Steve Hoersting
<shoersting@campaignfreedom.org>
Sent by: hoersting@gmail.com

02/24/2010 08:22 PM

To coordinationshays3@fec.gov
cc
bcc
Subject CCP's Supplemental Comments on Coordination

Dear Ms. Rothstein:

Please find attached our comments on the Supplemental NPRM.

Thank you,

Steve Hoersting
CENTER FOR COMPETITIVE POLITICS
124 West Street South
Suite 201
Alexandria, Virginia 22314
SHoersting@campaignfreedom.org
www.campaignfreedom.org

(703) 894-6800 phone

Supplemental Coordination Comments CCP 022410.doc

February 24, 2010

Ms. Amy L. Rothstein
Assistant General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
CoordinationShays3@fec.gov

VIA ELECTRONIC MAIL

Re: Supplemental Comments of Center for Competitive Politics on *Supplemental Notice of Proposed Rulemaking on Coordinated Communications,* 75 *FR* 6590 (Feb. 10, 2010).

Dear Ms. Rothstein:

The undersigned submits the following comments on behalf of the Center for Competitive Politics ("CCP") a not-for-profit, educational organization whose mission is to educate the public on the actual effects of money in politics, and the results of a more free and competitive political process.

Overview

Events now are such that the Commission cannot arrive at the *right* answer in this rulemaking. The Commission can only arrive at a *best* answer. There will be outright errors, let alone problems, in each of the options available to the Commission in this rulemaking now that there is no possibility of *certiorari* for *Shays III*.

The facts are these:

The applicable statute, 2 U.S.C. § 441a(a)(7), provides three and only three items that, when coordinated, can be treated as in-kind contributions. These are: 1) the republication of campaign materials (and everyone knows what that means); 2) electioneering communications (and we have a good idea of what that term means and know that the coordination content standard was upheld in *McConnell*); and 3) expenditures.

It is the third term, "expenditure," that is causing all of the trouble.

Judge Tatel has held the Commission may *not* limit the definition of "expenditure" in 2 U.S.C. § 441a(a)(7) to express advocacy. The Commission failed to appeal Judge Tatel's opinion, which means the Commission must follow it until told otherwise by another court addressing the same provisions.

Judge Tatel held as he did because the *McConnell* Court stated that the express advocacy/issue advocacy line is "functionally meaningless."[1] The Court, however, has since struck the one provision—the funding source restrictions for electioneering communications—that gave us the "functional equivalence" standard of *McConnell*,[2] and provided us with the "no reasonable interpretation other" test of *WRTL II*.

The *Citizens United* Court struck down the source restrictions that the "no reasonable interpretation other" test, the "NORI test," was created to subdivide. When the *Citizens United* Court had the chance to employ the "no reasonable interpretation other" test to save from disclosure "genuine issue advocacy" that occurs within the electioneering windows, the Court declined to do so. Therefore, the NORI test now serves no purpose and is moribund.

But it is fair to say that the Court recognized that the entire range of electioneering communications could be disclosed because the Court accepted Congress' assertion that they were functionally equivalent to express advocacy.

---

[1] It was in discussing disclosure that the Court stated that the line is "functionally meaningless. *See McConnell,* 540 U.S. at 202 (emphasis added).

> Nor are we persuaded, independent of our precedents, that the *First Amendment* erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. See *Buckley, supra, at 45, 46 L. Ed. 2d 659, 96 S. Ct. 612*. Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is *functionally meaningless. 251 F. Supp. 2d, at 303-304* (Henderson, J.); *id., at 534 (Kollar-Kotelly, J.)*; *id., at 875-879 (Leon, J.)*.

[2] It was in discussing the source restrictions that the *McConnell* Court noted the matter turned on whether regulated ads were the "functional equivalent of express advocacy." This was the standard the Court later built upon in *WRTL II*. The following is from *McConnell,* 540 U.S. at 205-06 (emphasis added).

> Rather, plaintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.
>
> This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent of express advocacy*.

The problem with using the "functional equivalence" standard, however, whether or not one uses its NORI test, is that it was presumed to apply only to those ads that are brightly demarcated before primary and general elections. *See WRTL II*, fn. 7. The Commission, here, would apply a functional equivalence standard year round.

Alternatively, the Commission has no authority to mix and match black-letter legal concepts. A "public communication that [PASOs]" a candidate *is not* the same thing as an "expenditure." The two terms are separate legal provisions and concepts. One (PASO communications) cannot be imported into another (441aa7 expenditures) without doing violence to the Act.

