American Federation of Labor and Congress of Industrial Organizations

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January 24, 2000

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Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Supplemental Notice of Proposed Rulemaking re: General Public Political Communications Coordinated With Candidates

Dear Ms. Smith:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits these comments in response to the "Supplemental Notice of Proposed Rulemaking, General Public Political Communications Coordinated With Candidates," 64 Fed. Reg. 68951, December 9, 1999 ("SNPRM"). The AFL-CIO requests an opportunity to testify before the Commission at its February 16, 2000, hearing with respect to the issues raised in the SNPRM.

I. Interest of the AFL-CIO

The AFL-CIO is a federation of 68 national and international unions representing 13 million union members throughout the United States in the private and public sectors and in virtually every occupation and industry; these national and international unions are in turn comprised of tens of thousands of local and intermediate affiliated labor organizations. Additionally, 50 state labor federations and 584 central labor councils affiliated with the AFL-CIO coordinate union activities and provide services at the state and local levels, and seven trade and industrial departments affiliated with the AFL-CIO do so at the national level in various economic sectors.

The AFL-CIO and its affiliates engage in substantial legislative and issue advocacy on matters of concern to working families, including Social Security, Medicare, education, labor standards, health care, pension security, workplace safety and health, trade, immigration, the right to organize, regulation of union governance, and the role of unions and corporations in electoral politics. As part of this extensive advocacy program, the AFL-CIO and its affiliates seek to inform their members concerning the importance of the issues, the performances of officeholders in addressing them, and the positions candidates for public office have taken on them. The AFL-CIO and its affiliates also carry out and support extensive voter registration and get-out-the-vote programs aimed at increasing their members' participation in the democratic process.

In connection with this legislative and issue advocacy work, union officers, union members and union employees regularly interact with Members of Congress and their staffs and with officials within the executive branch regarding both substance and strategy. Some of these contacts are intended to influence the actions and decisions of these officials, while other contacts involve joint planning in support of or opposition to particular measures; most contacts involve both purposes. In the past, the Commission's broad and ill-defined prohibition of coordinated public political communications has impinged on these legitimate union activities by deterring unions from speaking out on issues of concern and from continuing to meet with elected officials regarding them. The AFL-CIO submits these comments in an effort to ensure that the Commission's proposed new regulation in this area does not have the same deleterious consequence.

II. Violations of Section 441b(a) of FECA Should Be Limited To Coordinated Communications Expressly Advocating The Election or Defeat of Clearly Identified Federal Candidates

The AFL-CIO argued as amicus curiae in F.E.C. v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999), that violations of 2 U.S.C. § 441b(a) must be limited to coordinated communications expressly advocating the election or defeat of clearly identified federal candidates, as is the case in the Commission's current regulations. See 11 C.F.R. § 109.1. Expanding the scope of prohibited coordinated communications beyond express advocacy, as the Commission has attempted to do in prior enforcement actions and, now, in its proposed regulation, will, we believe, improperly deter unions, corporations and individuals from engaging in protected issue advocacy as well as from exercising their First Amendment right to petition their elected officials. There is no basis in FECA itself for this far-reaching expansion of the Commission's jurisdiction, and the district court's opinion in Christian Coalition did not, in the AFL-CIO's view, provide a satisfactory statutory basis for rejecting these arguments.

The AFL-CIO stands by the positions it presented in its brief in that case. Nevertheless, in light of the district court's determination and the text of the SNPRM, it appears that a majority of the Commission is unwilling at the present time to limit the scope of section 441b(a) to

express advocacy. In these comments we have sought to suggest modifications of the proposed rule that likewise are not so restricted, but we enclose our amicus brief so the record in this rulemaking of the AFL-CIO's views is complete. And, we caution that the suggestions we offer for narrowing the language of the proposed regulation do not suffice, in our view, to bring the regulation within constitutional bounds. Indeed, the Commission's unsuccessful effort to prohibit coordinated communications without reference to the express advocacy standard and the very substantial difficulty of crafting an alternative standard provide the best arguments of all for limiting § 441b(a) to express advocacy communications.

III. Any Regulation Defining Coordinated Political Communications Must Be Both Precisely and Narrowly Drawn in Order to Comply With the First Amendment

A. Regulating Such Communications Unavoidably Risks Chilling First Amendment-Protected Speech

In Buckley v. Valeo, 424 U.S. 1 (1976),[1] the Supreme Court made clear that political communications of the kind regulated in FECA are entitled to the highest degree of protection afforded by the First Amendment:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 14, quoting Roth v. United States, 354 U.S. 476, 484 (1957). See also 424 U.S. at 15 ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)). In order to ensure that citizens would not be chilled from discussion of issues during an election campaign, and recognizing that the discussion of public issues is

[1]Earlier today, the Supreme Court issued its decision in No. 98-963, Nixon v. Shrink Missouri Government PAC, which reaffirmed the rationale and holding in Buckley concerning statutory limitations on private contributions to candidates. Nixon is entirely consistent with our comments here as they concern Buckley and otherwise.

often tied to discussion of candidates, particularly incumbents, the Court in Buckley insisted that any restriction of political expression be narrowly and clearly drawn:

> Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties is an area permeated by First Amendment interests. The test is whether the language of [FECA] affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."

424 U.S. at 41-42, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).[2]

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[2]As the Court of Appeals for the Fourth Circuit has explained:

> The Court adopted the bright-line limitation that it did in Buckley in order to protect our cherished right to political speech free from government censorship. Recognizing that "the distinction between discussions of issues and candidates [on the one hand] and advocacy of election or defeat of candidates [on the other] may often dissolve in practical application," ... the Court concluded, plain and simple, that absent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled... The Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result.

F.E.C. v. Christian Action Network, 110 F.3d 1049, 1051 (1997) (emphasis in original). See also Faucher v. F.E.C., 928 F.2d 468, 471 (1st Cir. 1991) (reading Buckley as "adopting a bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation") (emphasis supplied); Maine Right To Life Committee, Inc. v. F.E.C., 914 F. Supp. 8, 12 (D. Me. 1996) (under Buckley, "FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues.") (emphasis supplied), affirmed for substantially the reasons set forth in lower court opinion, 98 F.3d 1 (1st

These two constitutional principles — that public political communications are entitled to the highest degree of protection under the First Amendment, and that any restriction imposed on such communications therefore must be narrowly and precisely drawn — should, indeed must, guide the Commission in its effort to regulate public political communications coordinated with candidates. The dangers inherent in overbroad regulation of political communications are just as applicable to communications that are "coordinated " with candidates as they are to the independent expenditures involved in Buckley, if not more so. Commission regulations that do not precisely and narrowly define the types of communications to which they apply "may ... operate to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone' .. than if the boundaries of the forbidden areas were clearly marked."" 424 U.S. at 41 n. 48, quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).[3]

In fact, introduction of the element of "coordination" adds a second level of uncertainty that not only may chill the communications themselves but may also inhibit the equally important First Amendment right of citizens to meet with their elected officials. As the First Circuit recognized in rejecting the Commission's overly broad regulatory definition of coordination as applied to voter guides and voting records:

> We think [the FEC rule prohibiting oral contact with candidates] is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office... It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues... It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.

Cir. 1996)(per curiam).

[3] Importantly, the Supreme Court did not naively assume that communications that do not contain express advocacy would never be intended to have, nor would have, an impact on the outcome of elections. Rather, in adopting the express advocacy test, the Court understood that the price of protecting communications about issues is that some protected communications will also have an election-related effect. See Buckley, 424 U.S. at 42-43 and n. 50. This understanding is as true of coordinated expenditures as it is of independent expenditures.

Clifton v. F.E.C., 114 F.3d 1309, 1314 (1st Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998).

