

POLICY BRIEF:
THE McCAIN-FEINGOLD CAMPAIGN FINANCE REFORM BILL'S IMPACT
ON CHARITIES (501(c)(3)s) AND SOCIAL WELFARE ORGANIZATIONS (501(c)(4)s)

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I. The Bill

The Senate passed the McCain-Feingold “Bipartisan Campaign Reform Act of 2001” (S.27) on April 2, 2001. The House has not yet taken up the bill, although various Representatives have introduced a number of other campaign finance reform bills.

This policy brief focuses on the portions of the McCain-Feingold bill which will have a direct effect on charitable (section 501(c)(3)) and social welfare (section 501(c)(4)) organizations, particularly the ban on certain issue ads. It therefore does not analyze the portions of the bill which have received the most media attention, including the soft money ban for political parties and the increases in hard money contribution limits.¹

A. Ban on Certain Issue Ads

The supporters of campaign finance reform included the ban on certain issue ads in the bill primarily for two reasons. First, several new studies have provided empirical data showing that in recent years the number of issue ads broadcast shortly before federal general elections has sharply increased and that the vast majority of these ads are in fact disguised efforts to support or oppose the election of particular candidates to federal office (such ads are often referred to as “sham” issue ads). Second, there is a concern that absent a ban on these sham issue ads, this trend will only become more pronounced once soft money is banned because soft money contributions will be redirected to non-party organizations, including nonprofits, to pay for such ads.

Sham issue ads are issue ads that clearly express support for or opposition to a particular candidate, but do not use words of express advocacy (e.g., “vote for,” “vote against”) and

¹ “Hard money” is money contributed to candidates, parties or political action committees that can be used by the candidate or in coordination with the candidate to explicitly support or oppose the election of the candidate to federal office; such money is subject to strict contribution limits. “Soft money” is money raised by political parties that is not subject to contribution limits and can be used for party building, issue advocacy, and more generic candidate promotion, but not for explicitly supporting or opposing the election of a particular candidate. The bill would prohibit national parties, candidates for federal office, and incumbents in federal office from raising, expending or transferring soft money. The bill would also require state, district and local party committees to spend only hard money on “federal election activity,” which includes voter registration and get-out-the-vote activities, as well as public communications, that relate to a federal election.

therefore are not subject to the contribution limits and disclosure requirements imposed on express advocacy communications by the Federal Election Campaign Act of 1971 (FECA). To address this perceived end run around FECA, supporters of campaign finance reform have for several years been trying to craft an expansion of FECA that would capture these ads. The difficulty they have faced in doing so is that any such expansion runs the risk of also capturing “true” issue ads, such as grassroots lobbying ads, that truly are communicating about issues and are not disguised attempts to support or oppose particular candidates. An expansion that also captures true issue ads could be vulnerable to a claim that it is an unconstitutionally overbroad infringement on First Amendment freedom of speech rights.

The legislative proposals to capture these sham issue ads have come to be known as “Snowe-Jeffords Amendments,” and the McCain-Feingold bill contains a Snowe-Jeffords Amendment provision. This provision would prohibit all labor unions and corporations, including charities, from paying for so-called “electioneering communications.” There is a narrow exception for social welfare organizations, and for political organizations² that are not political action committees (PACs), candidate committees, or political party committees. Political organizations that are PACs, candidate committees, or political party committees are not subject to this prohibition because they are already subject to extensive disclosure requirements and contribution limits.

An electioneering communication is defined as (1) a broadcast (i.e., television or radio), cable or satellite communication, that (2) refers to a clearly identified candidate for federal office (e.g., by name or likeness), (3) is made within 60 days before a general, special or runoff election for such office or 30 days before a primary or preference election, or party convention or caucus that has authority to nominate a candidate, for such office, and (4) is made to an audience that includes members of the electorate for such election, convention, or caucus. There is an exception for news stories, commentaries and editorials. There is no exception for communications relating to nonpartisan candidate debates or forums.

