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Subject Comments in Response to NPRM 2010-01

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February 24, 2010

Via E-Mail to Coordinationshays3@fec.gov

Ms. Amy L. Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Supplemental Notice of Proposed Rulemaking 2010-01 ("NPRM"), Comments in Response to *Citizens United* Decision

Dear Ms. Rothstein:

Please accept the following comments in response to the above-referenced NPRM issued by the Federal Election Commission ("the Commission") with respect to implementation of the Supreme Court's decision in *Citizens United v. Federal Election Commission* ("*Citizens United")*

1. The Commission should implement regulations that treat all corporations in the same manner as media corporations for purposes of interactions with candidates and officeholders.

If a federal candidate asks a newspaper editorial board or broadcast station to "endorse my candidacy" and the media corporation thereafter does exactly that, under existing FEC regulations, the subsequent expenditure does not constitute a 'coordinated public communication' because of the 'media exemption' under the Commission's regulations. If, however, a federal candidate asks a grassroots organization or, alternatively, a local business corporation to endorse his/her candidacy and *that* corporate entity thereafter publicly communicates its support for the candidate, such expenditures by the corporation very well might be deemed a 'coordinated public communication'.

Inasmuch as the Supreme Court has specifically concluded that there can be no differences between the treatment of different types of corporations, the Commission must carefully consider and re-craft the regulations to enforce the First Amendment rights of *all* corporations that are so clearly articulated in *Citizens United.*

In that regard, the *standard* for revising the regulations should be the historic treatment of media corporations by the Commission. Rather than developing some new laundry list of types of interactions between corporations and candidates, the Commission should apply to all corporations and unions the same protections that media corporations and their agents have long enjoyed.

2. The Commission should carefully review, revise and implement its regulations to clearly delineate the specific conduct that constitutes 'prearrangement or coordination', such that the regulations constitute *objective*, rather than *subjective* and intent-based standards that invite intrusive and extensive discovery and lengthy Commission investigations.

The Commission should indicate as *clearly* as possible specific conduct that does and does not constitute 'conduct' giving rise to a coordinated public communication. Some suggestions:

Conduct that constitutes prearrangement or coordination:

1. A direct request by a candidate or political party or its/his/her agent that a third party make a particular public communication to the general public or some segment of the general public regarding the candidate or political party, *other than* a request that the third party issue a public endorsement of the candidacy or political party.

2. Material involvement or substantial discussions with the third party and the political party, candidate or its/his/her agent about the manner in which a third party advertises or communicates its endorsement of or opposition to the candidate or political party.

3. Communications based on particular confidential or proprietary information from the candidate, campaign or political party about the needs, activities, plans or projects of the candidate, campaign or political party, not otherwise available to the general public.

Conduct that does *not* constitute prearrangement or coordination:

1. Interactions between the third party and the candidate or political party that occurred prior to the date of candidacy.

2. Interactions between the third party and a candidate or political party that are primarily devoted to causes, issues, legislation and policy positions and which primarily benefit the third party.

3. Requests by a candidate or political party for endorsement or opposition, as long as the decision as to how such endorsement or opposition is to be communicated is made solely by the third party.

4. Interactions seeking to obtain information for voter guides and other candidate questionnaires and inquiries to be used by the third party to educate voters as to the positions of candidates or political parties on issues, policies and legislation.

In other words, the Commission should make these standards *objective,* few, simple, and clear. The current standards are impossible to understand or explain to normal citizens. The 3-prong test, with

its multiple *subjective* sub-prongs, leads naturally to the intrusive and exhaustive discovery and investigations that the Supreme Court has found to be contrary to the First Amendment.

3. The Commission must base all revised regulations on the Supreme Court's decisions in *Citizens United* and *WRTL II,* with faithful adherence to protecting the First Amendment rights of political speakers.

The Commission should be clear from the outset that the its primary duty is to the Supreme Court's well-stated directives regarding the First Amendment, and not just to Democracy 21, the Campaign Legal Center, Common Cause and Judge Kollar-Kotelly.

Obviously, the campaign reform jihadists will *never* be satisfied with any coordination regulations the Commission writes. One wonders, if the rules are so simple to write, why *they* didn't write them into BCRA, since *they* wrote the statute. The complete absence of congressional language defining 'coordination' should be addressed in the next round of litigation. Could it be that those who keep challenging the regulations were unable to write definitions of 'coordination' that a) made sense and b) could pass the Congress? *They wrote the statute!* Surely, if they know exactly what coordination means, they could and should have included it in the statute.

It is tiresome that these people have nothing else to do – and that they *never* have to try and explain to ordinary people what is and isn't permitted under the law and the regulations. The Supreme Court has said that investigations and discovery must be limited, and that protecting the citizens' First Amendment rights must be paramount. It is time for some *bright lines* to be incorporated into these regulations.

Surely there is enough instruction in *Citizens United* and *WRTL II* on which the Commission's regulations can be grounded that a judge can be persuaded to adhere to the now-clearly established precedent of the Supreme Court, and the next lawsuit can be tried with the First Amendment (and not the *Washington Post* editorial page) in mind.

Please contact me if you have questions. I would be pleased to testify at the public hearing to be conducted on the Supplemental NPRM. Thank you.

Sincerely,

Cleta Mitchell

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