B. Regulation of Coordination Invites Intrusive Government Investigations of Political Activities

In addition to having the potential to chill the exercise of free speech and free association, the regulation of "coordinated" communications — under which communications may be found to violate federal criminal and civil law because of the speaker's activities and relationships *external* to the communications themselves — poses a far greater threat of government intrusion into protected political activities than a regulation based solely on the content of the political communications.[4] In its investigation into alleged "coordination," the Commission in the past has used its subpoena power to seek to identify, and inquire into the details of, virtually every contact between a corporation or union, acting through its officers, directors, members and allies, and a candidate, political party, or anyone else who might be acting on the candidate's behalf.[5]

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[4] The express advocacy test announced in Buckley not only provides a clear definition of prohibited conduct to guide citizens in conducting their political activities, but also constrains the authority of the government to chill First Amendment conduct through overly aggressive and discriminatory enforcement proceedings. The express advocacy test limits the chilling effect of both civil and criminal enforcement of FECA by narrowing government inquiry to the facial content of corporate and union communications. As a result of the bright-line standard, complaints of violations may be resolved quickly, inexpensively and, most importantly, without intrusion into the internal workings of the respondents. The Commission's longstanding and unsuccessful effort to expand the definition of "express advocacy" to take into account the "context" in which political communications are made would have greatly expanded governmental enforcement beyond what is allowed under the strict standard of express advocacy. See, e.g., Virginia Society for Human Life, Inc. v. F.E.C, No. 3:99CV559 (E. D. Va. January 4, 2000) (holding unconstitutional 11 C.F.R. § 100.22(b), which defines "express advocacy" by limited reference to "external events"); Right to Life of Dutchess County, Inc. v. F.E.C., 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (same); Maine Right to Life Committee, Inc. v. F.E.C. (same). The potential for intrusive government enforcement actions under a "coordination"-based standard of liability is even greater than under the expanded definition of express advocacy advanced by the Commission and rejected by the courts.

[5] For example, the Commission adopted the so-called "common vendor" theory under which the opportunity for coordination may be shown simply by a corporation's or union's use of a political consultant, pollster, media buyer or other vendor who also has ties to a candidate or party. See, e.g., Advisory Opinion 1979-80. The Commission has relied on this theory of coordination to seek access to all communications between corporations or unions and their political consultants in an effort to determine whether coordination has occurred. See, e.g., Democratic Senatorial Campaign Committee v. F.E.C., 745 F. Supp. 742 (D.D.C. 1990) (FEC's

The legitimate nature of these contacts has not deterred the Commission so long as, in the Commission's parlance, the contacts provided an "opportunity for coordination," which is to say any contact has been fair game for the Commission's investigators.[6]

Moreover, there has been no limit to the kinds of information the Commission might deem relevant to its "coordination" inquiry; access to an organization's legislative and political plans was frequently demanded, including intrusion into the most sensitive internal political discussions. Every relationship or affiliation, personal or otherwise, has been subject to disclosure.[7] Finally, a corporation or union may be forced to disclose the details of its political activities that are themselves legal in every way.[8]

General Counsel recommended that the Commission open a full investigation into possible coordination between trade association PAC and Senate candidate because of "unanswered questions regarding possible connections between the [candidate] committee and [association] and the two common vendors").

[6] For example, in the Christian Coalition case, the Commission's evidence of prohibited coordination included the fact that public officials addressed meetings of the organization. Public officials, of course, have a legitimate need to communicate with their constituents, and those constituents have a right to listen to their elected officials. These activities should not be deterred because the sponsoring organization fears that the officials' appearance will be construed as an opportunity for coordination to occur.

[7] In seeking to establish coordination between the Christian Coalition and various Republican candidates, the FEC relied heavily on the "friendship" between Coalition officials and the candidates, on the fact that Coalition members were engaged in their personal capacities in unrelated political activities, and on correspondence and telephone conversations between the organization's representatives and Bush Administration officials regarding pending policy issues. This information was obtained through the Commission's extensive use of its own and the court's subpoena power.

[8] Under Commission regulations, for example, it is permissible for corporations and unions to engage in partisan communications with their members and to coordinate these communications with candidates. See 11 C.F.R. § 114.3(a)(1). As discussed in detail below, the Commission has taken the position in its enforcement actions and regulations, see 11 C.F.R. § 114.2(c), however, that permissible coordination of these membership communications may be used as evidence that communications to non-members have been coordinated impermissibly. On this basis, the FEC has sought to investigate the details of corporate and union internal membership communications under the pretext that coordination of such activities, although lawful in itself, may have tainted or infected other such activities.

The dangers to the First Amendment posed by such broad government investigations of political activity have been recognized time and again by the federal courts. In Buckley, for example, the Supreme Court recognized that "compelled disclosure [regarding political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64.[9] Justice Felix Frankfurter made the same point earlier: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring). In F.E.C. v. Machinist Non-Partisan Political League, 655 F.2d 380 (D.C. Cir.), cert. denied, 454 U.S. 897 (1981), the District of Columbia Circuit held that FECA did not apply to so-called "draft committees," based primarily on the fact that this would allow a dramatic expansion of the Commission's authority to intrude into citizens' First Amendment activities:

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands all available materials which concern a certain political group's "internal communications," wherein its decisions "to support or oppose any individual in any way for nomination or

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[9] The discussion in Buckley regarding compelled disclosure arose in the context of FECA's reporting and disclosure requirements, which are applicable to all persons covered by the Act. The danger to associational activity posed by government-compelled disclosure is even more acute in enforcement proceedings where compelled disclosure is targeted on a specific group and not others. As the three-judge district court stated in Pollard v. Roberts, 283 F. Supp. 248 (E. D. Ark), aff'd, 393 U.S. 14 (1968) (per curiam), in enjoining a prosecuting attorney's subpoena of the bank records and contributor lists of the Arkansas Republican Party:

> [T]here may be much merit in legislation of general application which requires public disclosure of contributions and contributors. But a requirement expressed in a statute of general application and of the existence for which the public is charged with knowledge is quite different from a requirement made ex parte by a prosecuting officer, particularly where the demand has no more substantial basis than the one involved in this case.

283 F.Supp. at 258-59. In conducting investingations into violations of section 441b(a), the FEC and the Department of Justice conduct the kind of respondent-specific inquiries that pose the greatest danger to constitutional liberties.

> election to the office of President in 1980" are revealed. . . . Then this federal agency, whose members are nominated by the President, demands all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employees, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls ... [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.

655 F.2d at 388 (footnote omitted).[10]

Finally, and most pertinently, in response to these constitutional considerations, the district court in F.E.C. v. Christian Coalition last year ruled that the definition of "coordination" applicable to general public communications under Section 441b(a) "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." 52 F. Supp. 2d at 88-89.

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[10] The Second Circuit similarly has recognized that the FEC's investigatory authority should be constrained because of the sensitive nature of the activities which the agency regulates:

> [D]ifferent considerations come into play when a case, as here, implicates first amendment concerns. In that circumstance, the usual deference to the administrative agency is not appropriate and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency.

F.E.C. v. Larouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987).

Although the Commission elected not to appeal the district court's decision in Christian Coalition, and the proposals set forth in the SNPRM purport to be based on the standard announced in that case, the AFL-CIO believes that the definition of coordinated general public communications proposed by the Commission falls far short of the narrow and clear standard required by the Constitution and these authorities in a number of important respects.

