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Attached, please find the comments of Alliance for Justice.

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September 30, 2005

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

RE: Federal Election Commission Notice of Proposed Rulemaking 2005-20: Electioneering Communications

Dear Ms. Dinh:

Alliance for Justice welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking (NPRM) issued on August 24, 2005.¹ We request the opportunity to testify in person before the Federal Election Commission (Commission) when it holds a hearing on these proposed regulations.²

Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to policy processes. Most of Alliance for Justice's members are charitable organizations that receive tax exemption under Section 501(c)(3) of the Internal Revenue Code. A significant number of our members also work with or are affiliated with social welfare and advocacy organizations that engage in political activity.

After three years of litigation and ongoing debate, the Commission has returned to the question of whether it should exempt 501(c)(3) organizations from the definition of "electioneering communications" pursuant to its authority granted by Congress.³ Alliance for Justice asserts, as it did in the Commission's original electioneering communication rulemaking in 2002, that exempting 501(c)(3)s is entirely consistent with the goals of the Bipartisan Campaign Reform Act (BCRA)

¹ Federal Elections Commission Notice of Proposed Rulemaking on Electioneering Communications, Notice 2005-20, 70 Fed. Reg. 49508 (August 24, 2005) ("NPRM").

² If Alliance for Justice is invited to testify, Senior Counsel Tim Mooney will present our testimony.

³ 2 U.S.C. 434(f)(3)(B)(iv).

and is good public policy.⁴ When it passed BCRA, Congress granted the Commission the full authority to promulgate a blanket exemption for legally operating 501(c)(3) organizations. The comments that follow will address the Commission's statutory authority to promulgate a 501(c)(3) exemption, why 501(c)(3)s should be exempt from the definition of electioneering communications, and a discussion of some of the alternative rulemaking options.

I. THE COMMISSION HAS THE AUTHORITY TO EXEMPT 501(c)(3)s FROM THE DEFINITION OF ELECTIONEERING COMMUNICATIONS.

A. Congress delegated exemption authority to the Commission.

The statutory definition of electioneering communications includes broadcast advertisements that feature the name or likeness of a federal candidate and are broadcast to a targeted audience within 30 days of a primary or convention or within 60 days of a general election.⁵ Congress delegated to the Commission the authority to create exemptions to this definition.⁶

It is important to underscore, as the Commission does in the NPRM,⁷ that the decision in *Shays v. FEC* does not preclude the Commission from considering a blanket exemption for 501(c)(3) organizations under the definition of "electioneering communications."⁸ The District Court in *Shays* based its decision on a procedural analysis from *Chevron v. NRDC*⁹ and the Administrative Procedures Act (APA)¹⁰ – the court did *not* address the substantive issue of whether the 501(c)(3) exemption was permissible pursuant to BCRA.¹¹ Since this provision was not included in the Commission's appeal, the DC Circuit Court did not address the issue when it affirmed other aspects of the lower court ruling. In *McConnell v. FEC*, the only other major case interpreting BCRA, the U.S. Supreme Court did not address the Commission's authority to promulgate a 501(c)(3) exemption.¹² Subject to the exemption provisions of BCRA and the procedural requirements of the APA,¹³ the Commission retains the authority to promulgate a blanket 501(c)(3) exemption.

The Commission's authority to promulgate exemptions is limited to communications that do not promote, attack, support, or oppose (PASO) a candidate for federal office.¹⁴ The definition of PASO is a critically important element that determines the scope of the Commission's exemption authority. However, Congress did not define PASO in BCRA, nor has Congress provided a definition in the time since passage of BCRA. In addition, no court has defined PASO or offered any helpful guidance on its meaning. Therefore, Congress has effectively tasked the

⁴ Comments of Alliance for Justice, Federal Election Commission Notice of Proposed Rulemaking 2002-13: Electioneering Communications (August 21, 2002).

⁵ 2 U.S.C. 434(f)(3)(A).

⁶ *Supra* note 3.

⁷ NPRM at 49509-49510.

⁸ 337 F. Supp. 2d 28, (D.D.C., 2004), *aff'd* 414 F.3d 76 (DC Cir. 2005).

⁹ 467 U.S. 837 (1984) (*Chevron*).

¹⁰ 5 U.S.C. § 706(2).

