"Trainer, Karen E." <Karen.Trainer@bryancave.com>
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To <CoordinationShays3@fec.gov>
cc
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Subject Comments

Attached please find joint rulemaking comments of the National Republican Senatorial Committee, the Republican National Committee, and the National Republican Congressional Committee regarding Notice 2009-23.

Karen E. Trainer
Senior Reporting Specialist
Bryan Cave LLP
(202) 508-6179

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VIA ELECTRONIC MAIL

January 19, 2010

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, the National Republican Congressional Committee, and the Republican National Committee (collectively the "Party Committees") by and through counsel submit these comments in response to the Federal Election Commission's ("Commission" or "FEC") Notice of Proposed Rulemaking regarding Coordinated Communications. See Fed. Reg. Vol. 74 No. 202, 53893 (Oct. 21, 2009) ("Coordination NPRM").

Although the Coordination NPRM emphasized that "[t]he Commission is not proposing to revise the party coordinated communication rules in this rulemaking" (id. at 53893), and that any final regulations that are issued in this rulemaking proceeding will affect various third-party groups and not political parties, the Party Committees nevertheless thought it was vital that their voices be heard in connection with this critical rulemaking that will affect the free-speech rights of millions of Americans across the political spectrum.[1] The Party Committees hope that the following discussion of the relevant issues will prove helpful to the Commission and respectfully request that their representatives be permitted to testify at the Commission's hearing for this rulemaking proceeding.

INTRODUCTION

The Commission has the unenviable task of attempting, for the third time in the last eight years, to enact regulations regarding coordinated communications pursuant to the Bipartisan Campaign Reform Act of 2002 ("BCRA") that provide clear and meaningful guidance in this fundamental area

[1] The Coordination NPRM seeks comment on whether the Commission should issue a notice of proposed rulemaking regarding political party coordinated communications. See Coordination NPRM at 53910 (noting that the party coordinated communications regulations "were never challenged by the plaintiffs in the Shays litigation, nor were they addressed or even referenced by the appellate or district court decisions.") The Party Committees urge the Commission to initiate a rulemaking proceeding concerning political party coordinated communications as soon as practicable, and the Party Committees will provide detailed comments in connection with any such separate rulemaking proceeding that the Commission undertakes. 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. Additionally, the RNC is a party to ongoing litigation challenging many points of law that are related to the issues at hand. The proposals advanced in this comment are based on the current state of the law and are not reflections of the assertions the RNC is making in litigation.

of the law while also withstanding judicial review. The Commission's past efforts in this area have been commendable and sought to provide political entities with bright-line rules and understandable safe harbors wherever possible. It is critical that whatever regulations the Commission promulgates in this current rulemaking provide political actors with at least the same degree of clarity in distinguishing between those public communications that will be treated as coordinated communications – and therefore will be subject to very stringent legal prohibitions – and those public communications that will not.

The Supreme Court has repeatedly noted our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). And just two terms ago the Supreme Court emphasized that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." FEC v. Wisconsin Right to Life, 551 U.S. 449, 474 (2007) ("WRTL") (Roberts, C.J.). See also id. at 469 (Proper standards "must give the benefit of any doubt to protecting rather than stifling speech.").

In light of these teachings, the Commission should be guided by the following general considerations as it conducts this important rulemaking.

First, any revised coordinated communications regulations that the Commission enacts must contain a clear, bright-line content standard that will enable political actors to determine, prior to disseminating a public communication, whether the communication will be potentially subject to coordination restrictions. Accordingly, any regulations that the FEC issues in this area "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." WRTL, 551 U.S. at 469 (Roberts, C.J.). As the Supreme Court has repeatedly emphasized, any legal test that turns on the intent of the speaker "blankets with uncertainty whatever may be said, and offers no security for free discussion." WRTL, 551 U.S. at 468 (Roberts, C.J.) (quoting Buckley v. Valeo, 424 U.S. 1, 43 (1976) ("Buckley") (internal quotations omitted)). See also WRTL, 551 U.S. at 468. ("[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection. First Amendment freedoms need breathing space to survive.") (quoting NAACP v. Button, 371 U.S. 415, 433 (1963) (internal quotations omitted)). Similarly, any standard which turns on the perceived effects of speech is also impermissible. As the Supreme Court stressed in WRTL, the Court's ruling in Buckley "explain[ed] the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." WRTL, 551 U.S. at 469 (Roberts, C.J.) (internal quotations omitted).

In light of the foregoing, any new coordination regulations that the Commission promulgates must include an objective, bright-line content standard that focuses on the four corners of a public communication and does not turn on vague notions of intent and effect. In so doing, the Commission "must eschew the open-ended rough-and-tumble of factors, which invites complex argument . . ." WRTL, 551 U.S. at 469 (Roberts, C.J.) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995) (internal quotations omitted)).

Second, the Commission must ensure that any new coordination regulations that are issued are narrowly tailored and only restrict those public communications that are coordinated and that are made for the purpose of influencing a federal election as demonstrated within the actual content of

the communication. The Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") provides that "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). However, the Act limits "expenditures" to "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." 2 U.S.C. § 431(9)(A)(i) (emphasis added).

Significantly, both the District Court and the D.C. Circuit Court of Appeals in the Shays litigation have appropriately recognized that not all coordinated communications are restricted under FECA and BCRA, but rather only the narrow range of coordinated communications that are made for the purpose of influencing a federal election. As the D.C. Circuit Court emphasized in the Shays litigation, only "if someone makes a purchase or gift with the purpose of influencing a [federal] election and does so in cooperation with a candidate [does] FECA count[] that payment as a campaign contribution." Shays v. FEC, 414 F.3d 79, 97 (D.C. Cir. 2005) ("Shays I Appeal") (emphasis added). See also id. at 99 (noting under FECA that expenditures must be made "for the purpose of influencing a federal election" and that "time, place, and content may be critical indicia").