If this definition of electioneering communication is found to be unconstitutional, the bill provides the following alternate definition: “any broadcast, cable or satellite communication which promotes or supports a candidate for office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” No specific time periods limit this alternate definition.

There is no requirement that the corporation or union paying for the communication have an intent to affect the election of the candidate. Regardless of the purpose for making the communication, corporations, including charities, and unions will be absolutely prohibited from making any communication that qualifies as an electioneering communication if this provision of the bill becomes law and is upheld by the courts. For example, charities are allowed to host nonpartisan candidate debates, but under the bill a charity would be prohibited from broadcasting such a debate within 60 days of a general election or advertising that debate on radio or TV if the ads clearly identified the participating candidates. Charities are also permitted to engage in a limited amount of grassroots lobbying, including asking the public to contact incumbent

² Political organizations are organizations tax-exempt under section 527 of the Code.

members of Congress by name; under the bill, a charity would be prohibited from broadcasting such grassroots lobbying within 60 days of a general election or 30 days of a primary election in which the named incumbent member of Congress was a candidate.

Social welfare organizations, and political organizations that are not PACs, candidate committees, or political party committees, are exempt from this prohibition only with respect to electioneering communications that are not targeted. An electioneering communication is “targeted” if the communication is distributed from a television or radio broadcast station or provider of cable or satellite television service whose audience consists primarily of residents of the State for which the clearly identified candidate is seeking office. The bill does not define the term “primarily.”

If a social welfare or political organization wants to make a non-targeted electioneering communication, it must pay for that communication solely with contributions from individuals who are U.S. citizens or U.S. permanent residents. The organization must therefore only receive contributions from such individuals or, if the organization receives money from program or business activities or accepts contributions from corporations or unions, it must pay for any non-targeted electioneering communications from a separate segregated fund to which only such individuals can contribute.

Political organizations that are PACs, candidate committees, or political party committees (federal, state or local) are not subject to the prohibition on electioneering communications, even if they are corporations. PACs are organizations, sometimes formed by corporations or unions and sometimes operated independently, that make contributions to candidates (either directly or by coordinating their activities with candidates) or expressly advocate for the election or defeat of specific candidates. PACs, candidate committees and political party committees are instead subject to limits on sources of contributions (generally limited to individuals who are U.S. citizens or permanent residents, with further restrictions for corporation and union controlled PACs), amounts of contributions (generally limited to \$5,000 per contributor annually for PACs) and extensive disclosure requirements.

The bill treats electioneering communications that are developed in coordination with a candidate, candidate committee, political party committee, or an agent or official of a candidate, candidate committee or political party committee, as contributions to the supported candidate. This treatment would effectively prohibit most if not all such coordinated communications because of the prohibition on corporate contributions to candidates.

B. Disclosure by Organizations Making Electioneering Communications

If a person, including a social welfare or political organization taking advantage of the above exception for non-targeted communications, spends more than \$10,000 on an electioneering communication, the bill would require that person to disclose the following information to the Federal Election Commission (FEC): the name of the person and, if an organization, its principal place of business; the custodian of books and accounts of the person; the name of any other entity sharing or exercising direction or control over the activities of the person; the election to which the electioneering communications pertain and the names of the candidates identified in the communications; the amount and name of the payee for each

payment of more than \$200 for an electioneering communication; and for organizations, the names and addresses of all donors of \$1,000 or more from the first day of the preceding calendar year and ending on the disclosure date. If the payments are only made out of a separate segregated fund (usually established by creating a separate bank account), only donors of \$1,000 or more to that fund need be disclosed.

The disclosure must be made within 24 hours of reaching the \$10,000 threshold and within 24 hours of each additional \$10,000 of such spending. The disclosed information is public information and presumably will be posted by the FEC on its Web site.

C. Broadened Definition of Coordination

The bill includes a new and broader definition of coordination with candidates and political party committees. The bill defines a “coordinated expenditure or other disbursement” as “a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with, such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” The bill instructs the FEC to promulgate new regulations to enforce this definition within 90 days of the effective date of the bill.