IV. The Definition of General Public Political Communications In Proposed § 100.23(b) Is Unconstitutionally Overbroad

A. Limiting the Prohibition to "Political" Communications That Refer to a Clearly Identified Candidate Does Not Sufficiently Narrow or Clearly Define The Scope of the Proposed Regulation

Proposed § 100.23(b) defines the communications to which the proposed definition of coordination applies as "[a]ny general public political communication that includes a clearly identified candidate....." As used in this regulation, the adjective "political" provides no guidance to citizens who wish to make public communications involving candidates. Thus, Webster's defines "political" as including anything "of or concerned with government, the state, or politics," Webster's New World Dictionary of the English Language 1103 (1980), a definition so broad as to include virtually any public communication dealing with an issue of public policy. The definition in the proposed regulation is, in this respect, even *broader* than the "electioneering message" standard now rejected by a majority of the Commission as overly broad and unconstitutionally vague. See Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc. (Primary)," etc. at 4-6 (June 24, 1999).

Proposed § 100.23(b) also defines general public communications that may not be coordinated with candidates as including a reference to "a clearly identified candidate," as that term is defined elsewhere in the Commission's regulations. See 11 C.F.R. § 100.17. Although this element is necessary and narrows the scope of the proposed regulation somewhat, it does not narrow the prohibition on coordinated communications to the degree required by the First Amendment. There are innumerable situations where issue-based communications to the public that clearly identify an individual candidate may not lawfully be prohibited simply because the communications were coordinated with a candidate. The "Texas Savings and Loan League" and "Shays-Meehan" hypotheticals set forth in the SNPRM are two such examples: as they illustrate, public communications may include the names of, or other references to, persons who are "clearly identified candidates" in the context of a coordinated message that serves a legislative or other purpose distinct from the campaign being waged by the candidates; such communications

may not be prohibited without violating the First Amendment, as Buckley and its progeny quite clearly hold.[11] Accordingly, as proposed, § 100.23(b) is unconstitutionally overbroad.

B. The Prohibition In § 100.23(b) Should Be Limited To Communications That (i) Expressly Identify the Referenced Individual As A Candidate or Otherwise Make Express Reference to an Election; (ii) Expressly State Approval or Disapproval of the Candidate; and (iii) Are Made Within 30 Days of An Election

If the prohibition on coordinated "political" communications is to withstand constitutional challenge (if possible absent a restriction to express advocacy communications), § 100.23(b) must be further narrowed so as to exclude issue communications. Although the opinion in the Christian Coalition case did not address this question, the facts in that case suggest additional elements that could be used to define the kinds of communications covered by the regulation. If all of these elements were added to the proposed regulation, they would provide brighter-line guidance concerning the application of the prohibition without requiring an inquiry beyond the four corners of the communications themselves.

First, the voter guides and other communications in issue in the Christian Coalition case expressly identified the candidates *as candidates*, not merely as public officials or as individuals, and included other express references to the upcoming election. Without these limiting elements, the prohibition on coordinated communications would reach Congressional voting records published by numerous organizations in connection with their legislative activities even though, as the court in Clifton recognized, there is normally nothing improper about coordinating such information with Members of Congress or the executive branch.

Second, the Christian Coalition's voter guides clearly expressed an opinion about the candidates' positions on various issues by rating those positions as being consistent or inconsistent with the positions favored by the organization. Absent an expressly stated rating component, §100.23(b) would reach voter guides distributed by organizations such as the League

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[11] In apparent recognition that § 100.23(b) as proposed would reach communications protected by the Constitution, the Commission has proposed that, in order to be prohibited or limited, coordinated communications must not only contain a reference to a clearly identified candidate, but also be "distributed primarily in the geographic area in which a candidate is running [and be] paid for by any person other than that candidate, the candidate's authorized committee, or a party committee." Prop. Reg. § 100.23(c). This definitional element fails to narrow sufficiently the scope of the proposed regulation, since legitimate issue communications of the kind identified in the text almost always will be distributed in the geographic area in which the candidate is running in order to influence the votes or positions embraced by that candidate.

of Women Voters and other organizations that merely publish *verbatim* candidates' responses to questions.

Third, one of the primary difficulties of the Commission's past approach to coordination issues, as illustrated in the Christian Coalition case itself, is that it opens to government scrutiny a wide range of sensitive legislative and other organizational activities *over an unlimited period of time*. Limiting the public communications covered by the regulation to those made within a relatively short period prior to the election, such as thirty (30) days,[12] would have the effect of limiting the intrusive nature of investigations involving coordination while providing the regulated community with another bright line to guide its actions. Although adding such an element without also adding the elements discussed above would *not* sufficiently limit the scope of the prohibition on coordination, when taken together with the first two elements this temporal element would focus the prohibition on the period when coordination is most likely to have an electoral purpose and effect and would serve to exclude many constitutionally protected issue communications.

V. The Proposed Coordination Standard in §100.23(c) is Not Sufficiently Protective of First Amendment Rights

Although it is derived largely from the court's opinion in the Christian Coalition case, proposed § 100.23(c) is not sufficiently protective of First Amendment rights in several respects that were not involved in that case.

First, the preliminary language in § 100.23(c) should be clarified by adding the following italicized language so that a corrected communication "is created, produced or distributed *as a result of*" the actions in subsections 1, 2 and 3 (with those subsections revised as to tense in order to accommodate the change in text). This meaning is implicit in the proposal, but ambiguous.

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[12] This suggestion is *not* the same as the regulation struck down in Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F. Supp. 2d 740 (E. D. Mich. 1998), and Right To Life of Michigan v. Miller, 23 F. Supp. 2d 766 (W. D. Mich.1998). The regulation in these cases defined express advocacy to include automatically any communication by a union or corporation that included a candidate's name or likeness and that was broadcast or distributed within 45 days before an election. There was no requirement that the candidate be identified as a candidate or that the communication otherwise make an express reference to an election, nor did the prohibited communication have to express a clear opinion about the candidate, as suggested by the AFL-CIO. Furthermore, the Michigan regulation was not limited to communications that were coordinated with a candidate, a distinction of paramount significance under the district court's opinion in Christian Coalition. The AFL-CIO continues to believe that any prohibition on union and corporate communications that does not include *all* of these elements is unconstitutional on its face.

Second, whereas § 100.23(b) makes clear that in order to be prohibited coordination must be with the candidate who is identified in the communication or with an opposing candidate, but not with another individual who may be a candidate in another state or congressional district, the alternative formulations of § 100.23(c) leave open the possibility that a labor organization or corporation could be penalized for coordinating with respect to an issue communication with any Member of Congress who is running for re-election in another jurisdiction. Such a broad prohibition is inconsistent with the mandate in Christian Coalition and does not appear to be the intention of the Commission in proposing the new regulation.

Third, the reference in both alternative versions[13] of § 100.23(c)(1) and in § 100.23(c)(2) to the "agent" of a candidate, a candidate's authorized committee, or a party committee introduces a high degree of uncertainty into the regulation and will make it extremely difficult for labor organizations and corporations to obtain professional advice and support relating to their issues communications. Unlike someone who is expressly authorized to act on behalf of a candidate or party committee with respect to a particular communication by a corporation or labor organization, and who acts in that capacity, the proposed term "agent" includes any vendor or other entity having some relationship to the candidate or the party no matter how unrelated this relationship may be to the communication in question. Thus, a labor organization or corporation that employs a political consultant to advise it on a series of issues advertisements may be found to have coordinated with the candidate named in the advertisements if the consultant has *any* form of an agency relationship with the candidate, however unrelated it is to the advertisements themselves. In rejecting the Commission's theory of liability based solely on a "conspiracy" or "insider trading" theory, the district court in the Christian Coalition case implicitly rejected this broad view of agency as well. The regulation should be amended, therefore, to provide that an "agent" is someone who is "acting at the express behest, and under the authority, of the candidate or party committee in making the request or suggestion covered under § 100.23(c)(1) or exercising the control or decision-making authority covered under § 100.23(c)(2)."[14]

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[13]As between the two, the AFL-CIO prefers Alternative 2-B because it identifies the particular salient aspects of a communication.