Third, the D.C. Circuit Court of Appeals has made clear in the Shays litigation that the Commission must enact coordination regulations that "rationally separate[] election-related advocacy from other activity that fall[s] outside FECA's expenditure definition . . . ." Shays v. FEC, 528 F.3d 914, 925 (D.C. Cir. 2008) ("Shays II Appeal") (quoting Shays I Appeal, 414 F.3d at 101-02.) In doing so, the D.C. Circuit has also recognized that "the FEC, properly motivated by First Amendment concerns, may choose a content standard less restrictive than the most restrictive it could impose . . . ." Shays II Appeal, 528 F.3d at 926. Such a narrowly tailored and careful approach would be consistent with the Supreme Court's long-standing edict that precision of regulation "must be the touchstone in an area so closely touching our most precious freedoms." Buckley, 424 U.S. at 41 (internal quotation and citation omitted).

DISCUSSION

I. The Commission Should Adopt the WRTL "Appeal to Vote" Test as the Content Standard Governing Coordinated Communications and the WRTL Test Should Apply at All Times

The content standard is at issue in this rulemaking because of a basic question: what coordinated speech outside of express advocacy may lawfully be subject to regulation and restriction? Since BCRA was enacted, no clear answer has existed. BCRA provided that some speech beyond express advocacy was subject to regulation, but how was it to be identified? And beyond electioneering communications – a specific category of non-express advocacy speech that Congress targeted directly in BCRA – what, if anything else, could be constitutionally regulated at all?

The Party Committees believe the Supreme Court established the appropriate, and indeed the constitutionally required, standard in Chief Justice Roberts's opinion in WRTL. Unless a coordinated communication is susceptible of no other reasonable interpretation than advocating a

clearly identified federal candidate's election or defeat, the communication may not be subject to restriction, and this standard should apply year-round, without any time limitation.

A. Background

The coordinated communications regulations, first enacted in the 1970s, implement sections 441a(a) and (d) of the Act. These two provisions address, respectively, contribution limits to federal candidates and political party committees, and expenditures by political party committees "in connection with [the] general election campaign of candidates for federal office." See 2 U.S.C. § 441a(a) & (d). "Expenditure" is statutorily defined as "any purchase, payment, loan, or gift. . . made for the purpose of influencing" a federal election. 2 U.S.C. §§ 431(9)(A), 441a(a)(7)(B)(i) (emphasis added). The Act treats coordinated expenditures as contributions, subject to the Act's contribution limits and source prohibitions.

Congress in BCRA did nothing to change the Act's basic definitions of "contribution" and "expenditure." However, BCRA did repeal the Commission's then-existing coordinated communications regulations with respect to third party groups and directed the Commission to enact new coordination regulations. Public Law 107-155, sec. 214(b), (c) (March 27, 2002). Accordingly, the Commission promulgated revised coordination regulations in 2003.[2]

B. FEC's Prior Coordination Regulations

The Commission's 2003 coordination regulations created a three-prong test for determining whether a communication was coordinated involving (1) payment, (2) content, and (3) conduct. The 2003 regulations were designed in this way, at least with respect to their including a content standard, as a recognition of the constitutional limits inherent in regulating coordinated expenditures involving speech.[3] The Act's coordinated expenditure provision states that any "expenditure made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized committee, or political party, shall be considered to be a contribution." 2 U.S.C. § 441a(a)(7)(B)(ii). In enacting the 2003 coordination regulations, the Commission correctly recognized that were the act of coordinating alone enough to convert speech into an "expenditure" under FECA, the regulations would be boundless. Under such a regulatory regime, a federal electioneering motive would automatically be imputed to all communications paid for by a person with any candidate or party involvement whatsoever.

At the time two commenters urged the Commission to adopt that exact regulatory approach. The Commission recognized the constitutional danger in doing so, and rightly rejected it:

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[2] Congress mandated that the Commission's new coordination regulations address four specific aspects of coordination: (1) republication of campaign materials; (2) use of common vendors; (3) communications directed or made by a former employee of a candidate or political party; and (4) communications made after substantial discussion with a candidate or political party. Public Law 107-155, sec. 214(c)(1)-(4) (March 27, 2002). Notably, Congress gave no instruction whatever concerning a communication's content. As such, the Commission was left on its own to navigate the constitutional minefield inherent in censoring and restricting speech outside of express advocacy.

[3] "The Commission is including a content standard in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election." Fed. Reg. Vol. 68, No. 2, 427 (Jan. 3, 2003).

> The Commission recognizes that a content requirement may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of [BCRA], but the Commission believes that a content standard provides a clear and useful component of a coordination definition in that it helps ensure that the coordinated regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election. Fed. Reg., Vol. 68, No. 2, 426 (Friday, January 3, 2003). [4]

The Commission's 2003 content standard identified four categories of communications that would satisfy the standard. Two of those categories were (1) "electioneering communications," and (2) public communications referencing federal candidates, or parties, or both, that air within certain pre-election time frames and are targeted to the relevant electorate. 11 C.F.R. §§ 109.21(c)(1), (4).[5]

1. Section (c)(1)

The Commission incorporated the statutory definition of electioneering communications at 11 C.F.R. § 100.29 into its 2003 coordination regulations as one of the applicable content standards. The electioneering communications regulation prohibited corporations and unions from using their general treasury funds to finance any broadcast, cable, or satellite communications referencing a federal candidate 60 days before a general election and 30 days before a primary election and targeted to the relevant electorate. The inclusion of electioneering communications in the Commission's content standard followed Congress's instruction that coordinated electioneering communications be treated as in-kind contributions. Accordingly, 11 C.F.R. § 109.21(c)(1) implemented BCRA Section 434(f)(3), which was Congress's direct assault on communications that reached beyond express advocacy but which were believed by Congress to be the "functional equivalent" of express advocacy.

2. Section (c)(4)

The Commission's 2003 coordination regulations, however, went far beyond just capturing express advocacy and electioneering communications. 11 C.F.R. § 109.21(c)(4) as promulgated in 2003 applied to "any public communication" targeted to the relevant electorate and referencing a federal candidate 120 or fewer days before an election.

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[4] Furthermore, the Commission expressly noted that a content standard acted as a "safe harbor" and that certain speech was beyond the reach of the coordinated regulations "under any circumstance." Fed. Reg. Vol. 68, No. 2 at 430, n.2 (Jan. 3, 2003).

