fec.gov>
bcc
Subject Comments on Notice 2006-4

Attached please find comments of the Campaign Legal Center and Democracy 21 on Notice of Availability 2006-4.

Donald J. Simon
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
Suite 600, 1425 K St. NW
Washington, DC 20005
Telephone: (202) 682-0240
Facsimile: (202) 682-0249
E-Mail: dsimon@sonosky.com
Web: www.sonosky.com



Commentson Notice of Availability 2006-4.pdf

April 17, 2006

**By Electronic Mail**

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Comments on Notice of Availability 2006–4 Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication"**

Dear Mr. Deutsch:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's "Notice of Availability" of a petition for rulemaking asking the Commission to revise its rules under Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA) "by exempting certain communications consisting of 'grassroots lobbying' that otherwise meet the definition of an 'electioneering communication.'" Notice 2006–4, 71 Fed. Reg. 13557 (March 16, 2006).[1]

We urge the Commission to deny the petition to initiate a rulemaking because the Commission has already decided the matter presented by the petition, and there are no changed circumstances that warrant reconsideration of that decision.

When it promulgated the initial Title II rules in its 2002 rulemaking under BCRA, the Commission specifically proposed, considered, and rejected, a "grassroots lobbying" exemption of the same type as urged by petitioners here. The 2002 NPRM proposed four alternative versions of such a "grassroots lobbying" exemption, incorporating virtually all of the elements suggested here by petitioners. 67 Fed. Reg. 51145 (Aug. 7, 2002). Commenters submitted other proposals as well.

The Commission rejected all versions of the proposed "grassroots lobbying" exemption, concluding that any such exemption would permit ads that promote, support, attack or oppose (PASO) a candidate. The Commission correctly concluded it therefore lacks the statutory authority to promulgate a "grassroots lobbying" exemption, because BCRA specifically constrains the Commission's exemption authority, and permits only exemptions that will not allow a PASO communication. 2 U.S.C. § 434(f)(3)(B)(iv). The Commission explained its decision to reject any "grassroots lobbying" exemption as follows:

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[1] The petitioners are the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch.

> The Commission concludes that *communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal candidate.* Although 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. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement.*

Electioneering Communications Final Rules and Explanation and Justification (E&J), 67 Fed. Reg. 65190, 65201–02 (Oct. 23, 2002) (emphasis added). The Commission noted that "none of these exemptions is consistent with the *limited authority* provided to the Commission by the statute to make exemptions for communications that do not promote, support, attack or oppose a Federal candidate." *Id.* at 65200 (emphasis added).[2]

Nothing material to this decision has changed. The pending petition does no more than to propose that the Commission again consider the same type of exemption it rejected in 2002. Neither new case law, nor new facts, justifies the Commission re-examining the agency's settled position.

Since the Commission's 2002 decision on this matter, the Supreme Court in *McConnell v. FEC,* 540 U.S. 93 (2003), upheld Title II, in its entirely, as against a facial challenge. In the recent decision in *Wisconsin Right To Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*"), the Supreme Court simply ordered the district court to consider whether BCRA's "electioneering communication" provisions *might* be unconstitutional as applied to the specific ads at issue in that case. The Court did *not* hold that Title II was unconstitutional as applied to those ads, or to any other ads that might be described by their sponsors as "grassroots lobbying." The Court in *WRTL* gave no indication that a "grassroots lobbying" exemption to Title II is constitutionally required.

Certainly no compulsion for the Commission to act is provided by the Court's purely descriptive statement in *WRTL* that "[a]lthough the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here." 126 S. Ct. at 1017.

This statement is no more than a description of the state of the law, and explains why the complaint in *WRTL* presented a ripe controversy for the courts. It is of course true that the Commission has authority to create exemptions under Title II, subject to the statutory constraint

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[2] In characterizing its "limited authority," the Commission said that it "acknowledges that the statute limits its exemption authority by providing that the Commission may not exempt communications that promote, support, attack or oppose a candidate. The Commission's exemption authority is also limited by BCRA's use of 'bright line' distinctions between electioneering communications and other communications." 67 Fed.Reg. at 65198.

that any such exemption cannot permit communications that PASO a candidate. That constraint is precisely what the Commission considered in its earlier rulemaking, when it decided that no exemption for "grassroots lobbying" ads could be promulgated without impermissibly opening the door to PASO communications.

The Court in *WRTL* did not decide – indeed, it expressly left open – the question of whether the ads at issue in that case do or do not PASO a candidate. The district court, in dismissing the WRTL complaint, said that "WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," *i.e.*, ads that promote or attack a candidate. The Supreme Court did not reject this finding, but instead said only that "it is not clear" whether the district court rested its holding on this ground. 126 S. Ct. at 1018.

Thus, in *WRTL,* the Court did *not* decide that Title II is unconstitutional as applied to the ads at issue there; it did *not* decide that the Commission must, or should, create a regulatory exemption for "grassroots lobbying" ads, and it did *not* decide that the ads at issue in that case are "lobbying ads" that do not PASO a candidate (and thus should, or could, be exempted by a regulatory exemption). In short, nothing in *WRTL* compels the Commission to depart from the position it reached in the 2002 rulemaking to reject a "grassroots lobbying" exemption as outside its statutory authority.

The Commission is currently defending the constitutionality of Title II in two pending "as applied" challenges to the statute. *Wisconsin Right to Life v. FEC,* Civ. No. 04-1260 (D.D.C.)(three-judge court); *Christian Civic League of Maine, Inc. v. FEC,* Civ. No. 06-0614 (D.D.C.) (application for three-judge court granted). In both cases, the Commission is vigorously arguing that BCRA's "electioneering communication" provision is constitutional as applied to the ads at issue in those cases.

The Commission should continue its vigorous defense of the statute. To initiate the requested rulemaking at this time would undercut the Commission's legal position in court — that the existing Title II rules and restrictions can constitutionally be applied to the ads under scrutiny in both cases. The Commission should permit the ongoing judicial process to work in these cases. If, as a result of the court rulings yet to be issued, any further action becomes necessary, the Commission can act at that time, based on the holdings of the courts.

For the reasons set forth above, the Commission should deny the petition for rulemaking.

Sincerely,

*/s/ Fred Wertheimer*

Fred Wertheimer
Democracy 21

*/s/ J. Gerald Hebert*

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street, NW – Suite 600
Washington, DC 20005
202-682-0240

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue, NW – Suite 650
Washington, DC 20036
202-736-2200

Counsel to the Campaign Legal Center