UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CHRISTOPHER SHAYS & MARTIN MEEHAN,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 02-1984 (CKK)

BRIEF *AMICUS CURIAE* OF OMB WATCH

Robert F. Bauer (Bar No. 938902)
PERKINS COIE LLP
607 14th Street NW
Suite 800
Washington, DC 20005
(202)628-6600

DATE: March 22, 2004

Perkins Coie LLP
607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

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607 14th Street, Suite 800
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Phone: (202)434-1690

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

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This brief *amicus curiae* is submitted on behalf of OMB Watch.

I. INTERESTS OF AMICUS

A. Description of OMB Watch

OMB Watch is the operating name of Focus Watch, Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society.

OMB Watch's primary focus areas are the federal budget, regulatory issues, nonprofit advocacy; right-to-know, or impacting economic justice, health, safety, and the environment. OMB Watch's 17-person, $1.7 million organization has had a significant impact. Over the years, it has played a leadership role on important federal policies, including regulatory

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

reform measures, balanced budget constitutional amendments, the repeal of the estate tax, attacks on nonprofit advocacy, and advancement of the public's right-to-know, particularly information concerning the release of toxic chemicals. On average, nearly 90% of its revenue comes from foundations, often in the form of project grants.

In order to be effective, OMB Watch must react quickly and flexibly to emerging policy debates, and must to be able to shift from planned agenda items to unplanned ones. It often works through coalitions, and it places a high value on bridging the gap between Washington and the grassroots level and energizing citizens at the community level. The coalitions OMB Watch leads connect it to scores of umbrella groups and national membership associations. They, in turn, distribute OMB Watch's materials to thousands of their respective constituents around the country.

B. Interest in the Case

OMB Watch and its coalition partners of nonprofit organizations depend greatly on free media efforts to spread their messages. Because they cannot afford to pay for television advertisements, they rely on the broadcasters' willingness to provide unpaid access. Access is provided consistent with the broadcasters' legal obligation to operate in the public interest. OMB Watch and its coalition partners also hold press conferences or other informational events, some of which have been covered by C-SPAN or local public interest channels. Consistent with its tax status, OMB Watch does not use these occasions to intervene in political campaigns. Nevertheless, in the course of a typical broadcast there will be regular references to clearly identified officeholders who may also be candidates for federal office. In fact, given the nature of the organization, it would practically be impossible for OMB Watch to discuss issues of concern without identifying legislators or officeholders who are

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

candidates for federal office. Often the candidate is the sponsor of the legislation discussed or the executive who has initiated the policy debate.

OMB Watch is concerned that if 11 C.F.R. § 100.29(b)(3)(i) is overturned, some or all of these activities cannot escape being considered electioneering communications. Without a regulatory exemption, these broadcasts fall clearly within the definition of an electioneering communication. As a consequence it is unlikely that they will be aired. The result would be that OMB Watch and its coalition partners would be denied a large and important audience with whom it desires to communicate.

II. ARGUMENT

A. Introduction

11 C.F.R. § 100.29 defines "electioneering communication" as a broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office; that is publicly distributed within 60 days before a general or 30 days before a primary election or convention; and that is targeted to the relevant electorate. *Id.* § 100.29(a). The definition is satisfied without regard to the content or context of the reference, even a passing neutral reference meets the definition. It is not necessary that a communication take any position with regard to the candidate's fitness for federal office to qualify as an electioneering communication; purely informative and nonpartisan communications are electioneering communications if a candidate for federal office is clearly identified, even merely in his or her capacity as an officeholder.

The Federal Election Commission has defined "publicly distributed" to mean "aired, broadcast, cablecast or otherwise disseminated *for a fee* through the facilities of a television station, radio station, cable television system, or satellite system." *Id.* § 100.29(b)(3)(i)

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

(emphasis supplied). The phrase "for a fee" "reflected[ed] the Commission's determination that electioneering communications should be limited to paid programming." Final Rules; Electioneering Communications, 67 Fed. Reg. 65,190, 65, 192 (Oct. 23, 2002).

The Commission adopted this exemption for sound and compelling reasons. First, commenters brought to the Commission's attention the statute's impact on "entertainment programming, educational programming, or documentaries," none of which would be excluded from coverage absent a regulatory exemption. *See id.* at 65,193. Second, the Commission determined after reviewing the legislative history that the statutory purpose of the electioneering communications provision was to limit paid political advertisements. "Much of the legislative history and virtually all of the studies cited in legislative history and presented to the Commission in the course of this rulemaking focused on paid advertisements in considering what should be included within electioneering communications." *Id.* at 65,192.