Congress had the chance to add PASO communications to section 441a(a)(7) when it added PASO communications to section 431(20)(iii). That Congress has not done so indicates that a PASO standard has no basis in coordination law. That Senator Schumer and Congressman Van Hollen now propose adding a PASO content standard to section 441a(a)(7) makes it only more evident that a PASO coordination content standard currently has no basis in law.

Therefore, the Commission is left with no *correct* alternative. Until something changes, Judge Tatel compels the Commission to act as though the term "expenditure" does not stop at express advocacy. The Commission, then, must choose either to implement a vague and overbroad standard (functional equivalence beyond and 30 and 60 days), perhaps by way of a moribund test (the NORI test) or to blur black letter terms by pretending that public PASO communications are "expenditures" under section 441a(a)(7).

The best of these alternatives is for the Commission to expand the term "expenditure" in section 441a(a)(7) beyond express advocacy, as Judge Tatel decrees, by holding that the term reaches those communications that are the functional equivalent of express advocacy.

The Commission knows from *Citizens United* that communications (whether coordinated or independent) that are the functional equivalent of express advocacy can be disclosed. *See Citizens United.* It is an open question whether all communications that are the functional equivalent of express advocacy can, when coordinated, be banned. But this is a battle between Justice Kennedy and Judge Tatel now. The Commission is no position to resolve it.

The Commission should issue a functional equivalent of express advocacy standard to appease Judge Tatel. Adopting this standard has the virtue of adopting a phraseology created by the Court. It would tie the standard to a phrase somewhat related to expenditure gloss, that is, express advocacy.

And it would keep the Commission from blurring black letter law, and importing a PASO standard into the term "expenditure" as it is well known that PASO communications are different from "expenditures."

Supplemental Questions and Answers

"In concluding that 'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," the Court explained that, '[t]he 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.'"

1. *Does this statement suggest 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?*

No. Coordinated communications have, since *Buckley v. Valeo*, 424 U.S. 1 (1976), been treated as in-kind contributions. There is nothing to indicate, post *Citizens United*, that the coordination standard must be "stronger" or in any way "more robust." Coordinated expenditures, electioneering communications, and campaign republications are to be regulated. Independent speech is constitutionally protected. Independent speech must be recognized, given breathing room, and respected.

2. *The Court further held that the governmental interest in ''[l]aws that burden political speech'' is ''limited to quid pro quo corruption,'' and that ''[i]ngratiation and access, in any event, are not corruption.'' In light of these statements in Citizens United, is one of the governmental interests asserted in Shays III-Appeal for a stricter coordinated communications rule—i.e., to prevent third-party sponsors of communications from ingratiating themselves with Federal candidates — still valid after Citizens United? Or, was the Court's holding limited to the independent expenditures that were at issue in Citizens United?*

With all due respect to the *Shays* Court, curtailing "ingratiation" was never a compelling governmental interest. Ingratiation is a lesser and less clear standard than preventing "corruption or the appearance of corruption." The Supreme Court has made plain that limiting independent speech on the theory it ingratiates would prove too much. The less clear standard, preventing "ingratiation," was not a valid interest pre-*Citizens United* and was specifically rejected as a governmental interest in both *McConnell* and *Citizens United*.

3. *Given that coordination was not at issue in Citizens United, did the Court's mention of coordination suggest, in any way, that a different governmental interest would justify regulating non-party speech that may be coordinated? Now that Citizens United permits additional entities, such as public corporations and labor organizations, to make independent expenditures, does the proposed rule on coordinated communications adequately address those organizations?*

No, there is not a different interest that is implicated for non-party speech. The standard for applicable campaign finance regulation is to prevent corruption or the appearance of corruption. This is best understood as *quid pro quo* corruption, convincing an official to take actions on

one's behalf in return for campaign support, or the appearance of the same. This standard points-up the distinction between regulating contributions to 1) candidates, 2) committees that in turn give to candidates, or 3) political party committees comprised of or controlled by candidates, on the one hand, and independent expenditures, on the other.

And, yes, the proposed rules would adequately address coordinated communications made by any entity, including corporations and unions.

4. *The Commission seeks comment on the effect, if any, of the Citizens United decision on the proposed content standards. What effect does the decision have on the proposed Modified WRTL content standard, including the proposal's ''functional equivalent of express advocacy'' test? See, e.g., NPRM, 74 FR at 53902.*

The functional equivalent of express advocacy standard was created in *McConnell v. FEC*, 540 U.S. 93 (2003), to uphold against facial challenge BCRA § 203's ban on corporate funding for electioneering communications.