¹¹ *Shays*, 337 F. Supp. 2d at 127-8.

¹² 540 U.S. 93 (2003) (*McConnell*).

¹³ 2 U.S.C. 434(f)(3)(B)(iv); 5 U.S.C. 706(2).

¹⁴ 2 U.S.C. 434(f)(3)(B)(iv) citing 2 U.S.C. 431(20)(A)(iii).

Commission to interpret the boundaries of its own exemption authority. The Commission's interpretation of this statutory limitation on its exemption authority is critical to this rulemaking.

B. The PASO limitation does not preclude the Commission from promulgating a 501(c)(3) exemption.

The omission of a statutory definition for PASO has sparked a debate over what the terms "promote," "attack," "support," and "oppose" mean, particularly in the context of this rulemaking. Some argue that the PASO limitation on the Commission's exemption authority blocks it from drafting a blanket 501(c)(3) exemption. Alliance for Justice asserts that this interpretation ignores the plain language of the exemption authority and assumes that Congress would ignore fundamental free speech protections in the Constitution.

1. PASO must be contextually applied.

The Commission essentially faces two choices in determining how PASO limits its authority. The first choice is that PASO is applied in absolute terms, regardless of context. Under this theory, if someone is a federal candidate and a communication PASOs that person within the electioneering communications parameters, the Commission may not exempt any class of communications that might include such a communication. The second is that PASO is contextual, meaning that the Commission may not exempt a communication that PASOs a person *in the context* of his or her role as a federal candidate. This choice does, however, allow for the Commission to exempt communications that PASO a person in the context of legitimate grassroots lobbying or for appearing in a public service announcement unrelated to the person's candidacy. This is because the PASO limitation is directed at candidates, not legislators or community leaders.¹⁵ The latter contextual approach is analogous to the political intervention standard found in the Internal Revenue Code¹⁶ in that it captures all activity that supports or opposes candidates but does not preclude non-electoral related activity.¹⁷ This is familiar territory for the Commission, as it often analyzes the context of communications, most notably when enforcing the coordination provisions of the Federal Election Campaign Act (FECA). Alliance for Justice subscribes to the contextual approach and strongly encourages the Commission to do the same.

¹⁵ 2 U.S.C. 431(20)(iii).

¹⁶ 26 U.S.C. 501(c)(3); 26 C.F.R. 1.501(c)(3)-1. See also, Judith E. Kindell & John F. Reilly, *Exempt Organizations Continuing Professional Technical Instruction Program for Fiscal Year 2002*, "Election Year Issues" (2001) at 410-1.

¹⁷ Alliance for Justice compares PASO with the tax code definition of campaign intervention here as a part of a frame of reference for the discussion of the Commission's authority to promulgate exemptions, not as a suggestion for the definition of PASO. The more stringent restrictions on election-related activities by 501(c)(3)s are imposed as a condition of the recognition of the organizations' tax-exempt status. Courts have ruled that the voluntary choice by an organization to seek tax-exemption under 26 USC 501(c)(3) with the concomitant restrictions on the organization's activities reduces the First Amendment concerns that would otherwise arise when the government seeks to restrict core political speech. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143-144 (D.C. Cir. 2000)(rejecting First Amendment challenge to revocation of tax exemption for partisan political activity because government may refuse to subsidize political speech). See also *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) ("legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny").

Our reasoning is based on a common-sense analysis of the constitutional limits of BCRA – or more to the point – where Congress’s authority to regulate electioneering communications ends. Congress has limited authority to pass laws that impact political speech.¹⁸ *Buckley v. Valeo* and its progeny have held that Congress may pass laws that regulate campaign finance so long as the laws are narrowly tailored to address the compelling interest of “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”¹⁹ Congress does not have the authority to pass laws that regulate speech that fails to meet this high and exacting standard. Simply stated, Congress has no authority to limit speech when that speech does not corrupt or create the appearance of corruption of the campaign finance system. BCRA’s electioneering communications provisions addressed the concern over issue ads that Congress felt were contributing to corruption or the appearance of corruption in federal elections. However, in drafting the language of the statute, Congress chose broad language that captured a variety of communications that were unrelated to federal elections and are, therefore, beyond its power to regulate.²⁰ These communications include lobbying communications, public service announcements, and any other category of speech that does not corrupt or risk the appearance of corrupting the federal election system.

