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Subject Supplemental comments of Campaign Legal Center and Democracy 21

Please find attached supplemental comments of the Campaign Legal Center and Democracy 21 in response to SNPRM 2010-01 (Coordination).

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CLC-Democracy 21 Supplemental Comments in 2010-01 (Coordination).pdf

February 24, 2010

By Electronic Mail (CoordinationShays3@fec.gov)

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

Re: Comments on Supplemental Notice 2010-01: Coordinated Communications

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Supplemental Notice of Proposed Rulemaking (SNPRM) 2010-01, published at 75 Fed. Reg. 6590 (February 10, 2010), seeking comment on the effect, if any, of the Supreme Court's recent decision in *Citizens United v. FEC,* No. 08-205 (Jan. 21, 2010), on the Commission's pending rulemaking to revise its coordination regulations to implement the mandate and decision of the D.C. Circuit Court of Appeals in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*).

The Campaign Legal Center and Democracy 21 previously filed comments in this rulemaking, dated January 19, 2010.[1] We believe those comments are unaffected by the *Citizens United* decision, and we wish to reiterate the positions taken in those comments with the following three supplemental points:

First, the *Citizens United* decision underscores the necessity of strict and effective coordination rules.

Second, the *Citizens United* decision does not relieve the Commission of its obligation to implement the *Shays III Appeal* decision.

Finally, the *Citizens United* decision does not alter our view that the Commission should, in its coordination rulemaking, adopt a PASO test as the content standard outside the 90- and 120-day window periods.

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[1] *See* Comments of the Campaign Legal Center and Democracy 21 on Notice 2009-23 (Jan. 19, 2010), *available at* http://www.fec.gov/pdf/nprm/coord_commun/2009/clcdemocracy21.pdf.

1. The *Citizens United* decision underscores the necessity of strict and effective coordination rules in order to guard against the danger of *quid pro quo* corruption and the appearance of corruption.

Citizens United was a case about independent spending – *i.e.*, spending which is not coordinated with a candidate or party. The Supreme Court emphasized that it was the very independence of the spending at issue in the case – the fact that it was not coordinated – which was central to the Court's premise that such spending could not result in corruption or the appearance of corruption. Adhering to the basic distinction made in *Buckley v. Valeo*¸ 424 US. 1 (1976), between independent expenditures and coordinated expenditures (which are treated as contributions), the Court in *Citizens United* said:

> The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47-48, because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.*, at 47. *Buckley* invalidated §608(e)'s restrictions on independent expenditures, with only one Justice dissenting. See *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 491, n. 3 (1985) *(NCPAC).*

Slip op. at 29 (emphasis added). The Court reiterated this same point at page 41:

> "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U. S., at 47; see *ibid.* (independent expenditures have a "substantially diminished potential for abuse").

Slip op. at 41 (emphasis added). On page 43, the Court distinguished its holding in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*) by again resting on the distinction between limits on contributions (or coordinated expenditures) and limits on independent expenditures:

> *NRWC* thus involved contribution limits, see *NCPAC*, *supra*, at 495-496, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption, see *McConnell*, 540 U. S., at 136-138, and n. 40; *MCFL*, *supra*, at 259–260. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

Slip op. at 43 (emphasis added). Further, the Court made clear that it was precisely the fact that the spending at issue in *Citizens United* was not coordinated with a candidate that "by definition" placed it outside the zone of permissible regulation:

> By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley*, *supra*, at 46. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.

Slip op. at 44 (emphasis added).

Thus, in its fundamentals, *Citizens United* is not only consistent with, but reaffirms, the distinction drawn in *Buckley* between independent spending and coordinated spending. *See* CLC-Democracy 21 January 19 Comments at 3-4. Nothing in *Citizens United* undermines the *Buckley* premise that spending coordinated with a candidate or party is tantamount to a direct contribution to the candidate or party, and should be treated as such. As *Buckley* held, and as *Citizens United* reaffirms, spending that is coordinated with a candidate or party presents the same danger of corruption or the appearance of corruption as is presented by direct contributions, and there remains a compelling governmental interest in measures which combat those ills.