[5] The two other content categories in the Commission's coordination regulations were (1) express advocacy, and (2) republication of a candidate's campaign materials. So long as "express advocacy" is constitutionally defined and applied, see infra Sec. III, these two categories are properly included in the Commission's coordination regulations. In the context of coordinated communications, these categories are the closest to coordinated expenditures, "virtually indistinguishable from simple contributions," and thus are appropriately subject to regulation. See FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 444 (2001) ("Colorado") (quoting Colorado Republican Federal Campaign Committee. v. Federal Election Commission, 518 U. S. 604, 624 (1996) ("Colorado I").

The candidate reference standard at § 109.21(c)(4) was adopted in order to capture speech that was the same in content as an electioneering communication but which was distributed through a medium that was not covered under the electioneering communications provisions, such as newspapers, magazines, or presumably, books. See Fed. Reg. Vol. 68, No. 2 at 429 (Jan. 3, 2003). Put differently, this content standard was created solely to regulate speech that was (1) not express advocacy, and (2) distributed through print media. As such, this provision was also broader than the electioneering communications provision in its temporal and medium coverage.

The Commission's 2003 candidate-reference standard was different than the current candidate-reference standard in that the 2003 standard applied the 120-day time frame to all federal races. In its current form, the time frames subject to regulation certain defined speech that occurs within 90 or 120 days of a federal election, depending upon whether the speech refers to, respectively, a Senate or House or a Presidential candidate.[6] In both cases, the Commission's coordination regulations captured only express advocacy and republication of campaign materials outside the given time frames.

These revised 90/120 day time frames were developed after a 2006 supplemental rulemaking specifically focused on the justification for the time frames. See Notice of Supplemental Rulemaking, Fed. Reg. Vol. 71, No. 50 at 13306 (March 15, 2006). Nine comments were filed and public hearings were held concerning the justification for the regulation's proposed timeframes. The Commission, relying upon voluminous empirical evidence, concluded that the overwhelming number of campaign advertisements were aired inside the 90/120 day time window. Nevertheless, the new time frames were rejected by the courts in the Shays litigation as lacking proper justification under the Administrative Procedure Act.

C. The Shays Litigation

The Commission's content standard, among other BCRA-implementing regulations, have been challenged twice in federal court as being overly permissive and contrary to BCRA's intent. See Shays I Appeal; Shays II Appeal.

Plaintiffs have not, however, triumphed on their claims outright. The reason the rulemaking-to-lawsuit path has become well tread is exactly because even during BCRA's constitutional apex, distinguishing issue from electoral speech was a sticky wicket. While the D.C. Circuit has twice rejected the FEC's coordinated communications regulations, the D.C. Circuit has never held that the inclusion of a content standard is impermissible. To the contrary, the D.C. Circuit has noted that the content of a public communication is directly relevant to determining whether the communication is for the purpose of influencing a federal election. See Shays I Appeal, 414 F.3d at 99.

[6] The time frames are applied differently. The 90-day time frame applicable to House and Senate candidates applies 90 days before both a primary and a general election, whereas the 120-day time frame applicable to presidential candidates is triggered 120 days before each state's primary and then continues until the general election.

1. Shays I

The Shays I court rejected the Commission's original 120-day time frames on the grounds that the Commission failed to adequately justify why use of a content standard was not contrary to congressional intent. In doing so, the D.C. Circuit overturned the district court's ruling that the regulations failed on Chevron step two grounds because the D.C. Circuit agreed with the Commission that some speech referencing federal candidates fell outside of the Act's definition of an "expenditure":

> While election-related intent is obvious, for example, in statements urging voters to "elect" or "defeat" a specified candidate or party, the same may not be true of ads identifying a federal politician but focusing on pending legislation .... Shays I Appeal, 414 F.3d at 99.
>
> And:
>
> [W]e think the FEC could construe the expenditure definition's purposive language as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign. Id.

Rather, based upon the Supreme Court's determination in McConnell v. FEC, 540 U.S. 93 (2003) ("McConnell"), that the line between certain issue advocacy and express advocacy was "functionally meaningless," the D.C. Circuit held that the Commission required a more persuasive justification for its coordination regulations outside of the 120-day time frame.[7] Shays I Appeal. Accordingly, in 2006 the Commission issued revised coordination regulations after receiving comments, holding a hearing, and collecting a vast array of empirical data concerning the time periods during which campaign communications are disseminated.

2. Shays II

The Commission's revised coordination regulations were again challenged on the grounds that they did not restrict enough political speech outside of the specified time windows. The D.C. Circuit again invalidated the regulation on the grounds that the Commission failed under the Administrative Procedure Act to adequately justify its reliance solely upon express advocacy and republication of campaign materials to restrict communications outside the 90/120 day time frame. See Shays II Appeal.

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[7] A demonstration of how dramatically the constitutional landscape surrounding issue advocacy has changed since McConnell and Shays I were decided is the Shays I court's statement that "while 'electioneering' ads are clearly one category of communications that may count as coordinated expenditures under BCRA, nothing in the statute suggests they represent the only – or even primary – such category... nothing should prevent the FEC from regulating other categories of non-electioneering speech..." Shays I Appeal, 414 F.3d at 101. This dicta is squarely at odds with the Supreme Court's ruling in WRTL.

D. Analysis

In the aftermath of the Supreme Court's ruling in WRTL, there are now clear standards regarding how far the Commission may lawfully go in regulating and restricting coordinated communications.[8]

1. Regulation of Issue Advocacy is Subject to Strict Scrutiny

Post-WRTL, the regulation and restriction of issue advocacy is subject to strict scrutiny. Furthermore, money spent by an entity or individual only becomes an "expenditure" under the Act if it is done for the purpose of influencing a federal election, and the foregoing activity only becomes an in-kind contribution that is subject to the applicable contribution limits if it is coordinated. In short, the act of coordination does not create an "expenditure" where it does not already exist. Thus, coordination merely creates a contribution issue for a communication that would constitute an expenditure on its own.