By granting the Commission the specific authority to exempt communications that fall within the electioneering communications definition, but outside of Congress’s authority to regulate speech, Congress may have solved the overbreadth problem. Had Congress not included this exemption authority, we assert that the definition would have remained unconstitutionally overbroad. The caveat to the exemption authority is that the communications could not PASO a federal candidate. Assuming – as we must – that the limitation is consistent with *Buckley* and *McConnell*, “PASO a candidate” cannot be read to limit the Commission’s authority to exempt communications that do not corrupt or risk the appearance of corrupting the federal election system. In other words, “PASO a candidate” must be read to allow the Commission, in every circumstance, to exempt any communication captured in the electioneering communication definition that is beyond the power of Congress to regulate.

A rigid reading of PASO would provide federal officeholders who are running for reelection a significant shield from public accountability for their legislative actions. It would defy common-sense for Congress to grant exemption authority that prohibits the Commission from exempting activity that is completely unrelated to a federal election. A contextual application of PASO is the only viable alternative.

¹⁸ *Buckley v. Valeo*, 424 U.S. 1 (1976); U.S. Const. amend I.

¹⁹ *Buckley*, 424 U.S. at 25. See also *Federal Election Comm’n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981).

²⁰ *McConnell* did not hold the broad scope of the electioneering communications definition to be facially defective; however, the Supreme Court recently agreed to hear the appeal of *Wisconsin Right to Life v. FEC*, No. 04-1581, in an as-applied challenge to the inclusion of legitimate grassroots lobbying in the definition.

2. 501(c)(3) organizations do not PASO federal candidates.

McConnell held that the constitutional basis for allowing regulation of electioneering communications is that they were the “functional equivalent of express advocacy.”²¹ A 501(c)(3) organization is already prohibited from making any communications that rise to that standard. During the Commission’s original rulemaking on this issue, Alliance for Justice testified that 501(c)(3) organizations *do not* engage in activity that even remotely promotes, attacks, supports, or opposes candidates.²² The federal tax code states that nonprofits organized under IRC Section 501(c)(3) may never “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”²³ This prohibition against political intervention includes all candidates at all levels of government (i.e., federal, state, and local) and includes all activity in any form (i.e., broadcast and print).²⁴ In fact, the existing federal tax law and IRS regulations governing 501(c)(3) organizations prohibit even communications that fall far short of the Commission’s previous interpretations of express advocacy.²⁵

Since 501(c)(3) organizations are absolutely prohibited – *as a requirement of their legal existence as tax-exempt entities* – from engaging in or funding any activity that even implies support for or opposition to any candidate for public office at every level of government, 501(c)(3)s are already held to a statutory and regulatory standard that is both consistent with and more prohibitive than the goals, intent, and statutory language of BCRA.

3. The Commission has already gone further in exempting Qualified Nonprofit Corporations for similar constitutional reasons.

Even without the benefit of the gloss we suggest here for PASO, the Commission has already exempted an entire class of organizations from electioneering communications enforcement based on a constitutional rationale similar to the one we raise here in the 501(c)(3) context. In *FEC v. Massachusetts Citizens for Life*, the Supreme Court held that constitutional guarantees of free speech trumped regulation of certain forms of organizations.²⁶ As a result, the Commission promulgated regulations that defined a class of qualified nonprofit corporations (QNCs) and exempted them from the prohibitions on independent expenditures.²⁷ Post-BCRA, the Commission also exempted QNCs from the ban on electioneering communications.²⁸

The QNC exemption is additional proof that the PASO limitation must be viewed through a constitutional prism. A QNC organization, by its very nature, makes public communications

²¹ *McConnell*, 540 U.S. at 206.

²² *Supra* note 3.

²³ 26 U.S.C. 501(c)(3).

²⁴ *Supra* note 16.

²⁵ See “Election Year Issues” *supra* note 15 at 352, citing *US v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981); *Association of the Bar of New York v. Commissioner*, 858 F.2d 876, 881 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).

²⁶ 479 U.S. 238, 265 (1986).

²⁷ 11 C.F.R. 114.10.