[14] The Commission has previously advanced a "common vendor" theory of coordination in connection with independent expenditures that is derived from the use of the term "agent" in the regulations dealing with independent expenditures. See 11 C.F.R. § 109.1(a)(4); see also Advisory Opinion 1979-80. The term "agent" is defined in this regulation to mean any person who has actual oral or written authority, either express or implied, "to make or to authorize the making of expenditures on behalf of a candidate [or] who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures." 11 C.F.R. § 109.1(a)(5). Reliance on this or a similarly broad definition of "agent" in connection with general public communications which do not contain express advocacy would severely undercut the ability of

Fourth, § 100.23(c)(3) should be amended to clarify that the substantial discussions or negotiations with the candidate, the candidate's authorized committee, or a party committee "resulted in express agreement regarding"or "had an actual and substantial effect" on the content, timing, location, mode, intended audience, volume or distribution or frequency of placement of the communication that was discussed. As the facts in the Christian Coalition case illustrate, outside individuals and organizations may inform candidates in some detail about their proposed communications without seeking the advice of the candidates or, if advice is given, without relying on it in any significant way. Under the proposed regulation, coordination could be found merely because of the existence of a discussion, even though the discussion had no or only a minor impact on the communications. Given the First Amendment values at stake, it is essential that such minor contacts not result in an enforcement proceeding or a prohibition of speech.

Fifth, the regulation fails to address the consequence of coordination with a party committee. Specifically, does coordination with a party committee result in a contribution to the party alone, to the candidate who benefits from the coordination, or both? While this distinction may not be significant for labor organizations and corporations, which are prohibited from making contributions to both candidates and parties, the distinction may well be important to individuals, who may make contributions to both candidates and parties and who have separate and different contribution limits as to each. In view of Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1969), holding that parties may engage in independent expenditures, coordination with a party committee should result only in a contribution to the party, and not to the candidate.

VI. Proposed Section 100.23(d) Should Be Expanded To Provide Additional Protection to First Amendment Communications and Activities

As discussed above, the district court in Christian Coalition warned that the standard of coordination applicable to communications not containing express advocacy must be a very narrow one in order to ensure that the risk of intrusive enforcement actions does not deter citizens from communicating with their elected representatives and candidates concerning legislation and other matters of policy: "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." 52 F. Supp. 2d at 88-89.[15] The proposed standard of coordination

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labor organizations and corporations to make legitimate issues communications to the public.

[15] The court's warning is especially significant in view of the Commission's longstanding difficulty in defining how much evidence of coordination is sufficient to support a finding of

does not "limit the universe of cases triggering potential enforcement actions" because (1) it is potentially misleading as drafted, and (2) it fails to include a number of critical and necessary qualifications adopted by the district court in the Christian Coalition decision in applying the coordination standard to the facts in that case.

A. Proposed § 100.23(d) Should Be Revised To Make Clear That Any Communication With A Candidate or Party Regarding Their Legislative or Policy Positions Does Not Alone Make A Communication Coordinated

Section 100.23(d) is potentially misleading insofar as it states that only a candidate's or party's "response to an inquiry" regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated, since it might be

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reason-to-believe ("RTB"). While the Commission has in the past been willing in some cases to make an RTB finding based only on circumstantial evidence that an "opportunity for coordination" existed, this approach poses significant dangers for the exercise of First Amendment rights and is inconsistent with the decision in the Christian Coalition case. As one former Commissioner put it:

> "Contrary to popular belief, the job of the Commission is not to "ferret out' violations wherever we remotely suspect they might lurk, or to act as investigative reporters following a hunch. The Commission is not intented to be a roving 'watchdog' — nor should anyone want it to be. ... it is clear that the Commission is not entitled to view the Constitutional constraints upon prohibiting or limiting genuinely independent expenditures as some 'loophole' in the regulation of campaign finance activity or as a threat to proper enforcement of the Federal Election Campaign Act. The First Amendment's permitting of unlimited independent expenditures is not a dangerous result for which the Commissiion must compensate. The Commission should be vigilant and thorough in scrutinizing evidence presented in complaints concerning this activity, but we should not make it impossible for those engaging in indpendent expenditures to avoid an 'RTB' finding and a lengthy and full-blown inquiry."

Matter Under Review 2766, Supporting Memorandum of Commissioner Thomas J. Josefiak For The Statement of Reasons of Chairman Lee Ann Elliott and Commissioners Joan D. Aikens and Thomas J. Josefiak at 1-3(1990). The regulation needs to make clear that in exercising its enforcement authority, the Commission will require evidence of actual coordination before opening an investigation in this sensitive area.

inferred from this narrow "exception" that other communications with a candidate or party about issues of legislation or policy *can* be the sole basis for a finding of coordination. The regulation should be revised to make clear that *any* communication with a candidate or party regarding their position on legislative or policy matters does not make the communication coordinated no matter how that communication comes about. We suggest the following language:

> "(d) *Activities Not Constituting Coordination*:[16] A communication with a candidate or political party regarding the candidate's or party's position on legislative or public policy issues, no matter how such communication is initiated, shall not constitute coordination or evidence of coordination with a candidate or political party.

B. Additional Limitations To § 100.23(d) Should Be Included In Order To Avoid Unduly Intrusive Enforcement Actions

In a critical portion of its opinion, the court in the Christian Coalition case made clear that, contrary to the Commission's argument, a union's or corporation's mere knowledge of a candidate's or party's plans and strategies does not amount to coordination even where this information is available only to insiders: "the First Amendment does not allow coordination to be inferred merely from a corporation's possession of insider knowledge from a federal candidate's campaign." 52 F. Supp. 2d at 95. The court also ruled that merely informing a candidate or party about an organization's plans does not amount to coordination even if the information provided is not yet public. Id. at 94.

Addition of express language incorporating these qualifications to the regulation would give notice to the regulated community that the regulation is not intended to deter certain kinds of legitimate activities that they might otherwise avoid out of an abundance of caution. In addition, setting out the qualifications in the regulation would make clear that certain evidence, standing alone, is not sufficient to open a far-ranging investigation into a respondent's activities. The AFL-CIO therefore recommends that a new § 100.23(e) be added (and current proposed § 100.23(d) be re-lettered accordingly) to read as follows:

> The following communications, standing alone, shall not constitute evidence of the existence of coordination with a candidate or political party:

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[16]Since the activity described in the current version of § 100.23(d), as well as the activities discussed in test, do not amount to coordination under any permissible definition of that term, it is a misnomer to describe this section as an "exception" to the general rule.

(1) A communication providing information about a candidate's or party's plans and strategies, even where such information is only available to persons associated with the candidate's campaign or the party; or

(2) A communication to a candidate or party providing information about an individual's or entity's plans and strategies, even where such information is unavailable to the public.

VII. The Definition of "General Public Political Communications" In § 100.23(e) Should Be Clarified

The definition of "General Public Political Communications" set forth in proposed § 100.23(e)(1) should be narrowed in a number of respects.

First, not all communications made through the electronic and print media should be prohibited even where they are coordinated with a candidate or party. Communications in the form of responses to a reporter's inquiry, even though printed in a newspaper or reported on television or radio, should not be prohibited even if they were made at the request or suggestion of a candidate or there is other evidence of coordination. Communications such as letters to the editor, op-ed articles, radio talk-show calls and the like similarly involve virtually no expenditure by the person responsible for the communication and should not be prohibited. Also, consistent with the Commission's existing regulation concerning union and corporate endorsements, communications in the form of press releases, press advisories and press conferences should be excepted from the prohibition on coordinated public communications. Cf. 11 C.F.R. § 114.4(c)(6).

