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02/24/2010 06:39 PM

To <CoordinationShays3@fec.gov>
cc
bcc
Subject NRSC/NRCC Supplemental Coordination Comment

To whom it may concern,

Please find attached the National Republican Senatorial Committee and National Republican Congressional Committee's comments regarding the proposed regulations on coordinated contributions.

Please do not hesitate to contact us with any questions.

Thank you,

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Supplemental Coordination Comment.pdf

February 24, 2010

VIA ELECTRONIC MAIL

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

Dear Ms. Rothstein:

The National Republican Senatorial Committee and the National Republican Congressional Committee (collectively the "Party Committees") by and through counsel submit these comments in response to the Federal Election Commission's ("Commission" or "FEC") Supplemental Notice of Proposed Rulemaking regarding Coordinated Communications. See 75 Fed. Reg. 6590 (Feb. 10, 2010) ("Supplemental Coordination NPRM"). The Party Committees reaffirm their comments submitted in response to the original Notice of Proposed Rulemaking regarding Coordinated Communications, see 74 Fed. Reg. 53893 (Oct. 21, 2009) ("Coordination NPRM"), and supplement the previous submission with the comments contained herein.

The Party Committees reiterate that, while it is understood that final regulations issued in response to both the Supplemental Coordination NPRM and the Coordination NPRM are intended to and will affect various third-party groups and not political parties, given the important free speech rights at stake, the Party Committees believe it is vital that their views be heard in this rulemaking proceeding as well.[1]

INTRODUCTION

On January 21, 2010, the Supreme Court issued its decision in Citizens United v. Federal Election Commission, 558 U.S. ____, slip op. (2010) ("Citizens United"), holding that corporations have a constitutional right under the First Amendment to spend an unlimited amount of their general treasury funds on independently-produced public communications that either expressly advocate the election or defeat of clearly identified candidates or reference candidates in the course of discussing political or public policy issues. See id. at 50. Further, the Court invalidated the "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002

[1] The Party Committees renew the request in their January 19, 2010 comments that the Commission initiate a separate rulemaking as soon as possible concerning political party coordinated communications. Until that time, the Party Committees will continue to operate under and in full compliance with the Commission's existing political party coordination rules. See 11 C.F.R. § 109.37.

("BCRA"), which had placed strict time limits on when electioneering communications could be publicly disseminated.[2] See id. at 49-50. In the aftermath of Citizens United, there are no longer any content or timing restrictions on corporate and union election-related advertising financed out of their general treasury funds.

The Supreme Court's decision in Citizens United bears directly on this rulemaking in three important ways. First, the decision made clear that Commission regulations implicate vital First Amendment rights and any regulations that are promulgated must be clear and provide bright-line guidance that will facilitate, rather than chill, political speech. Second, the decision underscores and reinforces the range of political speech that is constitutionally subject to regulation – only speech which is made for the purpose of influencing a federal election. See the "Appeal to Vote" test established in Wisconsin Right to Life, 551 U.S. 449 (2007) ("WRTL"). Finally, the Citizens United decision highlighted the importance of any regulation in this area being narrowly tailored.

DISCUSSION

I. Citizens United Reaffirmed That Political Speech Is Entitled to the Highest First Amendment Protection

The Party Committees' original comments in this rulemaking proceeding argued that the Commission should adopt the objective WRTL "appeal to vote" test as the content standard governing coordinated communications, and that the FEC should reject any content standards that turn on whether a public communication promotes, attacks, supports, or opposes ("PASOs") a clearly identified federal candidate. Citizens United underscores these points, and made clear once again that regulation of political speech is subject to strict scrutiny.

While Citizens United involved independent, and not coordinated speech, the constitutional principles at issue apply here. Specifically, and as the Party Committees' original comments discussed at length, money spent by any individual or entity – coordinated or not – becomes an "expenditure" under the Act only if it is done for the objective purpose of influencing a federal election. Put differently, protected issue speech is not transformed into speech subject to regulation simply because it is "coordinated." Citizens United, like WRTL, addresses that threshold underlying speech.

With respect to the WRTL standard, the Citizens United ruling both supports the use of the WRTL standard and indicates that going beyond the WRTL standard raises serious constitutional doubts. The Citizens United Court took a dim view of the Commission's rulemaking following WRTL, stating that the complexity of the FEC's regulations ignored that decision's "objective 'appeal to vote test'," and served as a practical prior restraint on speech. Citizens United at 18-19 ("This is precisely what WRTL sought to avoid."). In the aftermath of Citizens United, it is clear

[2] The Citizens United Court, however, did uphold certain disclaimer and disclosure requirements that apply to electioneering communications. See id. at 52.

that "[a]mbiguous tests" and "11-factor balancing tests" are not appropriate and that objective, bright-line regulations in this area are essential. Id. at 19. The Commission should seek to avoid a similar result in this proceeding as took place in the WRTL rulemaking.

Citizens United also made clear what is not acceptable in terms of regulation. First, the decision struck down a statutory provision, "electioneering communications," that is incorporated directly by reference into the Commission's coordination regulations. See 11 C.F.R. § 109.21(c)(1). It is no longer constitutional to regulate such speech absent an objective "appeal to vote," and thus 109.21(c)(1) is no longer appropriate. Second, as the Party Committees noted in their initial comments, the reference standard in 109.21(c)(4) is broader than the electioneering communications provision and, therefore, also inappropriate as a standard. Finally, the Citizens United ruling made clear that PASO – defined as anything other than an objective "appeal to vote" – is not an appropriate standard. PASO's regulatory complexity is precisely the sort of "practical prior restraint" Citizens United found to be entirely unacceptable.

Finally, the Citizens United decision made no suggestion whatever that a "more robust" coordination rule is appropriate. Certainly, with respect to content, Citizens United makes clear that the Commission's current coordination regulations are overly broad because they capture speech that is well beyond the scope of permissible regulation.

II. Citizens United Provides an Even Stronger Case for Clear Guidance and Bright-Line Rules

By ruling that corporations have a First Amendment right to spend an unlimited amount of their general treasury funds on independent expenditures, the Supreme Court broadened the group of speakers and the types of funds that may be used to make independent expenditures and electioneering communications. All persons and entities making independent expenditures and electioneering communications, including corporations and labor unions, deserve, and are constitutionally due, bright-line regulations and understandable safe harbors that will allow speakers to know in advance which communications will be treated as coordinated communications and which will not.

CONCLUSION

The Party Committees appreciate the opportunity to provide these written comments, and representatives of the Party Committees look forward to testifying at the Commission's hearing for this rulemaking proceeding.

Respectfully submitted,

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