For the most part this provision should not concern charities and social welfare organizations, as they generally avoid any activities that could be construed as coordination under either the old or new definitions. However, it should be noted that under the new definition even a single communication with a candidate or political party committee could make an organization’s expenditure in connection with a federal election (for example, for nonpartisan get-out-the-vote or voter registration work) a coordinated payment and therefore a contribution to the candidate’s campaign or the political party. Section 501(c)(3) of the Internal Revenue Code prohibits charities from making contributions to candidate’s campaigns or political parties, and therefore a charity could lose its tax-exempt status if it were deemed to have made such a contribution.

D. Ban on Contributions to Tax-Exempt Organizations by Political Parties

The bill would also prohibit political party committees (national, state, district or local) from soliciting funds for or making or directing any donations to any organization exempt from tax under section 501(c), including charities and social welfare organizations, or to political organizations (other than political committees). Most charities will not be affected by this provision. Charities or other tax-exempt entities that have relied on support from political parties for voter registration, candidate forums, and other nonpartisan activities would, however, have to locate other sources of support for these activities.

II. Analysis

The following analysis reviews the likely effects of the ban on electioneering communications on IRS regulation of charities and social welfare organizations and whether the ban could lead to other restrictions on the advocacy activities of such organizations. It also

reviews whether the disclosure requirements imposed on organizations permitted to make electioneering communications could lead to the imposition of additional disclosure obligations on charities and social welfare organizations generally. Finally, it discusses the constitutionality of both the ban on electioneering communications and the disclosure requirements.

A. Likely Effects of the Ban On “Electioneering Communications” and the Related Disclosure Requirements

1. The IRS is Unlikely to Modify Its Definition of Political Activity Based on the Bill’s Definition of Electioneering Communication

Unless Congress clearly indicates, such as through comments in the legislative history, that it intends the definition of electioneering communications to also apply for purposes of the Internal Revenue Code, it is unlikely that the IRS would change its definition of political activity to encompass the definition of electioneering communications. Senior officials in the IRS National Office, when presented with this issue, have stated informally that the IRS looks to the Internal Revenue Code, and regulations and rulings issued under the Code, for its definition of political activity and not to the statutes, regulations and rulings used by the FEC.

This conclusion is borne out by at least one current situation. The IRS definition of political activity is generally much broader than the FEC’s definition of activity subject to its jurisdiction. However, with respect to nonpartisan candidate debates the FEC has an extensive set of requirements for expenditures for such debates to qualify as other than contributions to the candidates involved. In several respects, these requirements are more stringent than the requirements imposed by the IRS for such debates to be considered nonpartisan and therefore a permitted activity for charities. Despite this inconsistency, the IRS has not indicated any desire or need to bring its rules into alignment with the FEC’s rules.

2. The Ban is Unlikely to Lead to Further Attempts to Limit Nonprofit Advocacy, Except With Respect to Advocacy that Could be Disguised Attempts to Support or Oppose Particular Candidates

The ban currently in the bill defines electioneering communications relatively narrowly in order to avoid the constitutional concerns discussed below. If the ban withstands constitutional scrutiny, supporters of campaign finance reform are likely to seek to expand that definition to include other types of communications that they believe are also disguised attempts to support or oppose the election of particular candidates to federal office. One possible expansion would be to extend the definition to print and telephone communications that mention candidates and are made shortly before an election.

There is no indication, however, that the supporters of campaign finance reform have any interest in regulating the broader issue advocacy activities of charities or social welfare organizations. They appear to be focused solely on advocacy activities that could be used for disguised support or opposition of particular candidates. Therefore, for example, it is extremely unlikely that these efforts would lead to any additional restrictions on charities or social welfare

organizations engaging in advocacy communications that do not specifically name or otherwise identify candidates for federal office.

It is also possible that if the ban survives constitutional challenge, supporters of campaign finance reform might attempt to extend the time frames used in the definition of electioneering communications. Assuming the ban is upheld in the first place, an expansion in the covered time periods would probably be possible only if additional empirical data can be gathered which shows that even within the expanded time frame the vast majority of issue advertisements are actual election-related communications. This proof requirement should create a limit on the degree, if any, that the time frames could be expanded without making the definition unconstitutional. It therefore appears that such an expansion is unlikely unless and until empirical data can be gathered that would support such an expansion.