The standard was built upon by the Court in *WRTL II*, on the road to invalidating BCRA § 203 in its entirety in *Citizens United v. FEC.* The "no reasonable interpretation other than" standard of *WRTL II* is gone. Plaintiffs in *Citizens United* asked the Court to uphold the standard in separating the disclosure of ads that are the functional equivalent of express advocacy from those that are "genuine issue advocacy." The Court did not accept the invitation. In striking the source prohibition for all independent electioneering communications, and failing to strike disclosure of those electioneering communications that meet the NORI test, we may safely infer that the NORI test is now moribund. To find otherwise would be to apply a standard the Court created for provisions no longer exist.

Some may say that the NORI test or even the functional equivalence standard survives in the realm of coordination. This is incorrect. First, neither the functional equivalent doctrine nor its NORI test can be read as gloss on core FECA terms like "expenditure" or political committee. Those terms simply were not before the Court in *McConnell* when the Court created the standard and when the *WRTL II* Court created the NORI test. *See* comments of CCP on original NPRM. Second, it must be a future case that will determine whether the source prohibitions (for corporations and unions) and contribution limits (for individuals) can apply to those electioneering communications that are both coordinated with candidates or party committees and are genuine issue advocacy. All that the Commission knows of those provisions is that coordinated electioneering communications were upheld against facial challenge in *McConnell v. FEC*, 540 U.S. 93 (2003).

Despite the death of the NORI test, the Court recognized the functional equivalence of broadcast ads run near an election and express advocacy as the basis for upholding disclosure for the entire range of electioneering communications. Because functional equivalence in some sense survives *Citizens United*, and because Judge Tatel insists that the Commission define "expenditure" beyond express advocacy, the Commission may use functional equivalence as a content standard.

5. *Should the Commission devise alternative criteria for the Modified WRTL content standard, or does the Court's discussion of the Commission's ''two part, 11-factor balancing test to implement WRTL's ruling'' indicate a general disapproval of such an approach? Citizens United, slip op. at 18 (referring to FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (''WRTL'')). Are any additional criteria necessary at all, or should the Commission simply rely on the Modified WRTL standard as articulated in the proposed rule text? Did the Court's application of the test to Hillary: The Movie demonstrate that the Court's ''functional equivalent of express advocacy'' standard is sufficiently workable without further explanation?*

The Court plainly believed that the two-part, eleven-prong test prevented speakers from knowing quickly whether their ads would be covered. The Commission may take it upon itself to redraw its functional equivalence line and clarify its two-part eleven prong test, predicated as it is on a moribund NORI test. But, even if the Commission is not interested in detailing the prongs of functional equivalence, and merely wants to state the standard without explanation, it is better for the Commission to simply state the functional equivalence standard than to simply state a PASO standard.

6. *What impact, if any, does the Court's conclusion that Hillary: The Movie is ''the functional equivalent of express advocacy'' have on the Commission's coordinated communications rules and in particular to the application of the ''express advocacy'' content standard outside the 90/120-day windows?*

The Court's determination that *Hillary: The Movie* is the functional equivalent of express advocacy served only to show that this movie was within the statute and that the Court had, once again, to determine whether the funding source prohibitions for independent speech could survive exacting scrutiny. The Court's finding will have little or no application for this rulemaking.

7. *Is there anything in the opinion to suggest that the Court intended its conclusion, that Hillary: The Movie is ''the functional equivalent of express advocacy'' to apply only in limited contexts?*

The Court found that *Hillary: The Movie* was the functional equivalent of express advocacy only to find that the Court had to go beyond its *WRTL II* opinion to resolve the case. There is no reason to think the Court's test was entirely contextual. There may have been some limited reference to context.

8. *Are the proposed PASO definitions sufficiently clear and unambiguous so as not to require ''intricate case-by-case determinations'' or to require prospective speakers to seek guidance from the Commission as to whether their proposed speech would be coordinated? Id. at 12.*

Absolutely not. PASO is not at all clear, and it will result in case-by-case determinations. Indeed, there will be some vagueness and overbreadth in constructing a functional equivalence standard that goes beyond broadcast media, and beyond 60 days of a general election. But Judge

Tatel compels that the Commission go beyond express advocacy. What is more, a PASO standard is worse because PASO communications as a content standard has no basis in the statute. The fact that there are Congressional proposals to add PASO content standards to the coordination statute only makes more clear that it is not the law now.