In WRTL, Chief Justice Roberts explained how the relevant level of scrutiny is determined:

> This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. McConnell at 206. So to the extent the ads in these cases fit this description, the FEC's burden is not onerous; all it need do is point to McConnell and explain why it applies here. If, on the other hand, WRTL's ads are *not* express advocacy or its equivalent, the Government's task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest. No precedent of this Court has yet reached that conclusion.

WRTL, 551 U.S. at 465.

Neither the Chief Justice's opinion in WRTL, nor any other Supreme Court precedent, has changed this analysis for speech beyond express advocacy or the functional equivalent of express advocacy – and the presence or absence of coordination is not a part of that analysis. Only if the speech itself constitutes express advocacy or the functional equivalent of express advocacy is the speech subject to the lower, "close scrutiny" standard of review applicable to contributions.

The Commission's time frames in its current coordination regulations were created as a means to regulate exactly the speech that the Shays courts identified as Congress's target: communications that were the "functional equivalent" of express advocacy or, put differently, communications aimed at influencing a federal election. This is because FECA has long regulated and restricted contributions – and contributions have always been and remain "any gift . . . made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (emphasis added). There is no question that this range of communications is what the Commission's prior time frames in the coordination regulations were designed to capture.[9]

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[8] The Supreme Court's decision in the pending Citizens United v. FEC ("Citizens United") case may further circumscribe the Commission's regulatory power in this area. The Party Committees reserve the right to supplement these comments if the Citizens United ruling bears on the FEC's legal ability to regulate and restrict coordinated communications.

[9] The Commission made the central purpose behind the time frames clear in the 2006 coordinated rulemaking: "[T]hese data, therefore, provide empirical support for the Commission's decision to use time frames as part of a bright-line test

2. The New Standard: WRTL "Appeal to Vote" Test

Following WRTL, the only relevant question in identifying public communications that may be regulated and restricted as coordinated communications is whether the communication meets the payment and conduct prongs of the coordination rules and (1) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate, or (2) constitutes republished campaign materials. Some commenters may argue that the Court's ruling in WRTL is inapplicable to the Commission's consideration of coordination regulations because § 203, the electioneering communications provision at issue in WRTL, imposed a ban on the communications, while 11 C.F.R. § 109.21 does not ban coordinated communications, but merely restricts them as in-kind contributions subject to the applicable contribution limits. Federal courts have been clear, however, that a contribution limit on otherwise protected speech constitutes an unconstitutional "back door" restriction of that speech. See e.g., EMILY's List v. FEC, 583 F.3d 1 (D.C. Cir. 2009).

Indeed, the District Court for the District of Columbia viewed the WRTL ruling as broad enough in its potential effect to issue an order asking the Shays II parties' opinions as to whether the court should order briefing on the question of WRTL's impact on that litigation. See D.D.C. Order (July 6, 2007). Not surprisingly, plaintiffs argued that there was none. Surprisingly, so did the Commission.

The Commission offered two reasons why WRTL did not apply to the coordinated communications regulations:[10] first, that WRTL reiterated "general principles of campaign finance jurisprudence" that supported the "careful line drawing" the Commission had undertaken; and, second, that Chief Justice Roberts's analysis was limited to independent expenditures. See Defendant's Notice Regarding Additional Briefing on Pending Motions for Summary Judgment at 2 (July 13, 2007). Both reasons are flawed.

The first rationale is flawed because the "general principle" articulated in WRTL was that the First Amendment requires that the government give the benefit of the doubt to speech, not censorship. More specifically, regulating protected speech as a means of regulating unprotected speech "turns the First Amendment upside down." WRTL, 551 U.S. at 475 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)). This "general principle" is not supportive of a content standard that is broader in scope than the one curtailed in WRTL – with or without the presence of coordination. Under such an approach, speech that WRTL directly held to be protected issue advocacy – the Wisconsin Right to Life advertisements themselves – would potentially become subject to regulation if coordinated with a candidate. Moreover, those same advertisements run in print form – and thus not even covered by BCRA's electioneering communications restrictions – would become potentially subject to regulation.[11]

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for determining whether a communication is made for the purpose of influencing federal elections." Explanation and Justification, Fed. Reg., Vol. 71, No. 110, 33197-8 (June 8, 2006) (emphasis added).

[10] Notably, the Commission took virtually the same position on this issue as the plaintiffs, despite the fact that the Commission was defending the existing regulations against charges that the regulation was too lax. Even the plaintiffs admitted "WRTL arguably could be relevant to different challenges against the coordinated regulations that might be brought by other plaintiffs." Plaintiffs' Notice Regarding the Bearing of FEC v. WRTL on Pending Cross Motions for Summary Judgment at 2 (July 13, 2007).

[11] This is precisely the sort of regulatory gymnastics, and precisely the subject matter – regulation of non-express advocacy or its functional equivalent – that Chief Justice Roberts addressed in WRTL, declaring: "Enough is enough.

The second rationale is flawed because while WRTL arose in the independent speech context, nowhere does the Chief Justice's opinion in WRTL limit the "general principles of campaign finance law" to independent speech. There is no mention of coordination in the Chief Justice's opinion in WRTL, much less any distinction drawn between non-express advocacy or its functional equivalent speech and coordinated non-express advocacy or its functional equivalent speech.

For all of the reasons outlined above, the Commission should use the WRTL appeal to vote test as the applicable content standard in the FEC's coordination regulations and this content standard should apply at all times.

II. PASO Is Not An Appropriate Content Standard Because PASO Is Unduly Complex, The FEC Has Failed To Achieve Consensus On Its Scope, And It Is Overly Broad

The Coordination NPRM includes multiple proposed content standards that turn on whether a public communication promotes, supports, attacks, or opposes ("PASOs") a clearly identified federal candidate. See Coordination NPRM at 53897-53901 (proposing multiple and contradictory PASO standards). The Coordination NPRM contains an extensive discussion of the various and often overlapping dictionary definitions of the terms "promote," "support," "attack," and "oppose," as well as numerous examples -- many of which are inconsistent with each other -- of hypothetical public communications that purport to contain or not contain PASO.