3. The Disclosure Requirements are Unlikely to Lead to Broader Attempts to Require Donor Disclosure

The focus on the bill is on disguised attempts to support or oppose candidates for federal office — that is, on activities that are already barred for charities by federal tax rules. There does not appear to be any reason for campaign finance reform supporters to try to extend the disclosure requirements to charities unless charities begin engaging in such activities, or to extend them to social welfare organizations that do not engage in such speech. To be sure, there may be increasing pressures on charities and social welfare organizations to engage in such activities as other avenues for doing so are closed off or become less attractive because of the disclosure requirements. With respect to charities, however, there will be no policy rationale for subjecting charities to additional election law disclosure requirements, provided the IRS effectively enforces the tax law ban on partisan activities by charities.

B. Constitutional Issues

1. The Ban on Electioneering Communications is Vulnerable to a Number of Constitutional Attacks

The proposed ban on “electioneering communications” faces at least three substantial constitutional hurdles. The first relates to the validity of the ban in its entirety, the second to the scope of the narrow exception for social welfare and political organizations, and the third on the ban’s validity as applied to charities. The disclosure requirements imposed on organizations that can engage in electioneering communications also face constitutional questions, which are discussed separately below.

a. The Constitutionality of the Ban in its Entirety is Suspect

It is well established that a major purpose of the First Amendment’s freedom of speech provision was to protect the free discussion of governmental affairs, including discussion of candidates for public office and of legislative issues.³ It is also well established that this

³ E.g., Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

protection applies regardless of the source of the speech, and so applies with equal strength to both speech by corporations and speech by individuals.⁴ To overcome this protection, the government must therefore show a compelling interest in regulating the speech at issue and the restriction employed must be narrowly tailored to serve that interest.⁵ As part of satisfying this latter requirement, a restriction must not be either unconstitutionally vague or unconstitutionally overbroad.⁶

FECA subjects election-related speech to contribution limits and disclosure requirements. In Buckley v. Valeo, the Supreme Court addressed the issue of whether the definition of the communications subject to FECA's limits and requirements was unconstitutionally vague. The Court found that the definition was unconstitutionally vague, but that this vagueness could be remedied by interpreting FECA as only applying to communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office."⁷ Such communications are now commonly referred to "express advocacy" communications. The Court also provided the following non-exclusive list of express words of advocacy of election or defeat which a communication would need to include to be considered express advocacy: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject."⁸ In FEC v. Massachusetts Citizens for Life, the Supreme Court also limited FECA's ban on election-related communications by corporations to express advocacy communications.⁹

Relying on these decisions, a number of lower federal courts have rejected or enjoined attempts by both the FEC and various states to ban or require disclosures relating to corporate expenditures for political communications that did not fall within the Supreme Court's definition of express advocacy.¹⁰ Several of these cases involved a ban very similar to that contained in the McCain-Feingold bill.¹¹ Only one federal appellate court has accepted a broader definition,

⁴ E.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-85 (1978).

⁵ Id. at 786.

⁶ See, e.g., Buckley v. Valeo, 424 U.S. 1, 40-41 (1976) (describing basis for requirement that restrictions on First Amendment speech rights not be vague); Broadwick v. Oklahoma, 413 U.S. 601, 612 (describing basis for requirement that such restrictions not be overbroad) (1973).

⁷ 424 U.S. at 44, 80.

⁸ Id. at 44 n.52.

⁹ 479 U.S. 238, 249 (1986).

¹⁰ See, e.g., Citizens for Responsible Gov't PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000), cert. denied, 121 S. Ct. 1229 (2001); Vermont Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000); Iowa Right to Life Comm., 187 F.3d 963 (8th Cir. 1999); Faucher v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991); see also Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 506 (7th Cir. 1998) (reading Buckley as holding that "[c]ommunication that does not constitute express advocacy is generally not susceptible to regulation under the First Amendment").