²⁸ 11 C.F.R. 114.10(d)(2).

containing express advocacy. There is no question that these communications PASO a candidate. Yet, despite the PASO limitation, the Commission wisely chose to exempt QNCs from regulation under the electioneering communications provisions of BCRA.²⁹ As we stated earlier, by leaving PASO undefined Congress effectively tasked the Commission to interpret the boundaries of its own exemption authority. Because the Commission passed a full QNC exemption, it presumably determined that its authority allows it to exempt classes of communications that, if they remained under the electioneering communications definition, would lead to an unconstitutional result. In other words, the QNC precedent shows that the Commission may utterly ignore the PASO limitation to exempt an entire class of organizations if the constitution demands it.

In the case of an exemption for 501(c)(3)s, the choice is even easier because the Commission need not flout the statutory language to reach the constitutionally necessary result. As a class, 501(c)(3)'s communications do not corrupt or contribute to the appearance of corruption of the campaign finance system and are, therefore, outside of Congress's ability to regulate in the federal election law context. Leaving 501(c)(3)s subject to the electioneering communications definition would be an unconstitutional result. Because of this, the Commission, as demonstrated above, is not constrained by the PASO limitation. It may – indeed, it must – exempt 501(c)(3)s.

II. THE COMMISSION SHOULD EXEMPT 501(c)(3)s FROM THE DEFINITION OF ELECTIONEERING COMMUNICATIONS.

A. IRS enforcement of federal tax law does not preclude the Commission's enforcement of federal election law.

Since IRS enforcement data is not available for public review or analysis,³⁰ we are unable to prove with numbers what we know through experience – that the overwhelming majority of 501(c)(3)s strictly comply with the tax law prohibition against intervention in a campaign. Some suggest that there is a reason to doubt that tax law prohibitions will guarantee compliance. We disagree.³¹ In addition to the rigid rules of tax law, the IRS employs a rigorous enforcement program and has authority to hand down harsh penalties for violations. 501(c)(3) organizations found by the IRS to have engaged in prohibited political intervention face immediate loss of tax-exempt status and may additionally be subject to an excise tax.³² Nonetheless, we recognize that the Commission is the proper enforcement authority for BCRA.

²⁹ Curiously, the *Shays* plaintiffs challenged the 501(c)(3) exemption but did not choose to litigate the QNC exemption.

³⁰ “Our obligation is to enforce the law, which prohibits all charities from engaging in political activities... By law, the Internal Revenue Service cannot comment regarding any compliance activities involving specific tax-exempt organizations.” IRS Commissioner Mark W. Everson, available at <http://www.irs.gov/newsroom/article/0,,id=130652,00.html> (last visited September 30, 2005).

³¹ The burden is rightfully on those that would regulate constitutionally protected speech to prove that the record demonstrates 501(c)(3) noncompliance. As we have noted, the record does not support that.

³² The penalty for a 501(c)(3) intervening in a campaign is severe under tax law. See *Branch Ministries*, *supra*, 211 F.3d 137. Under the tax code, 501(c)(3) organizations that participate or intervene in an election not only face immediate revocation of tax-exempt status, but also substantial excise taxes on the electioneering activity and personal liability to managers of an organization that knowingly violate the prohibition. 26 U.S.C. 501(c)(3) and 26

The District Court in *Shays* held that the Commission did not properly address “the implications of allowing the IRS ‘to take the lead in campaign finance law enforcement.’”³³ As we have previously argued, we do not believe that a 501(c)(3) exemption abdicates BCRA enforcement authority to the IRS.³⁴ In the extremely unlikely event that a 501(c)(3) would risk its tax-exempt status and submit its managers to personal liability by “intervening in a campaign” with a broadcast advertisement within the 30 or 60 day windows, the activity should not be protected by a 501(c)(3) exemption. This would mean that a 501(c)(3) corporation that fails to comply with tax law will simultaneously be making an illegal corporate contribution under FECA.³⁵ This subjects the offending organization to enforcement by both the IRS under tax law and the Commission under federal election law.

