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January 7, 2004

TO: State Elections Board Members

FROM: Lester Pines
Attorney for Wisconsin Democracy Campaign

The Wisconsin Democracy Campaign has retained Cullen Weston Pines & Bach LLP to analyze the effect of the U.S. Supreme Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. ___ (2003), on issue ad regulation in Wisconsin and to provide its conclusions and recommendations to the Elections Board as a supplement to Mike McCabe's December 16, 2003 letter.

On the basis of our review, we recommend and request, on Wisconsin Democracy Campaign's behalf, that the Elections Board issue new rules that: 1) define "electioneering communication" consistent with the Bipartisan Campaign Reform Act of 2001 ("BCRA") (the definition, as set forth more fully below, is the mechanism to the regulation of sham issue ads), and 2) provide that expenditures for electioneering communications are for a "political purpose" within the meaning of Wis. Stat. § 11.01(16). The effect of these new rules would be to subject entities that make expenditures for electioneering communications to regulation under Chapter 11 of the statutes. Moreover, corporations would be prohibited from engaging in such electioneering communications consistent with Wis. Stat. § 11.38(1)(a)1.

1. **The U.S. Supreme Court has upheld regulation of sham issue advocacy, and opened the way for the Elections Board to act.**

The BCRA subjects persons who disburse in excess of $10,000 for electioneering communications in any calendar year to strict disclosure requirements, requiring such persons to file with the Federal Elections Commission ("FEC") the identification of: a) the person making the disbursement, b) any person sharing or exercising direction or control over the activities of such person, c) the custodian of the books and accounts of the person making the disbursement, d) the principal place of business of the person making the disbursement, and e) the elections to which the electioneering communication pertain. BCRA § 201. This information must be filed with FEC within 24 hours of each disclosure date. *Id.*

In general, the BCRA defines "electioneering communication" to mean a broadcast advertisement referring to a clearly identified federal candidate, targeted at that candidate's electorate, and aired within 30 days of a primary or 60 days of a general election. *See* BCRA § 201. The BCRA also prohibits corporations and labor unions from making disbursements for electioneering communications. *See* BCRA § 203.

In *McConnell*, the U.S. Supreme Court upheld the BCRA's disclosure requirements for electioneering communications. In doing so, it clarified that the *Buckley v. Valeo* "magic words" test was not constitutionally compelled, and that, in light of the record before it, the distinction between express advocacy and issue advocacy was "functionally meaningless." *McConnell*, slip op. at 86.

2. As a matter of state law, the Elections Board has the authority to act.

Little doubt can exist that the Elections Board has adequate state law authority to adopt the rules we suggest. *See* Wis. Stat. § 5.05(1)(f). As noted in Mr. McCabe's letter, the Wisconsin Supreme Court, in *Elections Board v. Wisconsin Manufacturers & Commerce*, ruled in favor of Wisconsin Manufacturers and Commerce ("WMC") on the narrow question of whether the Elections Board had regulations in place at the time requiring disclosure of issue ad activity. While the state supreme court held the Elections Board could not regulate WMC's activity without rules in place, the court stressed that its holding in no way placed limits on the legislature, or the Elections Board, to define further the definition of express advocacy, and it invited further efforts to craft such regulations. *Elections Bd. v. Wis. Mfgs. & Commerce*, 227 Wis. 2d 650, 681-82 (1999).

3. The Elections Board should provide by rule that money disbursed for "electioneering communications" is for a political purpose.

Wisconsin Stat. § 11.01(16) provides in relevant part that "[a]n act is for 'political purposes' when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office. . . ." The statute further provides that "[a]cts which are for 'political purposes' include but are not limited to: [t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate. . . ." Wis. Stat. § 11.01(16)(a). The Elections Board's authority, however, is not limited by this formulation because the statute expressly uses the language *"include but are not limited to."*

In *McConnell*, the U.S. Supreme Court upheld the disclosure requirements for electioneering communications on the grounds that they furthered important state interests, including the need to provide the electorate with information, deterring actual corruption and avoiding any appearance of actual corruption, and gathering the data necessary to enforce more substantive electioneering communications. *McConnell*, slip op. at 89. The Court recognized that these disclosure requirements were only "somewhat less intrusive" than comparable requirements that have long been applied to persons making independent campaign expenditures under federal campaign finance law. *Id.* at n.81.

The Elections Board should therefore move to amend Wis. Admin. Code § El. Bd. ch. 1 by providing that monies spent on electioneering communications are for a political purpose and therefore entities that disburse monies for such communications are subject to regulation under Chapter 11. In defining "electioneering communications," the Elections Board can be guided by the definition of that term in the BCRA.

It should be noted that amending § El. Bd. ch. 1 as suggested here will mean that the state will put in place a slightly different regulatory treatment for such communications than under the BCRA with the likely result that such communications will be regulated as independent expenditures under state law. However, the reporting requirements for independent expenditures are, like their federal counterparts, only slightly more intrusive than under the BCRA. In particular, registration with the Elections Board would need to occur prior to the disbursement of funds for electioneering communications. But this additional requirement can hardly be said to impose such a burden as to run afoul of First Amendment concerns, especially given the *McConnell* Court's conclusion that the distinction between express advocacy and so-called issue ads was "functionally meaningless."

4. No constitutional impediment exists to prohibit corporations from engaging in "electioneering communications."

Once the Elections Board defines the term "political purposes" to include electioneering communications, it necessarily follows that corporations will be prohibited from contributing or disbursing corporate funds for such communications. As the Elections Board knows, Wis. Stat. § 11.38(1)(a)1 prohibits corporations from making any contribution or disbursement. These terms are, in turn and in part, defined as acts made for "political purposes." *See* Wis. Stat. §§ 11.01(6) and (7). Corporations would still be free to establish separate segregated funds. Wis. Stat. § 11.38(1)(a)2.

The *McConnell* Court upheld the BCRA's prohibition against corporations engaging in electioneering communications as consistent with its prior precedent and as "informed by our earlier conclusion that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled." *McConnell*, slip op. at 98.

5. Conclusion.

By timely action, the Elections Board can adopt rules before the 2004 election cycle. Such action will subject electioneering communications to appropriate and needed disclosure requirements.