¹¹ See Vermont Right to Life Comm., 221 F.3d 376 (holding unconstitutional a Vermont statute requiring reporting of expenditures of \$500 or more for mass media communications including the name or likeness of a candidate for office and occurring within 30 days of a primary or general election); Right to Life of Michigan v. Miller, 23 F. Supp.2d 766 (W.D. Mich. 1998) (holding unconstitutional a Michigan administrative rule prohibiting corporations and unions

holding that “speech need not include any of the words listed in Buckley to be express advocacy . . . , but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”¹² This decision appears to be the basis for the alternative definition of electioneering communication contained in the McCain-Feingold bill.

These decisions highlight the constitutional concern relating to the ban on electioneering communications. The concern arises from the view that any attempt to expand the definition of the regulated speech beyond the Supreme Court’s definition of express advocacy is unconstitutionally overbroad because it will capture not only partisan, candidate-related speech but also nonpartisan, issue-related speech.¹³ The Supreme Court acknowledged this concern in Buckley when it noted: “For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.”¹⁴ When limiting FECA’s ban on election-related communications by corporations to express advocacy communications, the Supreme Court, in a section of its opinion joined by all the members of the Court, cited this same rationale and characterized its limitation of FECA’s application to express advocacy communications as done “in order to avoid problems of overbreadth.”¹⁵

Supporters of campaign finance reform in general and the McCain-Feingold bill in particular argue that overbreadth is only a concern if it is substantial, and that recent empirical data demonstrate that any overbreadth in this instance is insubstantial.¹⁶ This response to the

from using general treasury funds to pay for communications, made within 45 days prior to an election, that contain the name or likeness of a candidate); Planned Parenthood Affiliates of Michigan v. Miller, 21 F. Supp.2d 740 (E.D. Mich. 1998) (same).

¹² FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987).

¹³ See, e.g., Citizens for Responsible Gov’t State PAC, 236 F.3d at 1193-94; Perry, 231 F.3d at 161-62; Vermont Right to Life Comm., 221 F.3d at 387; Iowa Right to Life Comm., 187 F.3d at 969-70.

¹⁴ Buckley v. Valeo, 424 U.S. 1, 42 (1976).

¹⁵ Massachusetts Citizens for Life v. FEC, 479 U.S. 238, 248 (1986). The “overbreadth doctrine” permits litigants to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Massachusetts v. Oakes, 491 U.S. 576, 581 (O’Connor, J., plurality), 586 (1989) Broadwick v. Oklahoma, 413 U.S. 601, 612 (1973). The result of a successful assertion of the overbreadth doctrine is that the challenged statute is declared unenforceable against any party, not just the litigants invoking the doctrine, and therefore the doctrine is considered “strong medicine” by the Supreme Court. Broadwick, 413 U.S. at 613.

¹⁶ See, e.g., Richard L. Hasen, “Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy,” 85

overbreadth concern is based on the view that Supreme Court decisions require that any overbreadth be substantial to create a constitutionally fatal flaw in a statute.¹⁷ The empirical data are from studies conducted by the Annenberg Public Policy Center, by Professor Richard L. Hasen of data collected by the Brennan Center for Justice, and by Professor David B. Magleby of the Center for the Study of Elections and Democracy at Brigham Young University.¹⁸ These studies concluded that the vast majority of broadcast advertisements and, in the case of Prof. Magleby's study, other communications, aired or made shortly before federal general elections and which clearly identified candidates but did not fall within the Supreme Court's definition of "express advocacy" where "sham" issue ads primarily designed to affect the upcoming election, not to educate the public about an issue or to engage in grassroots lobbying.¹⁹

Even with these new data, supporters of campaign finance reform probably face an uphill battle in defending the constitutionality of the proposed ban on electioneering communications based on current case law.²⁰ First, it is not clear that in the context of pure speech on matters of public policy that the overbreadth must be substantial before a statute is constitutionally invalid.²¹ Second, the empirical data have various limitations: the Annenberg data primarily involves television advertising, Prof. Hasen's analysis was limited to television advertising within 60 days of federal general elections, and Prof. Magleby's report for relates to a broad range of communications but focuses on only seventeen of the most competitive year 2000

Minnesota L. Rev. 101 (2001) ("Hasen Article"); Letter from Brennan Center for Justice to Senator John McCain and Senator Russell Feingold dated March 12, 2001.