Second, not all communications made through the Internet should be included. As described in more detail in our January 7, 2000, comments to the Commission in response to its "Notice of Inquiry: Use of the Internet for Campaign Activity, 64 Fed. Reg. 6036 (November 5, 1999), much publicly accessible Internet content entails de minimis cost. In order to address only coordination that implicates FECA's purposes of deterring actual corruption and the appearance of corruption, we submit that the mere inclusion of coordinated express advocacy on a union or corporate website should be permissible, at least absent other Internet activities that entail a demonstrable, and more readily calculable, cost, such as the purchase of advertising in the form of banners or otherwise on other websites that communicate the express advocacy or invite viewers to the coordinated express advocacy website material, or the purchase of special search capability from a search engine (such as Yahoo or Excite) that sends an Internet searcher directly to that location.

Third, Section 100.23(e)(1) should be amended to clarify that the distribution of flyers, placards, demonstrations, speeches, etc. are not covered. Although this appears to be the

intention of the proposed regulation, use of the term "include" could be interpreted as giving room for other types of communications not listed, including these.

VIII. The Commission Should Adopt Conforming Amendments In Other Regulations Raising Similar Issues

The impact of the proposed regulation in narrowing the scope of coordinated public communications prohibited by FECA will be undercut if the Commission fails to address other of its regulations that raise similar issues.

First, the SNPRM does not modify in any way the definition of coordinated activity in 11 C.F.R. § 109.1(b)(4), which continues to be applicable to independent expenditures. As a practical matter, it will be extremely confusing to the regulated community to have two different and conflicting definitions of coordination that apply depending upon whether a communication is later found to contain express advocacy. The original NPRM published on May 5, 1997 recognized the need for a single definition applicable to all public communications. Moreover, recent decisions involving independent expenditures have sought to narrow the definition of coordination in this context similarly to how the district court approached the issue in Christian Coalition. See, e.g., F.E.C. v. Freedom's Heritage Forum, No. 3:98CV-549-S (W. D. Ky. September 29, 1999); F.E.C. v. Public Citizen, Inc., 64 F. Supp. 2d 1327 (N. D. Ga.1999).

Second, the Commission's regulations at 11 C.F.R. §§ 114.4(c)(4) and (c)(5), relating to voting records and voter guides, contain a broader definition of coordination than proposed § 100.23 insofar as these regulations prohibit obtaining information about a candidate's or party's position on issues. While proposed § 100.23(d) would except such contacts from the definition of coordinated public communications, failure to modify §§ 114.4(c)(4) and (5) in a similar manner would be contradictory and confusing.[17]

Third, the Commission's current regulation at 11 C.F.R. § 114.2(c) contains language regarding the effect of certain coordination on subsequent communications that is at variance with both the Christian Coalition decision and the proposed regulation. This provision states, correctly, that disbursements by corporations and labor organizations for the election-related activities described in §§ 114.3 and 114.4 of the regulations will not constitute contributions or expenditures even when coordinated with a candidate, candidate's agent, candidate's authorized

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[17] In its response to the petition for rulemaking submitted on behalf of the Iowa Right to Life Committee, Inc., see 64 Fed. Reg. 46319 (Aug. 25, 1999), the AFL-CIO recommended that a rulemaking be initiated to consider the impact of the Clifton decision on the Commission's regulations dealing with voter records and voting guides. See Letter from Laurence E. Gold to Rosemary C. Smith (September 24, 1999). The instant rulemaking is an equally appropriate vehicle for addressing these important issues.

committee(s), or party committee. However, the regulation then states that while coordination "beyond that" described in the cited provisions shall not cause subsequent activities directed at the restricted class to be considered contributions or expenditures, such coordination "may be considered evidence that could negate the independence of subsequent communications to those outside the restricted class by the corporation, labor organization or its separate segregated fund." While the meaning of this provision has always been extremely unclear, it appears to be based on a tainting theory of coordination that is inconsistent with the language in the proposed regulation stating that in order to be prohibited coordination must relate to the specific communication at issue. This portion of § 114.2(c) should be stricken in order to conform to new § 100.23.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff,	)	Civil Action No. 96-1781 (JHG) (AK)
v.	)	
	)	
THE CHRISTIAN COALITION,	)	
	)	
Defendant.	)	

Brief Amici Curiae On Behalf of the American Federation of Labor and Congress of Industrial Organizations and the American Civil Liberties Union

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the American Civil Liberties Union ("ACLU") submit this Brief Amici Curiae in support of the motion for summary judgment filed by the Christian Coalition in this case.

Interest of Amici

The AFL-CIO is the national federation of 73 national and international unions representing over 13 million working men and women throughout the United States. The AFL-CIO, as well as its affiliated unions, is subject to the provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 et seq, including its provisions precluding unions and corporations from making contributions and expenditures in connection with federal elections. However, the AFL-CIO lawfully may and regularly does make expenditures for communications with its

members in connection with federal elections. The AFL-CIO also regularly engages in legislative lobbying before Congress and issue advocacy before the general public. The AFL-CIO does so both when campaigns for federal office are actively underway and when they are not. The overreaching and, we submit, legally untenable "coordination" theory that underlies the FEC's complaint against the Christian Coalition in this case, if embraced by this or other courts, would severely restrict the AFL-CIO's ability to engage in the sort of issue advocacy, legislative lobbying and other public affairs activities that the AFL-CIO has conducted for many years on behalf of its membership and working families generally.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations. For the past twenty-five years, the ACLU has been deeply involved in the debate over government regulation of campaign speech. The organization was itself a plaintiff in one of the very first cases brought under the Federal Election Campaign Act, *see American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975), and represented plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). Since then, the ACLU has participated in numerous other cases on related issues both in the Supreme Court and in the lower federal courts.

Argument

The central issues in this case arise from an attempt by the Federal Election Commission ("FEC" or "Commission") to penalize a nonprofit advocacy group for political communications which did not, by the Commission's own admission, impermissibly advocate the election or defeat of federal candidates.[1] In contrast to the FEC's enforcement posture for more than twenty years, in which it has attempted to regulate corporate and union political communications through an expansive view of "express advocacy," the agency here contends that the Christian Coalition's communications violated the statutory ban on corporate and union campaign activity, not because of the content of the communications, but because they were allegedly made in "coordination" with federal candidates. As we show in point I, there is no constitutional basis for the FEC's attempt to deny coordinated communications the same degree of protection afforded by the Constitution to independent communications, and; as we show in point II, the Commission's coordination theory of liability finds no support in the language of FECA or the FEC's own prior decisions.

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1. The FEC does contend that three of the Christian Coalition's communications to the public involved express advocacy in violation of section 441b(a) of FECA. See Plaintiff Federal Election Commission's Memorandum Of Points And Authorities In Support Of Its Motion For Summary Judgment 9-21 (hereinafter "FEC Mem.") These communications are but a small part of the Coalition's activities challenged in this case and they raise issues which have been addressed numerous times by the federal courts. Amici therefore address only the issues raised by the Commission's attack on the Coalition's voter guides and similar communications which did not involve express advocacy.

I

BECAUSE OF THE FIRST AMENDMENT VALUES AT STAKE, COORDINATED COMMUNICATIONS BY CORPORATIONS AND UNIONS SHOULD BE PROTECTED BY THE SAME "EXPRESS ADVOCACY" STANDARD AS UNCOORDINATED COMMUNICATIONS.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court held that the term "expenditure" in section 608(e)(1) of FECA[2] applies "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44. The Court reached the same conclusion with respect to section 434(e) of FECA.[3] 424 U.S. at 80 ("we construe 'expenditure' for purposes of that section ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.") In F.E.C. v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) (hereinafter "MCFL"), the Court held that the express advocacy limitation applies to FECA's prohibition in section 441b(a) against corporate and union political expenditures.