The convoluted nature of the various PASO regulatory options is further highlighted by different proposed applications of the PASO standard, even setting aside the question of what the standard should be. The FEC notes in the Coordination NPRM that "[p]roposed [PASO] Alternative A would apply to those instances in the Commission's regulations in which two or more of the four component PASO words are used together." Id. at 53898. However, "[p]roposed [PASO] Alternative B would apply to those instances in the Commission's regulations in which all four of the component PASO words are used together." Id.

Further regulatory complexity is introduced when the Commission inquires as to whether certain "verbal" or "pictorial means" should be analyzed in assessing whether a particular public communication contains PASO. Specifically, the FEC notes that PASO Alternative B provides that "photographic or videographic alterations, facial expressions, body language, poses, or similar features" may not be considered in determining whether a communication contains PASO. Id. at 53901. By contrast, PASO Alternative A "would not restrict the manner in which a communication PASOs a candidate." Id. Accordingly, the Commission inquires in the Coordination NPRM whether "song lyrics," "images of the American flag," "patriotic or frightening music," and "altered candidate images" may or must be included in any assessment of whether a public communication contains PASO. Id. See also id. at 53912 (proposing that a television advertisement depicting a member of Congress with the date of the election does not contain PASO in which "[i]n the background, the Imperial March theme song from Star Wars is played"); id. (proposing no PASO finding in which "[a] television ad shows grainy video of a presidential candidate on a large screen silently speaking to a group of masses. A passerby throws a sledgehammer at the screen").

Issue ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them." WRTL, 551 U.S. at 478-79 (emphasis added).

It is difficult to overstate the inherent complexity of the Commission's various and conflicting PASO proposals. This is not surprising given that the Commission has failed to adopt a regulation defining PASO in the eight years since BCRA was enacted. See e.g., Political Committee Status Final Regulations, 69 Fed. Reg. 68056, 68060 (Nov. 23, 2004) (declining to adopt PASO in connection with certain allocation regulations under 11 C.F.R. § 106.6(b). See also Coordinated and Independent Expenditure Final Regulations, 68 Fed. Reg. 421, 428 (Jan. 3, 2003); Coordinated Communications Final Regulations, 71 Fed. Reg. 33190, 33199 (June 8, 2006) (declining to adopt PASO as a content standard). It is also not surprising given that the Commission in good faith has failed to reach consensus on whether particular communications did or did not contain PASO. See MUR 6113 (Hollingsworth) (rejecting on a 3-3 vote a proposed reason-to-believe finding that certain political advertisements contained PASO). Needless to say, some of the disagreements among the Commissioners concerning the scope of PASO have been very contentious. See e.g., Statement of Reasons of Commissioners Bauerly and Weintraub in MUR 6113 at 3 ("While ambiguity about the outer reaches of the PASO standard could inform the Commission's analysis in marginal cases, it should not prevent us from applying this legal standard... If the phrase 'I endorse the McCain-Palin team' is not a statement of support, it is hard to imagine what is."); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 6113 at 8-9 (declining to find PASO "to avoid unnecessarily getting mired in constitutional thickets").

Regardless of whether the Commission could reach consensus on the proper scope of PASO and could fashion a PASO test free of great complexity, the PASO standard is overly broad and is not an appropriate content standard for identifying coordinated communications. As was noted above, FECA and BCRA treat coordinated expenditures as in-kind contributions that are subject to applicable source prohibitions and contribution limits, but expenditures are limited to payments made "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(9)(A)(i). Likewise, the D.C. Circuit Court of Appeals emphasized in the Shays litigation that only "if someone makes a purchase or gift with the purpose of influencing a [federal] election and does so in cooperation with a candidate [does] FECA count[] that payment as a campaign contribution." Shays I Appeal, 414 F.3d at 97 (emphasis added). See also id. at 99 (noting under FECA that expenditures must be made "for the purpose of influencing a federal election"). A wide range of issue-oriented public communications can be viewed as "promoting," "attacking," "supporting" or "opposing" a federal officeholder on some level but which are not made for the purpose of influencing a federal election. In this respect, a PASO content standard would fail to "rationally separate[] election-related advocacy from other activity falling outside of FECA's expenditure definition." Shays II Appeal, 528 F.3d at 925 (quoting Shays I Appeal, 414 F.3d at 101-02.)

Moreover, to the extent that a PASO content standard would turn on either the intent of the speaker or the perceived effects of a public communication on its audience, use of the standard is foreclosed by the Supreme Court's ruling in WRTL. See WRTL, 551 U.S. at 469 (Roberts, C.J.) (The operative legal test "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."). As the Chief Justice emphasized in WRTL, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection. First Amendment freedoms need breathing space to survive." Id. at 469 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963) (internal quotations omitted)). Any standard which turns on the perceived effects of speech is also impermissible. As the Supreme Court re-affirmed in WRTL, the Court's ruling in Buckley "explain[ed] the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience.

Such a test puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." WRTL, 551 U.S. at 468-69 (Roberts, C.J.) (internal quotations omitted).

An intent or effects content standard such as PASO has a chilling effect because it raises the specter of the Commission evaluating various public communications under the totality of the circumstances – literally cuing up videotapes of political advertisements behind closed doors and weighing whether the advertisement's music, lighting, pictures, or other features are perceived by four or more Commissioners as somehow PASOing a federal candidate. Such an open-ended, standardless inquiry is overly broad and has no place where the government seeks to regulate core political speech protected by the First Amendment. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). Accordingly, precision of regulation "must be the touchstone in an area so closely touching our most precious freedoms." Buckley, 424 U.S. at 41 (internal quotation and citation omitted).

For all the foregoing reasons, the Commission should not adopt PASO in any form as a content standard for identifying coordinated communications that are subject to regulation and restriction under the Act.