¹⁷ See, e.g., Oakes, 491 U.S. at 588 (Scalia, J., dissenting), 590 (Brennan, J., dissenting); Broadwick, 413 U.S. at 615 (holding that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

¹⁸ Issue Advertising in the 1999-2000 Election Cycle (Annenberg Public Policy Center 2001) ("Annenberg Report"); Hasen Article at 117-27 (summarizing data collected by the Brennan Center for Justice); David B. Magleby (ed.), Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections (2001) (reporting data collected by the Center for the Study of Elections and Democracy) ("Magleby Report").

¹⁹ Annenberg Report at 13; Hasen Article at 123-25; Magleby Report at 46-47.

²⁰ At least one supporter of regulation of candidate-related issue advertising has candidly acknowledged that for such regulation to survive constitutional scrutiny the federal courts would need to reconsider the express advocacy/issue advocacy distinction articulated in Buckley. Richard Briffault, "Issue Advocacy: Redrawing the Elections/Politics Line," 77 Tex. L. Rev. 1751, 1759 (1999).

²¹ See New York v. Ferber, 458 U.S. 747, 771 (1982) (noting that the requirement that overbreadth be substantial extends "at the very least" to cases involving conduct and speech but not reaching the question of whether the requirement extends to cases involving "pure speech"); Broadwick, 413 U.S. at 615 (noting that overbreadth must be substantial "particularly where conduct and not merely speech is involved"); Kirk Jowers, "Issue Advocacy: If It Cannot be Regulated When it is Least Valuable, It Cannot be Regulated When It is Most Valuable," 50 Catholic U.L. Rev. 65, 79 (2000) (questioning whether substantial overbreadth is the appropriate test when "pure speech" near an election is at issue).

congressional races.²² The McCain-Feingold bill definition of electioneering communication includes radio broadcasting (not covered in Prof. Hasen's analysis and apparently receiving only limited coverage in the Annenberg study) and applies to the period 30 days before a primary election as well as 60 days before a general election. There are no studies currently available that explore whether issues ads aired 30 days before primary elections are predominantly disguised attempts to support or oppose particular candidates. Third and finally, the three federal courts that have reviewed attempts by the states to impose bans or disclosure requirements on issue ads aired within a certain time before an election have all rejected such attempts as unconstitutional.²³

The alternative definition is also vulnerable to constitutional attack. While based on the federal appellate court decision in FEC v. Furgatch,²⁴ it is very similar to an FEC regulation that the FEC issued in an attempt to build on that decision but which federal courts have consistently found to be unconstitutional.²⁵ It also explicitly does not require electioneering communications to be express advocacy communications, and federal courts have consistently found express advocacy to be a constitutionally required element for government regulation of political speech.²⁶

b. Current Supreme Court Precedent Requires a Broader Exception for Social Welfare and Political Organizations

The Internal Revenue Code permits social welfare organizations, unlike charities, to engage in a certain amount of partisan political activities, as long as such activities are not their primary activities. FECA, however, bars all corporations, including social welfare organizations, from engaging in express advocacy. But in FEC v. Massachusetts Citizens for Life (MCFL), the Supreme Court ruled that a social welfare organization could not constitutionally be prohibited from engaging in express advocacy when the organization was formed for the purpose of promoting political ideas, did not engage in business activities, had no shareholders or other persons who had a claim on its asset or earnings, and did not receive contributions from corporations and unions.²⁷ The basis for this decision was that these types of organizations, unlike business corporations, received their financial support only from individuals who knew that the organizations would use those funds to support a particular ideological and political agenda. These types of organizations therefore did not present the danger, which justified the general ban on corporations engaging in express advocacy, of a corporation using wealth accumulated from business activities to promote a political agenda.