Citizens United does not alter the law undergirding the regulation of coordinated expenditures but, instead, emphasizes the importance of it. If the Commission, by lax, ineffective or under-inclusive coordination regulations permits spending that is of "value" to a candidate to be coordinated in fact, but treated as "independent" in law, it will allow exactly the kind of "prearrangement and coordination" of an expenditure that the Court in *Citizens United* recognized could pose the danger of corruption and the appearance of corruption. *See Buckley*, 424 U.S. at 47 (absence of coordination undermines the "value" of an expenditure).

In short, as the Commission suggests in the SNPRM, the principal impact of *Citizens United* on this rulemaking is that it emphasizes "the need for a more robust coordination rule because the presence of prearrangement and coordination may result in, or provide the opportunity for, *quid pro quo* corruption." 75 Fed. Reg. at 3590.

2. The *Citizens United* decision neither alters the *Shays III Appeal* decision nor relieves the Commission of its obligation to implement the *Shays III Appeal* decision.

Nothing in *Citizens United* alters the analysis or conclusions reached by the D.C. Circuit in *Shays III Appeal*, and therefore, nothing in *Citizens United* alters the obligation of the Commission to conform its regulations to the holding of *Shays III Appeal.*

The core ruling in *Shays III Appeal* is that the existing coordination rules impermissibly allow soft money to be used in connection with federal elections. The court explained:

> Outside the 90/120-day windows, the regulation allows candidates to evade-almost completely-BCRA's restrictions on the use of soft money. As FEC

> counsel conceded at oral argument, Oral Arg. at 0:46-2:00, the regulation still permits exactly what we worried about in *Shays II* [*sic*], i.e., more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words. 414 F.3d at 98. Indeed, pressed at oral argument, counsel admitted that the FEC would do nothing about such coordination, even if a contract formalizing the coordination and specifying that it was "for the purpose of influencing a federal election" appeared on the front page of the New York Times. Oral Arg. at 7:34-8:03. Thus, the FEC's rule not only makes it eminently possible for soft money to be "used in connection with federal elections," *McConnell*, 540 U.S. at 177 n. 69, 124 S.Ct. 619, but also provides a clear roadmap for doing so, directly frustrating BCRA's purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC's proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA, for "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash,'" *id.* at 221, 124 S.Ct. 619 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001)), and "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude," *id.* at 145, 124 S.Ct. 619.

Shays III Appeal, 528 F.3d at 925 (emphasis added).[2]

The D.C. Circuit recognized that the Commission's existing coordination regulations allow soft money to flow into federal elections – not in the form of direct donations of non-federal funds to candidates, but in the form of expenditures paid for with non-federal funds that can be coordinated and prearranged with candidates without limit, so long as the ads eschew express advocacy (or republication of campaign materials) and are run at any point outside the 90/120 day windows.

The D.C. Circuit correctly described the Commission's existing coordination regulations as permitting a candidate to coordinate and, in effect, to direct the spending of soft money. In light of this, the D.C. Circuit then asked whether the existing regulations "frustrate Congress's

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[2] The D.C. Circuit's observation that candidates "would feel grateful" for coordinated expenditures made on their behalf, and that spenders "would seek to exploit that gratitude," quoting *McConnell*, 540 U.S. at 145, is not undermined by the Supreme Court's comment in *Citizens United*, made in the context of discussing a restriction on independent spending, that the anti-corruption interest recognized in *Buckley* "was limited to *quid pro quo* corruption." Slip op. at 43. Again, the Court there was talking about *Buckley* solely in the context of independent spending, not in the context of coordinated spending or contributions. And pertinently, the Court in *Citizens United*, at page 41 of the opinion, recognized that contribution limits (and thus, restrictions on coordinated expenditures) should be upheld as "preventative, because few if any contributions to candidates will involve *quid pro quo* corruption." It noted that the Court in *Buckley* sustained contribution limits "in order to ensure against the reality or appearance of corruption." The Court then expressly distinguished the independent spending at issue in *Citizens United* from contribution limits. Slip op. at 41. Thus, because the *Shays III Appeal* court was discussing coordinated spending, its analysis falls under the discussion on page 41 of *Citizens United* where the Court affirms the constitutionality of contribution limits as "preventative" of corruption.