III. If the Express Advocacy Test is Retained As Part of the Commission's Coordination Regulations, Express Advocacy Should Be Limited to 11 C.F.R. § 100.22(a) and 11 C.F.R. § 100.22(b) Should Be Repealed

The Commission seeks comment in the Coordination NPRM on whether it should clarify that the existing express advocacy content standard in the FEC's coordination regulations is congruent with the Commission's definition of express advocacy at 11 C.F.R. § 100.22. See Coordination NPRM at 53904 (seeking comment on whether to add a cross-reference to 11 C.F.R. § 100.22(a) in 11 C.F.R. § 109.21(c)(3)). As outlined above, the Party Committees believe that the Commission should adopt and use the WRTL "appeal to vote" test as the operative content standard in its coordination regulations at all times, which would make it unnecessary to retain the express advocacy test. However, if the Commission decides to continue using the express advocacy test in its coordination regulations, the FEC should repeal 11 C.F.R. § 100.22(b) and limit the scope of express advocacy to the bright-line definition contained in 11 C.F.R. § 100.22(a). As the Commission points out in the Coordination NPRM, the express advocacy test found in 11 C.F.R § 109.22(a) extends beyond magic words to include words and slogans "'which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." See Coordination NPRM at 53904 (quoting 11 C.F.R § 109.22(a).). Therefore, the Shays II Appeals court's concern regarding a "functionally meaningless" magic words standard outside the current time frames is addressed. The Party Committees believe that the 11 C.F.R § 109.22(a) content standard rationally separates electoral advocacy from other kinds of speech.

The Commission should repeal 11 C.F.R § 109.22(b) because the regulation has been struck down as unconstitutional by multiple federal appeals courts and by other federal courts. See Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001); Maine Right to Life Committee, Inc. v. FEC, 914 F.Supp. 8 (D. Me.), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996). See also Iowa Right to Life

Committee v. Williams, 187 F.3d 963, 970 (8th Cir. 1999) (striking down as unconstitutional a state statute with the exact same wording as 11 C.F.R. § 100.22(b)).

Moreover, given that 11 C.F.R. § 100.22(b) extends beyond explicit words of electoral advocacy and restricts implied electoral messages, its continued use by the Commission is foreclosed by numerous federal court rulings. See e.g., FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980 ("[T]he FEC would apparently have us read 'expressly advocating' . . . to mean for the purpose, express or implied, of encouraging election or defeat . . . .") (emphasis in original); id. ("[C]ontrary to the position of the FEC, the words 'expressly advocating' mean[] exactly what they say."); FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995) (same); FEC v. NOW, 713 F. Supp. 428, 434 (D.D.C. 1989) ("NOW's letters do not contain pointed exhortations to vote for or against particular persons. The three mailings include no explicit words directing the reader how to vote.").

There is no question that the Commission's continued use of 11 C.F.R. § 100.22(b) -- in the face of adverse court rulings across the country -- has not been appropriate and has forced speakers to hedge and trim, which has had a chilling effect on core political speech protected by the First Amendment. Unless restrictions are crafted with "narrow specificity," protected speech will be deterred as speakers "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." Buckley, 424 U.S. at 41 n.48 (quoting NAACP v. Button, 371 U.S. at 433). As the Supreme Court has repeatedly emphasized, First Amendment freedoms are "delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." Id.

Given that federal appeals courts across the country have ruled that 11 C.F.R. § 100.22(b) is unconstitutional, the Commission should repeal the regulation and should cease using it to regulate coordinated communications and should also discontinue using it in all other regulatory contexts.

IV. The "Explicit Agreement" Standard in the NPRM Should Be Rejected Because It Improperly Includes All Coordinated Communications, Not Just Those Communications That Are Made for the Purpose of Influencing Federal Elections

The Coordinated NPRM purports to contain a fourth alternative content standard, identified as the "Explicit Agreement Standard," which would be satisfied if there were a "formal or informal agreement" between a candidate or political committee and a person or entity paying for a public communication and "either the communication or the agreement . . . [is] made for the purpose of influencing a federal election." See Coordination NPRM at 53912 and 53904-05. In actuality, the Explicit Agreement Standard includes no content standard at all and would turn entirely upon whether specified conduct took place, in the form of certain "formal or informal agreements" between a candidate or political committee and a person or entity paying for a public communication.

The Commission should decline to adopt the Explicit Agreement Standard in any form because it is vague and overly broad and fails to include any content standard, which is indispensable to "rationally separat[ing] election-related advocacy from other activity falling outside FECA's expenditure definition." Shays II Appeal, 528 F.3d at 925 (quoting Shays I Appeal, 414 F.3d at 101-102.) See also Shays I Appeal, 414 F.3d at 99 (ruling that FECA expenditures must be made "for

the purpose of influencing a federal election" and emphasizing that "time, place, and content may be critical indicia") (emphasis added).

The Coordination NPRM indicates that the Explicit Agreement Standard is designed to capture "conduct that explicitly reveals both an unquestionable agreement and unequivocal intent to affect a Federal election . . . ." Coordination NPRM at 53904. How the Commission is to divine whether "unquestionable agreement" or "unequivocal intent" exists in a given circumstance is not evident. The Coordination NPRM states that the Explicit Agreement Standard "would apply without regard to when the communication is made or the targeted audience" and would be a "fact-specific determination." Id. at 53905. In terms of assessing whether a communication was disseminated for the purpose of influencing a federal election, the Coordination NPRM inquires "[s]hould the purpose be determined more broadly, e.g., by inference, discussions, implicit agreements, or course of dealing?" Id. If this were the operative regulatory approach, informal and formal agreements, as well as implicit and explicit understandings, however they may be alleged, would all be investigated, weighed, and ultimately evaluated by the Commission under the totality of circumstances, without any regard for the content of the alleged coordinated communication.[12]

It is difficult to envision a broader, more ill-defined and invasive coordination test than the Explicit Agreement Standard. Even if the Explicit Agreement Standard were not unduly vague and open-ended, the standard is contrary to the Supreme Court's repeated rejection of both an intent and effects test in regulating political speech. See WRTL, 551 U.S. at 467 (Roberts, C.J.) (noting that the Supreme Court in Buckley "rejected an intent-and-effect test for distinguishing between discussions of issues and candidates"). Thus, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." Id. at 468 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963) (internal quotations omitted)). Furthermore, as the Supreme Court emphasized in WRTL, the Court's ruling in Buckley "explain[ed] the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." WRTL, 551 U.S. at 469 (Roberts, C.J.) (internal quotations omitted).