²² Annenberg Report at 12; Hasen Article at 118-19; Magleby Report at 1.

²³ See cases cited in n. 11 supra.

²⁴ 807 F.2d 857, 864 (9th Cir.), cert. denied, 484 U.S. 850 (1987).

²⁵ See, e.g., Virginia Soc'y for Human Life v. FEC, 83 F. Supp.2d 668 (E.D. Va. 2000); Right to Life of Dutchess County v. FEC, 6 F. Supp.2d 248 (S.D.N.Y. 1998); Maine Right to Life Comm. v. FEC, 914 F.Supp. 8 (D. Me.), aff'd, 98 F.3d 1 (1996) (per curiam), cert. denied, 522 U.S. 810 (1997).

²⁶ See cases cited in n. 10 supra.

²⁷ 479 U.S. 238 (1986).

The initial version of the McCain-Feingold bill included an exception allowing social welfare and political organizations to pay for electioneering communications if they only received contributions from individuals or if they only paid for such communications from a separate segregated fund funded exclusively by contributions from individuals. This exception was clearly an attempt to accommodate the MCFL decision by allowing social welfare and political organizations to engage in electioneering communications as long as they could demonstrate that the funds for such communications only came from individuals who presumably were attracted to such organizations because of their ideological or political agendas.

The exception was significantly narrowed, however, by a floor amendment that limited the exception to non-“targeted” electioneering communications. A targeted electioneering communication is an electioneering communication distributed from a television or radio broadcast station or provider of cable or satellite television service whose audience consists primarily of residents of the State in which the clearly identified candidate is seeking office.

The narrowing of the exception to exclude targeted electioneering communications runs directly counter to the MCFL decision, which allowed at least some social welfare organizations to engage in express advocacy regardless of whether that advocacy was targeted or not. The bill’s total ban on social welfare organizations engaging in targeted electioneering communications will therefore almost certainly not survive challenge, with respect to at least MCFL type organizations, absent the Supreme Court reconsidering the MCFL decision.

c. Current Supreme Court Precedent May Require an Exception for Charities to the Ban

The constitutionality of the complete ban on corporations and unions engaging in express advocacy is based on the conclusion that corporations and unions are able to accumulate large amounts of wealth for reasons unrelated to their political activities and therefore, if unchecked, could wield an unfair amount of influence on elections.²⁸ In MCFL, however, the Supreme Court has held that this conclusion does not apply to corporations that accumulate their wealth not from business activities, but instead from individuals who contribute to an MCFL type social welfare organization specifically because they support the organization’s ideological or policy positions that then shape its express advocacy communications.

It has never been necessary for a court to consider whether the holding of MCFL would also apply to charities because charities are prohibited from engaging in express advocacy by the Internal Revenue Code. Charities can, however, engage in activities that would qualify as “electioneering communications” under the McCain-Feingold bill. For example, charities are allowed to engage in a limited amount of grassroots lobbying, but, under the bill, a charity would be prohibited from broadcasting grassroots lobbying ads naming an incumbent member of Congress within 60 days of a general election or 30 days of a primary if the named member of Congress was a candidate in that election.

²⁸ See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659-60 (1990); Massachusetts Citizens for Life, 479 U.S. at 258-59; FEC v. National Right to Work Comm., 459 U.S. 197, 207-08 (1982).

It appears that the MCFL rationale should also apply to charities, or at least to charities that, like the organization in MCFL, are formed for the purpose of promoting certain ideas, do not engage in business activities, and do not receive contributions from corporations and unions. The MCFL decision did not turn on the tax status of the organization involved, but rather on the attributes that distinguished it from a typical for-profit corporation. Many charities share those same attributes.