9. *Are any content standards broader than express advocacy or its functional equivalent permissible after Citizens United, or are these the only standards that the Court has concluded are sufficiently clear?*

There are no standards available that are broader. And there are even problems with adopting the functional equivalence standard here. *See* Overview, above. But the Commission must adopt a functional equivalence standard to satisfy Judge Tatel.

10. *In light of the Supreme Court's statements that the PASO components ''give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,'' McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003), and that any rule must ''eschew the open-ended rough-and-tumble of factors,'' Citizens United, slip op. at 19 (quoting WRTL, 551 U.S. at 469), should the Commission adopt a PASO content standard without a definition?*

The PASO standard was upheld in *McConnell* as against party committees, whose level of sophistication far outstrips that of ordinary citizens. And this constitutional holding cannot provide a statutory basis for PASO in section 441a(a)(7). The black-letter term, once coined by Congress and used in one place in a statutory scheme, cannot serve as a regulatory term to define a separate and different term within the same statutory scheme.

11. *[S]hould the Commission require a heightened standard (e.g., requiring more particularity or specificity) in any complaint alleging coordination before opening an enforcement proceeding?*

No. This can only be brought about with a workable content standard, the Commission's recognition that there is some subject matter it has no authority investigating. The content standards are better phrased as jurisdictional predicates. The Commission cannot start coordination investigations where there is no republication of campaign materials; where there is no disbursement for an electioneering communication; and, likewise, where there is no speech made "for the purpose of influencing" an election. See 2 U.S.C. § 431(9). Judge Tatel has told the Commission that it may not limit the phrase "for the purpose of influencing" to express advocacy. But this only means the Commission must choose another standard (content standard) for establishing that jurisdictional predicate. It does not mean the pleading standard affects the Commission's jurisdiction.

12. *Should such a heightened complaint standard be adopted with, or regardless of, any revised content standard?*

A revised pleading standard or heightened complaint standard should not be included.

13. *If the Commission may not require a heightened complaint standard for coordination allegations would that then preclude the application of a broader content standard? Why?*

No, the pleading standard and the standards for commencing an investigation differ and are not tied in any way. The content standards are better phrased as jurisdictional predicates. The Commission cannot start coordination investigations where there is no republication of campaign materials; where there is no disbursement for an electioneering communication; and, likewise, where there is no speech made "for the purpose of influencing" an election. See 2 U.S.C. § 431(9). Judge Tatel has told the Commission that it may not limit the phrase "for the purpose of influencing" to express advocacy. But this only means the Commission must choose another standard (content standard) for establishing that jurisdictional predicate. It does not mean the pleading standard affects the Commission's jurisdiction.

"[T]he NPRM proposes safe harbors that would exempt certain communications sponsored by 501(c)(3) organizations or candidates' businesses from being treated as coordinated. NPRM, 74 FR at 53907–53910."

14. *Are these proposed safe harbors consistent with the Citizens United decision? See, e.g., slip op. at 24 ("Prohibited too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").*

The basis for each of these safeharbors is not the nature of the entity alone, but rather the recognition that speech by many of these entities is too unlikely made "for the purpose of influencing" an election. These safeharbors are fine so long as they are clearly predicated on the premise that the underlying speech is not an "expenditure" as defined in the Act.

"In Citizens United, the Court stated, ''There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not,'' and ''[t]his differential treatment [between corporations with and without media outlets] cannot be squared with the First Amendment.'' Slip op. at 37.

15. *Does the Court's analysis of the media exemption affect the proposed rule changes or the coordination rules generally? If so, how?*

The media exemption serves to protect from regulation organizations engaged in certain functions: commentary, editorial, *etc*. Where the Court does not protect a kind of speech from regulation, the exemption is a matter of legislative grace. Since restrictions on coordinated corporate expenditures and coordinate electioneering communications are constitutional, the Commission need only determine which entities coordinating their activities fall within legislative exemption. Those entities that are *not* engaged in exempt activity are not protected from either the applicable source prohibitions or contribution limits.

Conclusion

CCP respects the efforts of the Commission in this area, and requests the opportunity to testify at a public hearing on these issues.

Respectfully submitted,

/s/ S M Hoersting

Stephen M. Hoersting
(703) 894-6800
SHoersting@campaignfreedom.org