For all the foregoing considerations, the Commission should not adopt the Explicit Agreement Standard in this rulemaking proceeding.

V. The Commission Should Retain the Current 120-Day Time Window Governing Common Vendors and Former Employees

The Commission has been tasked with the job of either further justifying the 120-day period of time included in the conduct prong at 11 C.F.R. §§ 109.21(d)(4) and (d)(5) -- during which a common vendor's or former employee's relationship with a political committee making a communication can potentially satisfy the conduct prong of the FEC's coordination regulations -- or amending the time period to two years or the current election cycle. Given that the D.C. Circuit has not ruled that a

[12] The potential scope of the Explicit Agreement Standard is further highlighted by Example 1 in the Coordination NPRM, which describes a hypothetical education advertisement aired by an outside group after certain discussions with a federal candidate. See Coordination NPRM at 53905. The Coordination NPRM indicates that the hypothetical advertisement would be restricted under the Explicit Agreement standard even though the advertisement does not depict or refer to the federal candidate or any of her opponents, or to any political party.

120-day standard in these areas is improper, and given the increasingly-shortened "shelf life" of campaign-related information, the Party Committees believe that the Commission should retain the current 120-day standard and provide additional support for the propriety of this time period.

At the outset, it is important to emphasize that the D.C. Circuit in the Shays litigation has not foreclosed the continued use of a 120-day time period in these portions of the Commission's conduct prongs for regulating coordinated communications. As the FEC noted in the Coordination NPRM, the D.C. Circuit "held that the Commission failed to justify sufficiently the 120-day time period applicable to both common vendors and former employees, [but] it did not hold that the 120-day time period was inherently improper." Coordination NPRM at 53906.

The justification for the 120-day time period turns on this basic empirical fact: information about a campaign's plans, projects, activities or needs becomes exponentially less relevant and less reliable with the passage of time. This being true, further restricting the flow of information and the ability of political committees to hire vendors and employ individuals will only result in preventing campaign professionals with no material information from contracting with and working on behalf of political campaigns.

No matter when the first piece of literature is mailed or when the first meet-and-greet is held, campaigns, and individuals and organizations wanting to ensure the success of those campaigns, focus on one singular goal and one singular date – helping the candidate to receive the number of votes required to win on Election Day.[13] In order to accomplish this goal on this day, information communicated must be material, relevant, and accurate to voters on the day that they go to the polls. The nature of campaign information is such that even the passage of two weeks can make once material information immaterial, and thus the passage of 120 days certainly erases any guarantee that information continues to be useful in accomplishing a campaign's ultimate goal.

As multiple commenters have stated in response to recent NPRMs addressing the coordinated communications regulations, the "shelf life" of campaign-related information is simply not very long. Even if one assumes that a common vendor or former employee was once privy to information material to the creation, production, or distribution of a communication -- which may or may not be an accurate assumption -- it is impossible to know whether that information is still relevant and material 120 days after the information was first learned. Additionally, each advance in technology, whether it is the Internet, increased reliance on personal digital assistants, Facebook, or Twitter, further shortens the shelf life of campaign-related information, as voters must consider and make decisions based upon ever-increasing amounts of new information that are received in real-time from a multitude of sources on any topic imaginable. Simply put, what was relevant to voters yesterday is unlikely to be important to voters today.

For example, information obtained about a campaign's media strategy or the targeted audience for certain communications, which are information categories covered by the Commission's common vendor regulations, is only relevant as it relates to what was going on when the decisions about the media strategy and targeted audience were made. Was there a certain political or policy issue framing the debate about the campaign at the time? Has something occurred since that time to change the strategy or the targeted audience? Without constant contact with the campaign, a vendor

[13] Even in those jurisdictions which permit early voting, the focus is on the final days and weeks before Election Day when early voting and absentee balloting takes place.

or employee would not know the answers to these fundamental questions, and thus the vendor's or employee's choice to craft a communication based upon this information would be based on mere speculation or conjecture as to the campaign's wishes and desires, which makes it inappropriate to treat this kind of a communication as a coordinated communication and an in-kind contribution to the campaign.

This notion that campaign information has a relatively short shelf life is not a new concept, but rather is incorporated into other parts of the Commission's regulations that have been in effect for decades. For example, the Commission determines the amount of a reportable contribution or expenditure for polling information by considering the number of days that have elapsed since the polling data was released to the original recipients. See 11 C.F.R. § 106.4(g). The Commission appropriately concludes that after 180 days, polling information is completely valueless. Id. In fact, the Commission treats polling data between 61-180 days old as worth only 5% of its original value. Id. This regulatory approach reflects the fact that campaign information loses value very quickly.

It is also important to note that the Commission decided to implement the current 120-day time period for the common vendor and former employee conduct prongs in the 2006 coordinated communication regulations only after receiving extensive comments and holding extended hearings -- in short, this was not a decision made in haste or without great consideration.

Of the three alternatives proffered by the Commission, the 120-day period is the only reasonable regulatory standard. Both the two-year period and the current election cycle period are over-inclusive. For the reasons explained above, and regardless of which federal office a particular federal candidate is seeking, a two-year time period is overly broad and disregards the increasingly short shelf life of campaign-related information. Additionally, most candidates, especially candidates running for the U.S. House, are not actively campaigning for an entire two-year period. Thus, a regulation incorporating a two-year restriction on common vendors and former employees would extend for many more months than is necessary.

With regard to campaigns for the U.S. House, either of these standards would essentially cover the same period of time, as the election cycle is two years for candidates running for these seats. When one considers that a two-year period of time in a campaign for the U.S. House would certainly cover a primary election and a general election, there is no question that the material information related to the plans, projects, activities, and needs of a campaign before the primary would be completely irrelevant and valueless in crafting communications targeted toward voters in the general election. While a two-year restriction is equally inappropriate as applied to candidates for the U.S. Senate, promulgating a restriction that covers an entire election cycle is completely unnecessary and overbroad as it applies to these candidates. Such a restriction would create a vast chilling effect on the provision of campaign-related services to U.S. Senate candidates, as the activities of individuals and vendors who have absolutely no material information could lead to allegations of illegal coordination.