Having failed in numerous attempts to expand the definition of "express advocacy" to

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[2] At the time of the decision in Buckley, section 608(e)(1) imposed a $1000 cap on "expenditure[s] relative to a clearly identified candidate during a calendar year." See 424 U.S. at 715.

[3] Section 434(e) as it existed at the time of Buckley required "[e]very person (other than a political committee or candidate) who makes contributions or expenditures" aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate" to file a report concerning its activities with the FEC. See 424 U.S. at 701. This provision, as amended to conform to Buckley, is now codified at 2 U.S.C. § 434(c).

include a broad range of corporate and union communications to the public,[4] the Commission now is attempting to circumvent Buckley and MCFL by contending that corporate communications which allegedly have been "coordinated" with candidates or political parties are not limited by the express advocacy requirement. This rhetorical sleight of hand, under which "expenditures" permissible under section 441b(a) become impermissible "contributions" under the same provision of law, would greatly expand Commission jurisdiction to include a broad range of issues communications to the public, including communications concerning legislation and ballot measures and policy issues of importance in elections. Moreover, the constitutional principles which led the Supreme Court to adopt the "express advocacy" test for independent "expenditures" apply with equal or greater force to the communications in issue here.

A. The Necessity For A Bright-Line Rule To Avoid Interfering With Protected Speech Is As Great Or Greater Where Communications Are Coordinated With Candidates as Where They Are Not.

In addressing the campaign limitations and requirements in the Federal Election Campaign Act of 1971, as amended, the Supreme Court in Buckley set forth three constitutional

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[4] Although the Court in Buckley plainly envisioned that "express advocacy" would be narrowly construed in light of the First Amendment values it was designed to protect, in the years following the decision the FEC sought in both its regulatory and its enforcement functions to expand the definition of "express advocacy" to reach a broad range of corporate and union activities. These efforts have been rejected by the federal courts as inconsistent with Buckley and the First Amendment jurisprudence on which it was based. See, e.g., F.E.C. v. Christian Action Network, 110 F.3d 1049, 1061 (4th Cir. 1997) (awarding attorneys' fees and costs against FEC because its express advocacy argument "simply cannot be advanced in good faith ... much less with 'substantial justification'"), and cases cited therein.

principles that must guide judicial consideration of any limitation on political speech. These same principles require that the Christian Coalition's issues communications in this case be protected against government intrusion in the form of civil or criminal penalties.

1. The Court in Buckley first made clear that the form of political speech to which FECA's contribution and expenditure limits are addressed is entitled to the highest degree of protection afforded by the First Amendment:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

424 U.S. at 14, quoting Roth v. United States, 354 U.S. 476, 484 (1957). See also id. at 15 ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"), quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). Because Buckley was a facial challenge to various provisions of FECA, it did not involve specific forms of political speech. MCFL, on the other hand, involved communications similar to those in this case -- voter guides and other communications designed to educate the public about candidates' positions on issues of importance to the group. Thus, in accordance with Buckley and MCFL, the communications at issue here are entitled to the highest form of First Amendment protection.

2. In contrast to statutory limitations on expenditures for political expression, the Court in Buckley held that a limitation on the amount that any one person or group may contribute directly to a candidate or political committee "entails only a marginal restriction upon the contributor's ability to engage in free communication [because] [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 20-21.

The FEC relies heavily on Buckley's differential treatment of expenditures and contributions to justify its regulation of coordinated communications without the protection afforded by the express advocacy test. It is clear, however, that the FEC in this and similar cases is not attempting to regulate the amount of cash or other things of value which corporations and unions, or their political action committees, may transfer to candidates for their own use; it is seeking to limit political communications made directly by corporations and unions to the public.[5] Semantics aside, the Court's view that contributions to candidates may be limited because they are merely a form of symbolic, rather than direct, speech has no application to the regulation of corporate and union communications to the public. As with the independent expenditures addressed in Buckley and MCFL, the limitations imposed by the Commission on

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[5] In differentiating between "expenditures" and "contributions", Buckley did recognize that "the expenditure of resources at the candidate's direction," 424 U.S. at 36, could implicate the same concern for quid pro quo corruption as transfers of cash. Even in those circumstances, however, the advantage of the express advocacy rule is that its bright line prevents the kind of far-reaching government inquiry that went on in this case. In any event, the FEC's proposed definition of a coordinated expenditure is not nearly so limited. Instead, it would ban virtually any contact between groups engaged in political advocacy and persons running for office. This expansive test cannot possibly be sustained under current law.

allegedly coordinated communications "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19.

While the Supreme Court in Buckley stated that expenditures by corporations and unions could be treated as contributions for reporting and other purposes under FECA if they are coordinated with candidates, the Court nowhere suggested that such "contributions" could be identified without regard to the express advocacy test. In describing when a coordinated expenditure will be treated as an in-kind contribution, the Court cited "billboard advertisements endorsing a candidate," 424 U.S. at 46 n.53 (emphasis added), a classic example of express advocacy. Also, the Court stated in Buckley that the purpose of the "express advocacy" standard is to limit FECA's requirements to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis supplied.) And, in MCFL, the Court described the "express advocacy" test as applying to section 441b(a) without regard to whether the communications constituted expenditures or contributions: "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249.

3. Finally, the Court in Buckley grafted the express advocacy limitation into section 441b(a) in order to insure that FECA would not chill citizens from discussion of issues during an election campaign. Recognizing that the discussion of public issues is often tied to discussion of candidates,[6] particularly incumbents, the Court insisted that the prohibition in section 441b(a)

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[6] For this reason, the FEC misses the point when it argues that communications which do not contain express advocacy may have an impact on the outcome of elections. In

on corporate and union political communications be narrowed so as not to deter speech related to issues:

> Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests.... The test is whether the language of [FECA] affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."

424 U.S. at 40-41 (citations and footnote omitted), quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963). As the Court of Appeals for the Fourth Circuit recently explained:

> The Court adopted the bright-line limitation that it did in Buckley in order to protect our cherished right to political speech free from government censorship. Recognizing that "the distinction between discussions of issues and candidates [on the one hand] and advocacy of election or defeat of candidates [on the other] may often dissolve in practical application," ... the Court concluded, plain and simple, that absent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled... The Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result.

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adopting the express advocacy test, the Supreme Court was not naive about the potential effect of non-express advocacy communications on elections; rather, it understood that the price of protecting communications about issues is that some protected communications will also have an election-related impact. This understanding is as true of coordinated expenditures as it is of independent expenditures.

F.E.C. v. Christian Action Network, 110 F.3d at 1051(emphasis in original).[7]

The dangers inherent in vague rules prohibiting political communications are just as applicable to corporate and union communications which are "coordinated " with candidates[8] as they are to independent expenditures, if not more so. As in the case of independent expenditures, reading section 441b(a) to prohibit coordinated corporate and union communications without regard to their content, as the Commission does, "may ... operate to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone' .. than if the boundaries of the forbidden areas were clearly marked."" 424 U.S. at 41 n. 48, quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958). Indeed, introduction of the concept of "coordination" adds a second level of uncertainty which, as the Court of Appeals for the First

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[7] See also Faucher v. F.E.C., 928 F.2d 468, 471 (1st Cir. 1991) (reading Buckley as "adopting a bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation.") (emphasis supplied); Maine Right To Life Committee, Inc. v. F.E.C., 914 F. Supp. 8, 12 (D.Me. 1996) (under Buckley, "FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues.") (emphasis supplied), affirmed for substantially the reasons set forth in lower court opinion, 98 F.3d 1 (1st Cir. 1996) (per curiam).