B. Constitutional Avoidance Doctrine

1. Judicial Deference

Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), courts are to defer to an agency's construction of a statute unless "the intent of Congress is clear." *Id.* at 842. When determining the intent of Congress, courts "must first exhaust the traditional tools of statutory construction." *NRDC v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995); *see also Am. Bankers Assoc. v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C. Cir. 2001) ("Although Chevron step one analysis begins with the statute's text, we must not confine [ourselves] to examining a particular statutory provision in isolation . . . we must also exhaust the traditional tools of statutory construction . . . . ") (internal citations omitted).

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

Prominent among the tools of statutory construction is the canon of constitutional avoidance. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988); *see also AFL-CIO v. FEC*, 333 F.3d 168, 183 (D.C. Cir. 2003) (Henderson, J., concurring) (arguing that constitutional limiting principles should be used under the first step of *Chevron*); *Halverson v. Slater*, 129 F.3d 180, 184 (D.C.Cir.1997) ("[i]f employment of an accepted canon of construction illustrates that Congress had a specific intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*.") (emphasis and quotations omitted).

2. Interpretation of the Statute

The Code section, 2 U.S.C. § 434(f)(3), where Congress defines "electioneering communication," did not address whether unpaid communications should be defined as electioneering communications. Without legislative direction, this Court should employ the canon of constitutional avoidance to interpret the statute as either excepting unpaid communications from the definition of electioneering communication, or as not "directly [speaking] to the precise question at issue." *Chevron*, 467 U.S. at 842.

A definition of electioneering communication that did not exempt unpaid communications would be vastly overbroad. Without the "for a fee" requirement, many communications would run afoul of the electioneering definition. Most of these communications will not fit into the exception for "a communication appearing in a news story, commentary, or editorial." 2 U.S.C. § 434(f)(3)(B)(i). While the scope of this

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

exception remains undefined, the McConnell court interpreted it narrowly. "The provision excepts news items and commentary only; it does not afford *carte blanche* to media companies generally to ignore FECA's provisions." *McConnell v. FEC*, 124 S. Ct. 619, 697 (2003).

Plaintiff's support for a broad reading of the news and commentary exception cannot be sustained, if for no other reason than the exception applies *to both paid and unpaid communications*. If the examples discussed below fall under that exception, then nothing would prevent outside groups from paying to air the same communication in the days before an election. Plaintiffs cannot have it both ways: if the "for a fee" language is overturned, then either the described activities can be broadcast both for free and for a fee paid by outside entities, or they cannot be broadcast at all during the proscribed time periods.

a) Public Service Announcements

Absent the Commission's regulation, a public service announcement featuring a federal candidate will be prohibited for sixty days prior to a general election. For example, a public service announcement featuring a Governor who is also a candidate for the United States Senate, announcing a state's response to a natural emergency, would fall under the definition of electioneering communication. So would a public service announcement by that Governor requesting donations of food and blankets to the Red Cross.

These announcements clearly do not fit into the news or commentary exception. Whether produced by a broadcaster or an outside group, such pleas for assistance cannot be shoehorned into any commonly understood meaning of news story, editorial or commentary. In the above example, the Red Cross likely produced the public service announcement and is requesting the donations; the local stations are merely airing it. The Red Cross does not

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

purport to be a member of the press. Furthermore, such announcements may not be reporting at all, as in the case of the donation request. If this is excepted from the definition of electioneering communication because it is news or commentary, then nothing would prevent a large corporation supporting the Governor's Senate campaign from paying television stations to re-air this public service announcement again and again, across the state, in the week before the election to demonstrate to voters the Governor's character.

b) Debates, Press Conferences & Talk Shows

Broadcasts on public service channels would also be captured absent the exemption. For example, unedited coverage of city hall meetings is a common feature on cable television. If a mayor were running for Congress, the cable company would be barred from broadcasting those proccedings in the statutory timeframe. Many community and political groups are afforded free time to promote their organizations on these channels. Again the community or political group's use does not qualify as a news story, editorial, or commentary. Furthermore, if such use were a news story or commentary, a corporation could pay to have announcements of candidate rallies and events aired on television and radio stations.

Other examples are press conferences and debates. For instance, on March 18, 2004, C-SPAN broadcast a debate between the chairs of the Democratic and Republican national committees discussing the relative merits of the two parties' presidential candidates. There is a statutory exception from electioneering communications for candidate debates, *see* 2 U.S.C. § 434(f)(3)(B)(iii), but no exception for other types of debates. The two chairs not only mention clearly defined candidates, but also spent the entire broadcast time promoting their respective candidate and opposing the other candidate.

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607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

This communication is not news or commentary, because it not a commentary by the broadcaster, and because it does not "appear[] in a news story." *Id.* § 434(f)3)(B)(i). If this type of broadcast is properly defined as news or commentary, then nothing prevents a labor union from paying to rebroadcast portions of the Democratic National Committee chair's comments on another, more widely watched station. If the complaint is that both sides of the debate were not aired in the rebroadcast, the labor union could instead rebroadcast portions of the Democratic National Committee's chair speaking alone at another function, also covered on C-SPAN.