B. The Congressional record does not support application of electioneering communications to 501(c)(3) organizations.

In passing BCRA, Congress relied almost exclusively on one study, *Buying Time 2000: Television Advertising in the 2000 Elections*, as the basis for passing the electioneering communications provisions.³⁶ The *Buying Time* report analyzed broadcast advertisements made in the top media markets in the country during the federal election immediately preceding passage of BCRA.³⁷ The study concluded that the majority of advertisements that were analyzed were made for the purpose of “generating support or opposition for political candidates.”³⁸ This conclusion was used by BCRA’s supporters to convince members of Congress that interest group advertising was out of control and is often cited as definitive proof of the need for the electioneering communications provisions, even for 501(c)(3) organizations.³⁹ However, this

C.F.R. 1.501(c)(3)-1; 26 U.S.C. 4955. The IRS has additional authority that allows it immediately to enjoin flagrant violators from continuing in their illegal activities. 26 U.S.C. 7409(b)(2). The IRS has also recently implemented the Political Intervention Project (“PIP”), which amounts to an even more aggressive approach to enforcing the campaign intervention prohibition. See Pamela J. Gardiner, Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations (February 17, 2005), available at <http://www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf> (last visited September 30, 2005). See also Letter of Steven Miller, IRS Commissioner (June 10, 2004), available at http://www.irs.gov/pub/irs-utl/eo_letter.pdf (last visited September 30, 2005).

³³ NPRM at 45910, quoting *Shays*, 337 F. Supp. 2d at 128.

³⁴ Alliance for Justice Memorandum of Amicus Curiae, *Shays v. FEC*, Civil Action No. 02-1984 (March 5, 2004).

³⁵ Electioneering communications paid for using corporate funds are considered illegal contributions under BCRA. BCRA amended the definition of the term “contribution or expenditure” to include “any applicable electioneering communication.” 2 U.S.C. § 441b(b)(2). It is “unlawful... for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with” certain federal elections. 2 U.S.C. § 441b(a). See *McConnell*, *supra*, 124 S. Ct. at 695 n.87 (2003).

³⁶ Brennan Center for Justice, *Buying Time 2000* (2002). This was a companion to a report on the prior election cycle, *Buying Time 1998* (2000).

³⁷ See Amended Expert report of Kenneth M. Goldstein in *McConnell v. FEC*, Civil Action No. 02-582 (2002).

³⁸ *Supra* note 36 at 26.

³⁹ Craig Holman, a senior policy analyst at the Brennan Center and the principal co-author of *Buying Time 2000* stated that the Brennan Center played a “central role” in the adoption of BCRA through the *Buying Time 2000* report and through direct contact with legislators. See *McConnell*, 251 F. Supp. 2d 176 at 307 (Henderson, J).

report did inquire as to tax-exempt status, according to Kenneth Goldstein, one of the authors of the study.⁴⁰

Buying Time offers absolutely no evidence that 501(c)(3) organizations purchased broadcast ads for the purpose of supporting or opposing political candidates. Of the 35 independent groups⁴¹ identified as having aired electioneering ads, only one – Federation for American Immigration Reform (FAIR) – could be identified as being organized under Section 501(c)(3) of the Internal Revenue Code.⁴² Their advertising was one of the smallest air buys included in the study.⁴³

The nature of the FAIR advertisement was wholly different than most of the other advertisements by the studied groups. We analyzed the transcript of the radio ad, assuming the copy was identical to the televised version that was part of the *Buying Time* study. The text of the ad clearly shows that the target of the advertisement was not a federal candidate but active federal legislation that was pending a vote before Congress.⁴⁴ Yet this single advertisement serves as the sole basis of support for including 501(c)(3) organizations in the electioneering communications regime. In our view, the ad provides insight to the different nature of 501(c)(3) communications in comparison to non-501(c)(3)s – the 501(c)(3) ad has a direct and unambiguous reference to legislation that completely negates the argument that it is aimed at impacting the federal election. BCRA has subjected 501(c)(3)s to the same standard as non-501(c)s without any evidence that 501(c)(3)s do anything except exercise their fundamental right to lobby on clearly defined legislation. We believe that this is a compelling reason for the Commission to adopt a broad exemption.

The Commission has asked whether section 501(c)(3) organizations have a history of airing ads close to elections, particularly those that satisfy the definition of electioneering communications. Past data is not available to Alliance for Justice, and we are unable to speculate how many specifically intend to broadcast advertisements in the future. However, we can safely say based on our experience working with the 501(c)(3) community that the failure to exempt 501(c)(3)s from the electioneering communications definition will almost certainly stop 501(c)(3)s from airing *any* broadcast ads in an election year for fear of violating the electioneering communications rule. Instead, 501(c)(3)s will self-censor their communications out of fear that even a perfectly legal communication could be construed as illegal. Even if only a handful of organizations take this approach, the cost of BCRA would be too high.