[8] Insofar as the FEC alleges that the Christian Coalition coordinated its voter guides with committees of the Republican Party, as opposed to individual candidates, the Commission's position must fail for two additional reasons. First, since the Coalition may, under current law, make unlimited cash contributions to a party for the purpose of financing issues advocacy, there can be no basis in law for prohibiting the organization from making in-kind contributions to a party for the same purpose. Second, after the Supreme Court's decision in Colorado Republican Federal Campaign Committee v. F.E.C., 116 S. Ct. 2309 (1996), it may no longer be presumed that coordination with a party committee is automatically coordination with the party's candidates.

Circuit recently recognized, may not only deter the communications themselves but may inhibit the equally important First Amendment right of citizens to meet with their elected officials:

> We think [the FEC rule on voter guides and records] is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office... It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues... It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.

Clifton v. F.E.C., 114 F.3d 1309, 1314 (1st Cir. 1997).

As part of their organizational missions and on behalf of their constituents, Amici, along with numerous other citizens and labor organizations in this country, frequently seek to influence public officials and the public with regard to the issues involved in pending and proposed legislation, ballot measures and other policy matters. These efforts do not cease during election campaigns; indeed, as the Supreme Court recognized in Buckley, elections are one of our most important forums for debating public issues, and for influencing candidates on the issues. Under the FEC's position in this case, however, corporations and labor organizations would be presented with a Hobson's choice of constitutional dimension -- either they must refrain from seeking to influence candidates and public officials regarding legislative and policy issues,[9]

[9] Thus, under the FEC's position in this case, a citizens organization or union which meets with a federal candidate in an effort to have the candidate adopt the group's position in his

or they must forego seeking to influence the public regarding these issues.

B. The Coordination Theory Advanced By The FEC Would Grant To Government Virtually Unlimited Authority To Intrude Into The Political Activities of Labor And Citizens Organizations.

The express advocacy test announced in Buckley and MCFL not only provides a clear definition of prohibited conduct to guide citizens in conducting their political activities, it also serves to constrain the authority of the federal government to chill First Amendment conduct through overly aggressive and discriminatory enforcement proceedings.[10] The express advocacy test limits the chilling effect of both civil and criminal enforcement of FECA by narrowing government inquiry to the facial content of corporate and union communications. As a result of the bright-line standard, complaints of violations under section 441b(a) may be resolved quickly, inexpensively and, most importantly, without intrusion into the internal workings of the respondents.

As the record in this case vividly demonstrates, the FEC's coordination theory, under

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or her campaign or to pledge to support that position if he or she is elected is at risk that this contact with the candidate will cause all of its public communications on the same issue to be treated as "coordinated". An organization or union would similarly be at risk if it meets with party officials in order to influence the party's platform.

[10] As the Court noted in Buckley, vague laws " [may] 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application'." 424 U.S. at 41 n. 48, quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).

which communications may be found to violate the law not because of their facial content but because of the speaker's political and other activities external to the communications, multiplies the scope of government enforcement authority to a frightening degree. As part of an investigation into alleged "coordination," the government may use its subpoena power under FECA to seek to identify, and inquire into the details of, every contact between a corporation or union, acting through its officers, directors, members and allies, and a candidate or political party, or anyone else who might be acting on their behalf.[11] The legitimate nature of these contacts is immaterial to the FEC so long as, in the Commission's parlance, they provide an "opportunity for coordination," which is to say any contact is fair game for the Commission's investigators.[12] Access to an organization's legislative and political plans may be demanded, including intrusion into the most sensitive internal political discussions. Every affiliation, personal or otherwise, is subject to disclosure.[13] Finally, the FEC may seek to investigate the

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[11] Thus, the Commission has adopted its so-called "common vendor" theory under which the opportunity for coordination may be shown simply by a corporation's or union's use of a political consultant, or other vendor who also has ties to a candidate or party. See FEC Advisory Opinion 1979-80, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469.

[12] For example, as evidence of coordination in this case, the Commission relies on the fact that public officials addressed meetings of the Christian Coalition. FEC Mem. at 28, 33, 34, 41. Public officials, of course, have a legitimate need to communicate with their constituents, and those constituents have a right to listen to their elected officials. These activities should not be deterred because the sponsoring organization fears that the officials' appearance will be construed as an opportunity for coordination to take place. The FEC also relies on evidence of meetings and communications between the Coalition and government officials regarding a variety of policy issues. FEC Mem. at 35 n. 24, 39 n. 31.

[13] In this case, for example, in seeking to establish coordination between the Christian Coalition and various Republican candidates, the FEC frequently relies on the "friendship" between Coalition officials and the candidates or campaign staff, FEC Mem. at 28n. 13, 33, 53, 59-60, 62; and on the fact that Coalition officials and members were engaged in their personal capacities in political activities. Id. at 28-29, 32n. 21, 33, 34, 37, 49, 53, 55, 57, 58n.48,

details of corporation and union communications with their members under the theory that coordination of such activities, although lawful in itself, may have tainted other political activities.[14]

The dangers to the First Amendment posed by broad governmental authority to investigate political activity have been recognized time and again by the federal courts. In Buckley, for example, the Supreme Court recognized that "compelled disclosure [regarding political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64.[15] Justice Felix Frankfurter made the same

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60. This information could only have been obtained by the Commission through the use of its own and this court's subpoena power.

[14] Under Commission regulations, it is permissible for corporations and unions to engage in partisan communications with their members and to coordinate these communications with candidates. 11 C.F.R. §114.3(a)(1). See United States v. C.I.O., 335 U.S. 106 (1948). The Commission has taken the position in recent regulations, see 11 C.F.R. §114.2(c), however, that permissible coordination of these membership communications may be used as evidence that communications to non-members have been coordinated impermissibly.

[15] The discussion in Buckley regarding compelled disclosure arose in the context of FECA's reporting and disclosure requirements which are applicable to all persons covered by the Act. The danger to associational activity posed by government-compelled disclosure is even more acute where, as here, compelled disclosure is targeted on a specific association and not others. As the three judge district court stated in Pollard v. Roberts, 283 F. Supp. 248 (E.D.Ark), aff'd, 393 U.S. 14 (1968) (per Curiae), in enjoining a prosecuting attorney's subpoena of the bank records and contributor lists of the Arkansas Republican Party:

> [T]here may be much merit in legislation of general application which requires public disclosure of contributions and contributors. But a requirement expressed in a statute of general application and of the existence for which the public is charged with knowledge is quite different from a requirement made ex parte by a prosecuting officer, particularly where the demand has no more substantial basis than the one involved in this case.

point earlier: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring). See also Gibson v. Florida Legislative Comm., 372 U.S. at 557 ("before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights," legislative investigating committee must establish a "foundation" based on "fact and reason" that demonstrates the necessity of disclosure to achievement of a "compelling" public interest.)

In F.E.C. v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981), the Court of Appeals for this Circuit considered whether the FEC's jurisdiction over "political committees" extended to so-called candidate "draft committees." In holding that FECA does not reach such groups, the Court of Appeals relied heavily on the fact that extension of the Commission's jurisdiction would allow a dramatic expansion of the government's authority to intrude into citizens' First Amendment activities:

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands all available materials which concern a certain political group's "internal communications," wherein its decisions

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283 F.Supp. at 258-59. In conducting investigations into violations of section 441b(a), the FEC and the Department of Justice conduct the kind of respondent-specific inquiries which pose the greatest danger to constitutional liberties.

> "to support or oppose any individual in any way for nomination or election to the office of President in 1980" are revealed.
>
> * * *
>
> Then this federal agency, whose members are nominated by the President, demands all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employees, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls ... [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.

655 F.2d at 388. The Court of Appeals for the Second Circuit has similarly recognized that the FEC's investigatory authority should be constrained because of the sensitive nature of the activities which the agency regulates:

> different considerations come into play when a case, as here, implicates first amendment concerns. In that circumstance, the usual deference to the administrative agency is not appropriate and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency.