goal of 'prohibiting soft money from being used in connection with federal elections'?" *Id.* at 924-25 (quoting *McConnell*, 540 U.S. at 177 n.69). Correctly, the court concluded that the existing regulations do so. *Id.*

Nothing in *Citizens United* alters this analysis. As the Commission itself has recognized, and as the Commission itself has argued in a pleading filed in federal court, the *Citizens United* decision leaves intact and undisturbed the Supreme Court's analysis in *McConnell v. FEC*, 540 U.S. 93 (2003), upholding as constitutional BCRA's soft money provisions. *See* Defendant Federal Election Commission's Supplemental Brief Regarding *Citizens United v. FEC* (Feb. 9, 2010), filed in *RNC v. FEC*, Civ. No. 08-1953 (BMK, RJL, RMC) (D.D.C.) (three judge court). In that filing, the Commission said, "[T]he Court in *Citizens United* could not have stated more clearly that its opinion was 'about independent expenditures, not soft money.' *Citizens United*, slip op. at 45." FEC Supp. Br. at 1. Further, the Commission noted:

> [E]ven if *Citizens United* had not explicitly distinguished soft-money donations from independent expenditures, the decision would not apply here because its constitutional analysis is not relevant to contribution limits. *Citizens United* addressed the constitutionality of independent expenditure limits, which are subject to strict scrutiny, slip op. at 23, and which are not justified by a governmental interest in preventing corruption. *See id*. at 40-45. Contribution limits, in contrast, are subject to intermediate scrutiny, *McConnell*, 540 U.S. at 134-37; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000), and the Court has upheld them repeatedly as valid anti-corruption measures. *See McConnell*, 540 U.S. at 136; *Buckley v. Valeo*, 424 U.S. 1, 23-30 (1976). Thus, the fact that an expenditure limit is found to be unconstitutional simply has no legal or factual bearing on the constitutionality of a separate contribution limit. *See, e.g.*, *Buckley*, 424 U.S. at 23-51 (upholding FECA's original contribution limits but striking down expenditure limits in same Act under different analysis).

FEC Supp. Br. at 2.

Thus, the Commission has already recognized that *Citizens United* did not undermine the holding of *McConnell* with regard to soft money, nor did it disturb the fundamental *Buckley* dichotomy between contributions and expenditures – a dichotomy that equates coordinated spending with contributions.

Since the analysis and holding of the D.C. Circuit in *Shays III Appeal* is based on its conclusion that the Commission's coordination regulation impermissibly facilitates the spending of soft money in federal elections – in the form of coordinated non-express advocacy expenditures, which are the equivalent of soft money contributions – the Commission has already in substance taken a position in court that *Citizens United* does not affect the analysis in *Shays III Appeal*. Accordingly, the Commission is still bound by its obligation to implement the ruling of the D.C. Circuit in *Shays III Appeal*.

3. The Commission should adopt a PASO test as the content standard outside the 90- and 120-day window periods.

In our January 19 comments, we urged the Commission to adopt a PASO content standard outside the 90- and 120-day windows. *See* CLC-Democracy 21 January 19 Comments at 34-39. Nothing in *Citizens United* alters our view on this.