These are not abstract issues for OMB Watch. The press conference or panel is a tool OMB Watch often uses to reach out to the public on its issues. For instance, in 2003 OMB Watch co-sponsored a press conference on the estate tax repeal. This press conference was broadcast in its entirety on a radio news service. This press conference did mention federal officeholders, some of whom may have been candidates. OMB Watch plans other panels on the estate tax, some of which are taped for later broadcast. In those circumstances, OMB Watch has no control over the timing of when these panels air.

OMB Watch personnel often participate in talk shows on both radio and television. This is a low-cost and effective way to educate the public on important legislative issues. During these programs, federal officeholders, who may also be candidates, may be referenced in the context of their sponsorship or vote on important issues. Some of these talk shows are not news stories or press commentary, the party commenting is not the broadcaster, but OMB Watch. Again, if these fall in the news and commentary exception, then nothing prevents an outside entity from paying to rebroadcast favorable talk show excerpts.

Perkins Coie LLP
607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

c) Entertainment Programming

Finally, the "for a fee" regulatory exception prevents entertainment programming from being treated as an electioneering communication. For instance, political jokes are occasionally made on comedies airing on national broadcast networks. Movies often have cameos by federal officeholders and candidates. Indeed, even a movie or television show that incorporates images of a candidate, such as a presidential candidate on a television in the background of a scene, could be caught in the spider web as an electioneering communication. These are certainly not all news stories or commentaries.

These types of communications cannot constitutionally be captured by the electioneering communications definition. Defining the statute in such a broad manner would be an affront to the First Amendment. As the Commission noted in the rulemaking process, there was no evidence before Congress that these communications were a danger. There is no legislative or regulatory record to sustain such an obvious infringement on pure speech. The Supreme Court has recognized only "corruption and the appearance of corruption" as permissible bases on which to regulate campaign finance. *McConnell*, 124 S. Ct. at 677. In upholding the electioneering communications provisions of BCRA, the Court spoke solely in terms of "ads". They cited studies in the record before the lower court that only examined paid advertising. For example, one study cited by the Supreme Court tracked spending on issue ads, using data from the Campaign Media Analysis Group estimating the cost of air time for such ads in the top 75 media markets in the United States. In this analysis, all results were framed in terms of spending. *See* ANNENBERG PUBLIC POLICY CENTER, ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE 3 (2001); *McConnell*, 124

Perkins Coie LLP
607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

S. Ct. at 651 n.20 (citing the Annenberg report). This study did not attempt to analyze unpaid broadcasts.

Without the requisite evidence that unpaid communications pose a threat of corruption or the appearance of corruption, the statute cannot constitutionally encompass and restrict these activities.

C. Reasonable Interpretation of the Statute

If the Court finds that the statute is ambiguous, the Commission's regulations should be upheld as a permissible interpretation of the statute.

The statute contains many exceptions to the definition of electioneering communications, all carving out areas which pose no threat of campaign finance abuse. One exception is a "candidate debate or forum" or a communication "which solely promotes such a debate or forum." 2 U.S.C. § 434(f)(3)(B)(iii). Another exception is the aforementioned one for "a news story, commentary, or editorial." *Id.* § 434(f)(3)(B)(i). These exceptions describe activities that pose little risk of abuse but further important public purposes..

It was not unreasonable for the Commission to interpret the statute as permitting a similar exception for unpaid communications. The statute is concerned with how communications are funded. It requires the disclosure of disbursements, *see id.* § 434(f)(1), and it prevents certain types of funding from being used for electioneering communications, namely corporate and labor funds, *see id.* § 441b(c). The Commission was justified in reading the electioneering provisions as a whole to be concerned only with communications that someone paid to be aired or broadcast.

Perkins Coie LLP
607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690

III. CONCLUSION

When crafting 2 U.S.C. § 434(f)(3), Congress was focused on the dangers of paid political advertisements airing in the days and weeks before a federal election. There is no evidence that Congress wished to regulate unpaid advertisements or other types of unpaid communications; similarly, there is no evidence that Congress even realized that the statute it was crafting might be interpreted to have this broad a reach.

The Commission included the requirement that the communication be aired "for a fee" in order to prevent the electioneering communication definition from encompassing a whole variety of types of communications not contemplated by Congress. If this regulation were struck down, the result would be a statute that is both unconstitutional in theory and wholly unworkable in practice. We respectfully request that the Court uphold the Defendant's motion for summary judgment as applied to 11 C.F.R. § 100.29(b)(3)(i).

DATED: March 22, 2004.

By _____

Robert F. Bauer (Bar No. 938902)
PERKINS COIE LLP
607 14th Street NW, Suite 800
Washington, DC 20005
(202)654-6600

Perkins Coie LLP
607 14th Street, Suite 800
Washington, DC 20005
Phone: (202)434-1690