F.E.C. v. Larouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987). The Commission's "coordination" theory of liability under section 441b(a) flies in the face of these precedents by relegating to the Commission virtually unlimited authority to intrude into the most sensitive political activities of corporations and unions.

II

THERE IS NO SUPPORT FOR THE FEC'S COORDINATION THEORY IN THE STATUTORY LANGUAGE OF FECA.

As we have shown above, the Commission's "coordination" theory is directly at odds with the constitutional principles announced in Buckley and MCFL. There is also no support for the Commission's theory in the language of FECA itself.

Thus, the general definitions section of the Act, which the Supreme Court held in MCFL is applicable in construing section 441b, see 479 U.S. at 245-46, defines "contribution" as any gift, etc. "made ... for the purpose of influencing" a federal election. 2 U.S.C. § 431(8)((A)(i). This is the same statutory phrase as is used in the definition of "expenditure," 2 U.S.C. § 431(9)(A)(i), and which was construed by the Supreme Court in Buckley to require a showing of express advocacy.[16] See 424 U.S. at 78-80. The general definitions section also states that the term "contribution" does not include "any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b)... would not constitute an expenditure by such corporation or labor organization." Since the term "expenditure" in section 441b(b) should be defined in the same manner as the Supreme Court construed it in MCFL with respect to

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[16] In this portion of its opinion, the Court was addressing section 434(e) of FECA, which imposed independent reporting requirements on individuals and groups who made "contributions or expenditures." In construing these terms, the Court turned to the general definitions section of FECA which defined both "contribution" and "expenditure" to include the use of money or other valuable assets "for the purpose of ... influencing" the nomination or election of candidates for federal office. 424 U.S. at 77; id. at 654-656 (setting forth the 1974 versions of 2 U.S.C. §§ 431(e) and (f)). The Court referred to these definitions as "parallel provisions" and gave no indication that they should be construed differently. 424 U.S. at 77.

section 441b(a), it is clear that Congress did not intend the definition of "contribution" to include communications which do not include express advocacy.

Other provisions of FECA support the same conclusion. Section 441a(a)(7)(B)(i) as amended after Buckley, for example, provides that coordinated "expenditures" shall be considered to be contributions for purposes of the Act's contribution limitations; it is unreasonable to believe that, following Buckley, Congress could have expected the word "expenditures" in this provision to be construed to mean anything other than expenditures for express advocacy, or that the term "contribution" would have a different meaning in section 441b as it has in section 441a. Similarly, section 441d, which requires certain political communications to include a disclaimer as to the source of payment, applies only to an "expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate," or for the purpose of soliciting contributions for a candidate. 2 U.S.C. §441d. Plainly, Congress did not contemplate that disbursements for non-express advocacy communications would be treated as contributions if they are coordinated with a candidate or it also would have required a disclaimer in such cases.

That the statutory language of FECA does not support the Commission's position is further evidenced by the fact that the Commission itself did not, until very recently, seek to assert jurisdiction over non-express advocacy communications on the theory that they were coordinated with a candidate or political party. Thus, the only regulation of the Commission defining the meaning of coordination applies solely to "independent expenditures," which by

definition involve express advocacy. See 11 C.F.R. § 109.1(b)(4). There is currently no parallel provision defining "coordination" with respect to communications that do not include express advocacy.[17]

Two lines of FEC Advisory Opinions[18] further demonstrate that the Commission traditionally has not viewed section 441b(a) as prohibiting non-express advocacy communications even where they have been coordinated with a candidate. First, the Commission has consistently held that corporate support for lobbying and other communications made by federal candidates does not constitute a "contribution" under FECA and is outside of the Commission's jurisdiction.[19] If corporations and organizations may lawfully transfer funds to

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[17] In 1997, the Commission issued a Notice of Proposed Rulemaking asking for public comment with respect to a proposal under which the definition of "coordination" would be removed from the part of the regulations dealing with independent expenditures and placed in the general definitions section so that the same definition would apply to express advocacy and non-express advocacy communications. The Commission also asked for public comment on whether the definition of coordination should be the same for both categories of communications. See "Independent Expenditures and Party Committee Expenditure Limitations," 62 Fed. Reg. 24367 (May 5, 1997). No final action has been taken by the Commission on these proposals.

[18] The FEC must issue advisory opinions, within prescribed time periods, in response to written requests from any person concerning the application of FECA or an FEC regulation "with respect to a specific transaction or activity by the person." 2 U.S.C. §437f(a). An advisory opinion may be relied upon by "any person involved in any specific transaction or activity with respect to which the advisory opinion is rendered," 2 U.S.C. § 437f(c)(1)(A), and by "any person involved in any specific transaction or activity which is indistinguishable" from the transaction or activity the opinion addresses. 2 U.S.C. § 437(c)(1)(B).

[19] For example, in FEC Advisory Opinion 1981-35, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5619, the Commission held that corporations could make contributions to a committee established by several federal candidates to lobby a state legislature on Congressional reapportionment issues and that such contributions were not required to be reported to the Commission. The Commission there noted that " the broad prohibition [in section 441b] against corporate involvement in the election process was not intended to cover lobbying activity."

candidates to support such non-express advocacy communications, there is no logical reason why corporations and unions may not also coordinate their own communications on the same topics with those candidates. Second, FEC Opinions have consistently held that corporations and unions may, without violating section 441b(a), coordinate with a federal candidate in arranging and supporting events attended by the candidate if the events do not include express advocacy of the candidate and campaign funds are not solicited at the event.[20] It follows that corporations and unions may also engage directly in non-express advocacy communications whether or not they are coordinated with a federal candidate.

Similarly, in FEC Advisory Opinion 1982-14, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5655, the Commission held that corporations could contribute funds to a political party committee to support its efforts to influence the state legislature's Congressional reapportionment plan. This Opinion was issued over the dissent of one Commissioner who argued that a party's efforts concerning Congressional reapportionment fell clearly within the prohibition of section 441b against corporate and union contributions and expenditures to influence federal elections, the same provision relied on by the FEC in this case. See also FEC Advisory Opinion 1984-57, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5799 ("[l]obbying activity in general is exempt from the Commission's jurisdiction."); FEC Advisory Opinion 1980-95, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5547 (holding that FECA's prohibition against state or federal action activity by national banks does not prohibit bank's contribution to a fund established by state Governor to promote adoption of ballot measure being considered by voters at same time as election for state, local and federal offices.).

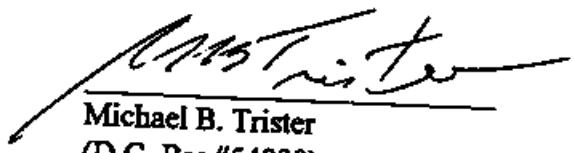
[20] E.g., FEC Advisory Opinion 1996-11, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6194 (nonprofit advocacy corporation may reimburse federal candidate's expenses to attend its convention where candidates' speeches addressing issues in campaign did not expressly advocate candidates' election); FEC Advisory Opinion 1992-6, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6043 (nonprofit educational corporation could pay honorarium to Presidential candidate where speech delivered a month before primary election would not contain express advocacy). The Commission's position in these cases was upheld in Orloski v. F.E.C., 795 F.2d 156 (D.C.Cir. 1986) (finding no violation of section 441b(a) where corporations provided in-kind support for picnic sponsored by candidate so he could discuss senior citizens issues with his constituents).

Conclusion

Without the protection afforded by the "express advocacy" test, citizens and labor organizations of every political stripe will be severely constrained in their ability to speak out on policy issues of concern to their members and to the public. Since the FEC concedes that the Christian Coalition's voter guides and similar communications did not expressly advocate the election or defeat of any federal candidate, the Commission's claims for relief under FECA § 441b(a) with respect to those communications should be dismissed.

September 28, 1998

Respectfully submitted,



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