⁴⁰ Alliance for Justice's Liz Towne spoke with Professor Goldstein in preparation for these comments.

⁴¹ The *Buying Time* study analyzed three types of players in federal elections: federal candidates, political parties, and independent groups. As used in the report, "the term 'groups' includes individuals, organizations, corporations, labor unions, and PACs." *Supra* note 36.

⁴² *Supra* note 37.

⁴³ *Id.* at 15.

⁴⁴ "This is an urgent message about our jobs. Senator Spence Abraham is again pushing a bill to import hundreds of thousands more foreign workers to take American jobs—our jobs. Recently Abraham killed the requirement that employers hire Americans first. He clearly thinks it's OK to favor foreign workers. Why treat Americans so badly? Money. Abraham has raised big political money from huge corporations that want cheap, foreign labor. And his newest bill gives them everything they want. Is your job next? Let's try to convince Abraham not to sell our jobs. **His bill could be voted on any day.** So call now: 1-800-xxx-xxxx. That's 1-800-xxx-xxxx. **Tell him you've had enough of his big foreign labor bills, like S. 2045.** This message sponsored by the Federation for American Immigration Reform. Visit our website at fairUS.org." NPRM at 49510 (emphasis added).

C. The record of the Commission's previous rulemaking supports a 501(c)(3) exemption.

There is no record of any 501(c)(3) advertisements that PASO a candidate. Examples that have been cited to the contrary are most frequently PASOing a legislator, not a candidate and are therefore fully exemptable.

The only cited example of an advertisement offered as proof that 501(c)(3)s PASO candidates is the aforementioned FAIR ad. The FAIR ad is a legitimate grassroots lobbying communication, protected under the First Amendment and permissible under 501(c)(3) tax law. While it may be true that the advertisement PASOs Senator Abraham as a legislator, it does not PASO him as a candidate. This is a distinction with a difference, and it marks a dividing line between the ads that were the target of electioneering communications regulation and legitimate, protected speech.

The Commission makes a false distinction when it contrasted Alliance for Justice's previous testimony with that of Southeastern Legal Foundation (Foundation).⁴⁵ In the current NPRM, the Commission states that the Foundation "stated that it does engage in issue advocacy that includes broadcast advertisement that refer to candidates and officeholders, and implied that these advertisements may well PASO a candidate."⁴⁶ This overstates the Foundation's position in its written comments, and only reveals the confusion over what PASO means. In reviewing the comment cited in the NPRM,⁴⁷ Alliance for Justice finds no evidence in the Foundation's 2002 testimony that supports the NPRM's conclusion that the Foundation "implied" that its advertisements PASO a candidate. The Foundation stated that it engaged in issue advocacy and that any broadcast advertisements that mentioned federal officeholders were because of their role as legislators, not because they were candidates.⁴⁸ This is a legitimate activity for a 501(c)(3) organization that is beyond the scope of BCRA to regulate.

Even if the NPRM's statement were true and the Foundation had implied its ads PASO a candidate while engaging in legitimate issue advocacy, it would only support the argument that the undefined terms "promote, support, attack or oppose" are vague standards that have not been properly defined by Congress or the Commission and cannot be applied directly to the regulated community. We continue to assert that "PASO of a candidate" does not include communications like the Foundation's ads.

We urge the Commission to recognize that the record is devoid of evidence that 501(c)(3)s engage in broadcast advertisements that PASO federal candidates. Neither the legislative record before Congress nor the notice and comment record before the Commission shows any support

⁴⁵ NPRM at 49510.

⁴⁶ *Id.*

⁴⁷ Comment submitted by Southeastern Legal Foundation, Inc., available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/se_legal_foundation.pdf (last visited September 30, 2005).

⁴⁸ *Id.* at 2.

that 501(c)(3) advertisements are of the same character and scope as the issue ads studied in *Buying Time* that were broadcast by non-501(c)(3)s. The Commission must consider *the lack of a record* as a compelling reason to exempt 501(c)(3)s. Including the legitimate advocacy activity of 501(c)(3) organizations in the electioneering communication definition is both unnecessary and unconstitutional. In order to regulate speech, the record needs to demonstrate speech that corrupts or promotes the appearance of corruption. As far as 501(c)(3)s go, the record is bare on this point.