The one significant barrier to this line of argument is the Supreme Court's decision that Congress can restrict the speech of charities in order to prevent the use of pre-tax dollars to fund that speech because charities have the option of establishing sister social welfare organizations to engage in that speech using after-tax dollars.²⁹ This holding arguably should not, however, affect the conclusion that charities must be excluded from the ban on electioneering communications. The ban on electioneering communications is not an attempt to limit what speech charities, using pre-tax dollars, can engage in; it is instead an attempt to prevent corporations from engaging in speech designed to affect elections. Since charities are already prohibited by Congress from engaging in speech designed to affect elections, the ban only applies to them with respect to speech that is not designed to affect elections but still falls within the definition of "electioneering communications." Therefore, the ban is arguably not a constitutionally-permitted attempt by Congress to limit the speech permitted by charities but is instead an unconstitutional, as applied to charities, attempt to limit the speech that Congress has explicitly allowed charities to engage in. This line of argument has never been pursued in the courts, however, so whether it would be successful is unclear.

2. The Disclosure Requirements are Probably Constitutional Except with Respect to Organizations Whose Supporters Can Establish a Reasonable Basis for Fear of Retaliation or Persecution if Identified

The Supreme Court has repeatedly held that the individual members and supporters of an organization have a First Amendment right to freedom of association that can be infringed if the organization is required to disclose their identities.³⁰ Whether the government can constitutionally require that disclosure therefore depends on whether the infringement is outweighed by a compelling governmental interest in disclosure and whether the disclosure has a substantial relationship to that interest.

In Buckley v. Valeo, the Supreme Court upheld the disclosure of contributors to candidates, political parties and organizations engaged in express advocacy or coordinating with candidates based on three compelling governmental interests: providing the electorate with information about the supporters of candidates, deterring actual corruption and avoiding the appearance of corruption, and gathering data needed to detect violations of other laws.³¹ The Supreme Court has, however, allowed an exception to the disclosure requirement where an

²⁹ Regan v. Taxation With Representation, 461 U.S. 540 (1983).

³⁰ Buckley v. Valeo, 424 U.S. 1, 64 (1976) (citing cases).

³¹ Id. at 66-68.

organization is able to demonstrate as a factual matter that its members or supporters are likely to be subject to retaliation if their support of the organization is made public.³²

Supporters of campaign finance reform argue that the disclosure required here, presumably including the disclosure of donors required for organizations allowed to engage in electioneering communications, serves the same three purposes that are served by the existing campaign finance disclosure laws. Since they assume that the vast majority of electioneering communication are in fact attempts to support or oppose candidates, they argue that disclosure deters actual corruption and the appearance of corruption and informs the electorate about the ultimate supporters (and opponents) of candidates. Effective enforcement of the ban on corporations and unions engaging in electioneering communications also requires donor disclosure to ensure that organizations allowed to engage in electioneering communications are not mere conduits for these types of organizations.

Assuming that the ban is upheld in its current form, the upholding of the ban would also support the constitutionality of the disclosure requirement since to uphold the ban a court would need to conclude that the ban does primarily affect election-related communications. The same rationale that applied in Buckley would therefore support the constitutionality of the required disclosure generally. The only exception that would be required would be if an organization could demonstrate that such disclosure would chill the ability of its members or supporters to associate because of documented threats of retaliation because of such disclosure.

If the courts held that charities were exempt from the ban but that otherwise the ban was constitutional, it seems likely that the exemption for charities would also extend to the disclosure requirements. The governmental interests in disclosure are significantly less if charities are not subject to the ban because charities cannot engage in political activities and so two of the interests, informing the electorate and deterring corruption, are much weaker if not non-existent. Enforcement of the law is also significantly weakened as a compelling reason, because even if corporations or unions gave funds to a charities for electioneering communications, such communications would not in fact be the “sham” issue ads that the bill is designed to address. It is therefore unlikely that the disclosure requirements could constitutionally apply to charities if charities are found to be exempt from the ban on corporations engaging in electioneering communications.³³

³² Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

³³ See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (finding unconstitutional a requirement that all materials designed to influence voters with respect to any election, whether relating to a candidate or an issue, identify the persons responsible for the material); West Virginians for Life v. Smith, 960 F.Supp. 1036 (S.D.W.Va. 1996) (finding unconstitutional a ban on anonymous issue advocacy within 60 days of an election).