We explained at length in our earlier comments why the express advocacy test applies to independent spending but not to coordinated spending. *Id.* at 32-34. Nothing in *Citizens United* changes that analysis since the *Citizens United* case was, of course, about independent spending. Thus, a rule regulating coordinated expenditures is not limited to express advocacy expenditures, but should instead capture all coordinated "expenditures" – *i.e.*, all spending "for the purpose of influencing an election," 2 U.S.C. 431(9)(A), that is coordinated with a candidate or party. The PASO test is the best approximation for that content standard.[3]

Further, as we previously pointed out, the PASO test has been upheld by the Supreme Court as a sufficiently clear standard so as to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell*, 540 U.S. at 170 n. 64. Nothing in *Citizens United* disturbs that ruling of *McConnell* – particularly in the context of coordinated spending. Whether individual Commissioners agree with this assessment of PASO is irrelevant. The Court has spoken on the matter.

In our earlier comments, we advised against promulgating a regulatory definition of PASO. CLC-Democracy 21 January 19 Comments at 35-36. The Court's discussion in *Citizens United* reinforces this view. There, the Court criticized the Commission's effort to elaborate upon the *WRTL* "functional equivalent of express advocacy" standard, belittling the Commission's "11 factor test" which it promulgated by regulation to elucidate that standard.

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[3] Relevant to this is the very recent decision by the federal district court in Louisiana, certifying constitutional questions in *Cao v. FEC*, No. 08-4887 (E.D. La.. January 27, 2010), a case challenging the constitutionality of section 441a(d), which imposes limits on party coordinated spending. There, at the Commission's urging, the court rejected the RNC's argument that the party coordination rules should apply only to spending which is "unambiguously campaign related." The court said any such test, which is a close cousin to the express advocacy standard, applies only to independent spending, not to coordinated spending:

> Plaintiffs are attempting to conflate the Supreme Court's jurisprudence limiting expenditures, where the content of the communication is inherently at issue and "lines" are inherently necessary, with that limiting contributions, where it is the act of coordination with political candidates that makes the communication regulable. Since *Buckley*, the Supreme Court has never applied a limiting "line" to coordinated campaign expenditures.

Slip op. at 75 (emphasis added) (footnote omitted). As the Court concluded, "In sum, Supreme Court jurisprudence has repeatedly emphasized that it is the coordination with the candidate, not the relationship between the speech and a campaign, that makes the communication Constitutionally regulable . . . ." *Id.* at 78. This decision was issued post-*Citizens United.*

Slip op. at 19. Thus, the Commission's effort to improve upon a standard the Court had already deemed to be sufficiently clear was seen by the Court as complicating, not clarifying, the matter.

The same is true of the PASO standard, which the Court also has already deemed to be sufficiently clear on its face to meet constitutional requisites. To try to "improve" upon this test by imposing an elaborate multi-factor definition of PASO would almost certainly backfire. Given the Court's reaction in *Citizens United* to the *WRTL* regulation, any such effort to define PASO would likely cause the Court to view the regulation simply as manufacturing complexity out of clarity.

Finally, we are strongly opposed to the suggestion made in the SNPRM that the Commission might impose a "heightened standard" before it even initiates an investigation into whether spending has been coordinated in violation of the law. 75 Fed. Reg. at 6591. Nothing in *Citizens United* suggests that any such standard – in the context of coordinated communications – is warranted, much less required. The problem with the Commission's implementation of the law regarding coordinated expenditures has not been too much enforcement, but too little.

For the Commission to adopt the notion that the mere possibility of an investigation might chill speech, and therefore that enforcement actions should be initiated only after a complainant meets some "heightened" pleading standard of "particularity or specificity," 75 Fed. Reg. 6591, would be a further abdication of the Commission's responsibility to enforce the law. The Commission should recall what the D.C. Circuit said in *Shays III Appeal* in rejecting a similar argument that the law on coordination should be structured to avoid a chill on First Amendment activity – "'regulating nothing at all' would achieve the same purpose, 'and that would hardly comport with the statute.'" *Shays III Appeal*, 528 F.3d at 925 (quoting *Shays I Appeal*, 414 F.3d at 101).

The statute with regard to coordinated communications remains in effect post-*Citizens United*. So does the Commission's obligation to fully and effectively enforce it.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

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