D. A 501(c)(3) exemption is good public policy.

Alliance for Justice has previously commented on the myriad reasons why it would be good public policy to exempt 501(c)(3)s from the electioneering communications definition.⁴⁹ Most importantly, 501(c)(3) organizations play a unique and essential role in the policy process. 501(c)(3)s traditionally serve constituencies and issues that have a limited voice in the policy process at all levels of government. As representatives of those constituencies, 501(c)(3)s are frequently the only voices in a community that address important issues such as homelessness, poverty, child welfare, resource conservation, and curing specific diseases. 501(c)(3) public charities are, by law, organized to serve the public interest with a prohibition against private benefit – making it even less likely that the policies promoted by 501(c)(3)s will be guided by political motivation rather than sound policy rationales driven by their charitable purpose.⁵⁰ This representative role, unique knowledge, and clear vision are just a few of the reasons why policymakers look to the nonprofit sector for leadership on policy priorities and advocacy.

The question the Commission should ask when considering whether 501(c)(3)s should be regulated under the electioneering communications provision of BCRA is what types of communications will be forfeited, rendered ineffective, or outright banned by such a rule? In this light, consider two examples cited in the NPRM:

1. FAIR aired a grassroots lobbying campaign, asking constituents to contact their Senator regarding a specific piece of legislation. The ad clearly identified a specific bill number and issue, and did not mention elections, candidacies or opponents.⁵¹
2. The National Kidney Foundation aired a public service announcement (PSA) promoting its fundraising golf tournament benefiting kidney disease research, featuring a local Congressman and a sports anchor, urging people to support the tournament and make life better for Washington, DC-area kidney patients.⁵²

Both of these advertisements run the risk of being subsumed by the definition of electioneering communications despite the fact that their regulation would serve no purpose in protecting the campaign finance system from corruption or the appearance of corruption. Such regulation

⁴⁹ *Supra* note 4.

⁵⁰ 26 U.S.C. 501(c)(3); 26 C.F.R. 1.501(c)(3)-1(d)(1)(ii); *see also Better Business Bureau Of Washington, D. C., Inc. v. United States*, 326 U.S. 279 (1945).

⁵¹ FAIR, *supra* note 44.

⁵² National Kidney Foundation, NPRM at 49511.

would only stifle public dialogue about important issues and restrain promotion of the socially beneficial efforts of public charities. These are precisely the types of communications the Commission should exempt.

Alliance for Justice works with hundreds of 501(c)(3)s every year, helping these groups to understand the federal tax and election laws that govern their advocacy activities. Based on our experience and conversations with these organizations, we believe 501(c)(3)s would be dramatically less likely to broadcast *any* communications, PSAs, or educational projects if they are not wholly exempted from the regulation of electioneering communications. 501(c)(3) organizations are already hesitant when conducting legitimate issue advocacy and broadcasting PSAs during elections under existing IRS prohibitions and penalties.⁵³ However, a piecemeal approach that exempts some communications but not others is an inadequate solution. Failure to exempt 501(c)(3)s as a class will almost certainly drive them away from the good work they can accomplish. Alliance for Justice believes that, as a matter of policy, sacrificing a charitable golf tournament ad is too steep of a price to pay for a nonexistent campaign finance benefit.

III. ALTERNATIVE RULEMAKING OPTIONS

A. “No-PASO” Exemption

In the current NPRM, the Commission asks whether it would be preferable to take maximum advantage of its authority under BCRA and exempt all communications that do not PASO a candidate. While this would presumably be the easiest method, and theoretically offers the most expansive safe harbor that the Commission can legally authorize, the reality is that this solution would be worthless to the regulated community. Such an exemption would include 501(c)(3)s, since 501(c)(3)s do not PASO federal candidates; however, 501(c)(3)s are reticent to act without firm protection under the law. As a result, Alliance for Justice believes that few, if any, 501(c)(3) organizations would take advantage of such a broad “no-PASO” exemption. Such an exemption would ultimately prove to be only marginally superior to no exemptions at all. With no definition of PASO, no organization would tempt fate and air an advertisement during the 30 or 60 day windows.