Regarding the question of whether the applicable time period should be different depending on what type of services are offered by particular commercial vendors, the Party Committees believe that the Commission must create a bright line rule applicable to all commercial vendors, however the FEC chooses to define that term. If the Commission sets different time periods for different types of vendors, the FEC will then be forced to set about the impossible task of defining vendor job descriptions very specifically and singularly categorizing each individual vendor and company so

that one knows exactly which temporal window applies to each. While two political consultants may offer the exact same services, there are likely to be differences in how they would describe and categorize their businesses and their job titles, and a vendor may be able to classify his or her company in a manner that makes for a more favorable application of the rule. It would simply be impossible to create different categories of vendors that at once cover every possible type of business and ensure fairness in the application of the rule.

VI. The Commission's Definition of a Commercial Vendor Should be Narrowed

In the Coordination NPRM, the Commission seeks comment on whether the list of vendor services set forth at 11 C.F.R. § 109.21(d)(4)(ii) captures the appropriate range of services likely to result in a common vendor conveying timely campaign information material to a communication to a person paying for the communication. The Party Committees believe that the list included in the Commission's current regulation is too broad and covers common vendors who would not be privy to the type of material information that is relevant to identifying coordinated communications.

Certain vendors provide services to campaigns without ever coming into contact with information that, if timely, would be material to a campaign if such information were used in creating a public communication. For instance, vendors who are engaged in media buying and media placement for campaigns are not privy to the sort of information that the coordinated communication regulations are attempting to regulate. These vendors communicate with campaigns about the days and times and frequencies that campaign communications will be broadcast, but do not have any editorial control over the content of a campaign's communications. Media buyers and placement vendors should be specifically excluded from the definition of a commercial vendor in 11 C.F.R. § 109.21(d)(4)(ii)(A).

Similarly, fundraising and financial bookkeeping services should be specifically excluded from the list of commercial vendor services that are potentially restricted by the coordinated communications regulations. Vendors raising funds and compiling reports for campaigns do not work with the type of information that would be material to the creation of public communications. Donor lists, FEC report data, event planning details, and other types of financial-related campaign information that campaigns share with fundraisers are in no way related to the types of information that become material to the creation of a campaign's public communications. Thus, the inclusion of fundraisers in 11 C.F.R. § 109.21(d)(4)(ii)(C) is overbroad and unnecessary to appropriately regulate coordinated communications.

In summary, the list of covered services in the commercial vendor portion of the Commission's coordination regulations should be narrowed to ensure that the list is not overinclusive and solely covers services that would expose commercial vendors to the types of campaign-related information that may be material to the development of a campaign's public communications.

VII. The Commission's Firewall Safe Harbor Is Working As Intended

It is important to note that the common vendor and former employee conduct prongs of the Commission's coordinated communications regulations are not triggered, regardless of time period or specific vendor services, if the commercial vendor, former employee, or political committee

involved has established and implemented a firewall that meets the requirements of the FEC's regulations set forth at 11 C.F.R. § 109.21(h)(1) and (2). The Supreme Court recognized in the Colorado I decision that political party committees have a constitutional right to make unlimited independent expenditures, and establishing a firewall pursuant to 11 C.F.R. § 109.21 is an effective way for party committees to protect that fundamental right while avoiding improper coordination. In light of the foregoing, the conduct prongs as discussed herein are irrelevant if a firewall is correctly established and maintained, and the Commission should preserve the firewall safe harbor as it currently exists.

VIII. The Commission Should Conduct a Party Committee Coordination Rulemaking Concurrent with This Rulemaking

Although as noted above the party committee coordinated communications regulations at 11 C.F.R. § 109.37 were not directly challenged in the Shays litigation, the Commission should issue a notice of proposed rulemaking and hold a concurrent rulemaking for the party coordinated communications regulations.

The Commission has already stated that the current party coordinated communications regulations incorporate by reference part of 11 C.F.R. § 109.21, the third-party coordination regulation at issue in this rulemaking, and that any changes to 11 C.F.R. § 109.21 would also automatically apply to the party regulation at 11 C.F.R. § 109.37. If the Commission is contemplating any changes to the party coordinated communications regulations, then a separate rulemaking should be opened concerning 11 C.F.R. § 109.37, which would allow commenters to provide detailed analysis regarding the proper scope of 11 C.F.R. § 109.37 and to participate fully in the rulemaking process.

Additionally, the coordination regulations at 11 C.F.R. § 109.21 and § 109.37 have traditionally mirrored each other. If the Commission plans to continue this trend, then it is only appropriate that the FEC open a concurrent rulemaking for the party coordinated communications regulations. Should the Commission adopt final rules for the third-party coordination regulations at 11 C.F.R. § 109.21, and then later open a rulemaking only to decide that the party regulations at 11 C.F.R. §§ 109.37 should mirror those of 11 C.F.R. § 109.21, then party committee input at such a later time would be meaningless. Were this to occur, any party committees not commenting on the rulemaking at hand would effectively be left out of the rulemaking process.

For all of these reasons, the Commission should open a concurrent rulemaking concerning the party coordinated communications regulations at 11 C.F.R. § 109.37 and should issue final regulations for both 11 C.F.R. §§ 109.21 and 109.37 at the same time. These two regulations are inherently tied to one another; thus, any consideration of altering one set of provisions requires simultaneous consideration of the other set of provisions.

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,

/s/ Sean Cairncross
Sean Cairncross
Michael E. Toner
Attorneys for the National Republican Senatorial Committee
425 Second Street, NE
Washington, DC 20002

/s/John Phillippe
John Phillippe
Brandis Zehr
Attorneys for the Republican National Committee
310 First Street, SE
Washington, DC 20003

/s/Jessica Furst
Jessica Furst
Tom Josefiak
Attorneys for the National Republican Congressional Committee
320 First Street, SE
Washington, DC 20003