PASO of a federal candidate is not a sufficiently self-executing standard to use as an exemption. There is no consensus on what PASO specifically means, so it would be an inadequate standard to foist upon the regulated community. PASO’s precise definition in this context is not necessary to exempt 501(c)(3)s because we assert that any communication that complies with the strict tax prohibitions do not PASO.⁵⁴ Given the debate amongst the many commenters on the definition of PASO, it is not likely that the general public would have any more wisdom on the matter. Worse yet, the safe harbor of communications that do not PASO a candidate would be defined mainly by enforcement actions conducted by the Commission. This would, at minimum,

⁵³ See previous comments of Alliance for Justice, *supra* note 4 at 3-4. In addition to the threat of tax status revocation at 26 C.F.R. 1.501(c)(3) and personal liability for managers at 26 USC 4955, the IRS PIP has heightened enforcement of campaign intervention prohibition. *Supra* note 32.

⁵⁴ See Elizabeth Kingsley & John Pomeranz, A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations, 31 Wm. Mitchell L. Rev. 55-118 (2004).

drive our members and other 501(c) organizations to spend precious resources on legal fees to provide certainty. It would be more likely that these groups will simply not air broadcast communications for fear that they would somehow not qualify for the no-PASO exemption. No rational organization would purchase ad time that simultaneously ensures legal expenses associated with defending an enforcement action.

In order for a no-PASO exemption to be effective, the Commission would have to reverse course and provide a useful definition beyond the oft-repeated words, “promote, attack, support, or oppose a candidate.” Alliance for Justice believes that this would require a new rulemaking, as the Commission only asked whether the lack of a definition of PASO was sufficient, and did not specifically ask for public comment on how PASO should be defined if used as a standard for an exemption.⁵⁵ The Commission must offer much more than an undefined subjective standard or it will merely trade one ambiguous definition for another. The regulated community needs something that it can easily understand, otherwise it will choose not to act rather than grasp at vapor.

If drafting a reasonable definition of PASO is not possible, then the Commission must provide clarity in the form of well-drafted safe harbors that conform to its authority under BCRA. This should include activity such as unpaid PSAs and lobbying activity. We believe that the no-PASO exemption should not replace consideration of the 501(c)(3) exemption as they are not mutually exclusive options.

B. “Permissible Lobbying” Exemption

The Commission should consider an additional exemption for legitimate lobbying activity. We conclude that the Commission has the authority to promulgate a limited exemption for lobbying activity where a communication is clearly referring to active or pending legislation. An organization may promote, attack, support or oppose (not the same as PASO here) legislation or a legislator in such a communication, but it does not PASO a candidate in the communication, which is the standard which Congress set for the Commission. Congress is constitutionally prohibited from passing a law that would restrict or inhibit lobbying activity since lobbying does not contribute to corruption or the appearance of corruption of the campaign finance system. We recognize that this exemption would cover more than just 501(c)(3) organizations, however we also believe that that does not alter the constitutional issues at play. Alliance for Justice contends that this exemption could be written as a safe-harbor clarifying a larger no-PASO exemption, or merely as a stand-alone exemption for all corporations. We do not believe, however, that this is a proper substitute for the larger 501(c)(3) exemption.

IV. CONCLUSION

Congress has granted the Commission limited but sufficient authority to promulgate a blanket exemption to 501(c)(3)s from the electioneering communications regulations. Alliance for Justice is confident that the record before the Commission will allow it to properly consider and construct the exemption to satisfy its obligations under the law. Because Congress has limited

⁵⁵ NPRM at 49513.

authority to regulate speech in the context of campaign finance, we believe that the Commission is within its authority to exempt 501(c)(3) organizations from BCRA's electioneering communications regime. These organizations are structurally incapable under the law from promoting, attacking, supporting, or opposing candidates, and an exemption is not only legally permissible, but practical from a policy standpoint as well. We strongly urge the Commission to draft exemptions that are clear and understandable. A blanket 501(c)(3) exemption is best, and we believe that some additional safe harbor exemptions for lobbying and public service announcements are advisable. We do not support a blanket PASO exemption, and we suggest that the APA would require a second rulemaking to define PASO. We look forward to the hearing on the matter and hope to provide the Commission with further information to supplement the record in this matter.

Sincerely,

Nan Aron
Alliance for Justice