



"John Phillippe - Legal"  
<JPhillippe@rnchq.org>

02/24/2010 11:56 PM

To <coordinationshays3@fec.gov>

cc

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Subject RNC Comments

Please see the attached RNC comments on the supplemental notice on coordinated communications.

**John R. Phillippe Jr.**

Chief Counsel

Republican National Committee

310 First Street, SE

Washington, D.C. 20003

Phone: (202) 863-8702

Fax: (202) 863-8654

Email: [jphillippe@rnchq.org](mailto:jphillippe@rnchq.org)



RNC Supplemental Comments re Coordination.pdf



## Republican National Committee

Counsel's Office

February 24, 2010

### VIA ELECTRONIC MAIL

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

Re: Supplemental Notice of Proposed Rulemaking. Fed. Reg. Vol. 75 No. 27, 6590  
(Feb. 10, 2010) ("Coordination SNPRM")

Dear Ms. Rothstein:

The Republican National Committee ("RNC") submits these comments in response to the above referenced Supplemental Notice of Proposed Rulemaking ("Coordination SNPRM").<sup>1</sup>

### INTRODUCTION

Following the decision of the Court of Appeals for the District of Columbia in *Shays v. FEC*, 528 F.3d 914 (D.C.Cir. 2008) ("*Shays III*"), the Commission published a Notice of Proposed Rulemaking ("NPRM") regarding potential changes to the "coordinated communication" regulations with comments on the NPRM due on January 19, 2010. In light of the United States Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. \_\_\_ ("*Citizens United*") on January 21, 2010, the Commission released the Coordination SNPRM requesting comments addressing the effect of the decision in *Citizens United* on this rulemaking.

As we pointed out in the comments we jointly submitted with the National Republican Congressional Committee and the National Republican Senatorial Committee ("Party Committee Comments"), although the regulations at issue apply to third-party groups rather than political

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<sup>1</sup>We remind the Commission that the RNC is a party to litigation challenging several points of law relevant to this rulemaking. These comments are based on the current state of the law and are not reflections on our assertions in that litigation.

parties, we believe our experience with the relevant issues can be helpful to the Commission. We therefore submit these comments to supplement the Party Committee Comments and demonstrate how *Citizens United* bolsters the most significant points made therein: that the new regulations must i) contain a clear bright-line content standard in order to avoid chilling constitutionally protected speech, and ii) be narrowly tailored to regulate only conduct that is truly coordinated. In addition, we will address some of the specific questions posed in the Coordination SNPRM. Finally, in light of *Citizens United*, we assert it is no longer merely unnecessary to extend the 120-day window restriction for common vendors and former employees, but it is now untenable; conversely, shortening or eliminating the time period is warranted.

## DISCUSSION

### **I. The Decision in *Citizens United* Mandates Clear, Concise Rules Such as the WRTL “Appeal to Vote” Test for the Content Standard Governing Coordinated Communications.**

#### **A. A clear, bright-line content standard is now even more imperative.**

The Supreme Court decision in *Citizens United* specifically allow corporations, labor unions, and trade associations funded with non-Federal money to make independent expenditures related to Federal elections. The Supreme Court recognized in *Citizens United* that prohibiting these independent expenditures results in “a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption.” *Id.*, *slip op.* at 41. While recognizing that independent expenditures may result in increased access to elected officials, the Court held that “[i]ngratiation and access, in any event, are not corruption.” *Id.*, *slip op.* at 45. Ultimately, the Court ruled that independent expenditures lacked the corruption element that had been the basis for banning speech by corporations and that therefore the ban violated the First Amendment. *Id.*, *slip op.* at 42.

In recognizing this First Amendment right, the Court also recognized that the ability to meaningfully exercise that right depends on clear guidelines because the absence of clarity would result in litigation to clarify the rules, and the “the interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech.” *Id.*, *slip op.* at 9.

While the Supreme Court did not directly address coordinated activities in *Citizens United*, the Court made a clear statement as to the requirement that independent speech be protected and not inhibited by over-regulation. It is imperative that the Commission establish clear, concise language in its rulemaking to ensure that individuals or corporations who wish to exercise their constitutionally protected right to free speech as recognized in *Citizens United* are not effectively prohibited from doing so out of concern that their actions may constitute a coordinated communication rather than independent expenditure. As the *Citizens United* Court pointed out, the practical effect of a complex regulatory regime is to effectively

require obtaining administrative permission to speak, and such a de facto prior restraint does not pass First Amendment muster. *Id.*, slip op. at 7, 18.

**B. The *WRTL* “appeal to vote” test is the appropriate content standard.**

The RNC asserts that the standard the Supreme Court adopted in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) (“*WRTL*”), is the appropriate content standard for coordinated communications. Under *WRTL*, 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.” *Id.* The “appeal to vote” test of *WRTL* rationally separates advocacy from other kinds of speech by allowing regulation of speech that either is susceptible of no other interpretation than clearly advocating for the election or defeat of an identified federal candidate, or 2) constitutes republished campaign materials. We believe this standard to be far clearer than the other proposed standards and the appropriate standard to meet the *Citizens United* Court’s concern discussed herein that vague and ambiguous standards unconstitutionally chill speech.

**C. Any version of a PASO standard is even more untenable after *Citizens United*.**

The content standard proposed in the Coordination NPRM that is based on whether a public communication promotes, attacks, supports, or opposes (“PASO”) a clearly identified candidate is far too vague and would result in the chilling of independent speech. The PASO standard would be too complex, overly broad and unworkable a standard. Rather than drawing sharp and concise lines so that individuals and entities would be able to distinguish between independent expenditures and coordinated activities, the result under a PASO standard would be more restrictive and uncertain, thus unconstitutionally suppressing free speech in contravention of the constitutional dictates of *Citizens United*. An ambiguous rule based on the PASO standard will do no more than require an intricate case-by-case determination as to whether an activity is in fact a coordinated communication and therefore fly in the face of the decision of *Citizens United*. Quoting *WRTL*, the Court in *Citizens United* held that First Amendment standards “must give the benefit of any doubt to protecting rather than stifling speech.” (*WRTL*, 551 U.S. at 469). Implementing the PASO standard and its uncertain terms would result in the immediate effect of stifling the very speech that *Citizens United* aims to protect.

**D. Similarly, 11 C.F.R. §100.22(b) is unconstitutional.**

Adoption of the *WRTL* “appeal to vote” test obviously would eliminate the need to retain the express advocacy test. However, if the express advocacy test is retained as part of the Commission coordination regulations, the test should be limited to 11 C.F.R. §100.22(a) only, and §100.22(b) should be repealed. As discussed in the Party Committee Comments, §100.22(b) restricts implied electoral messages over and above the express advocacy limitations. Section 100.22(b) 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 (4<sup>th</sup> Cir. 2001); *Maine Right to Life Committee, Inc. v. FEC*, 914 F.Supp. 8 (D.

Me., 1996), *aff'd per curiam*, 98 F.3d 1 (1<sup>st</sup> Cir. 1996). *See also Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 970 (8<sup>th</sup> Cir. 1999) (striking down as unconstitutional a state statute with the exact same wording as 11 C.F.R. §100.22(b)). It is difficult to think of a more subjective and unclear standard than “implied,” and the lack of objectivity and clarity in such a standard would impermissibly dampen speech.

## **II. Under *Citizens United*, Narrow Tailoring, Rather Than a More Restrictive Approach, is Necessary.**

Ironically, in the Coordination SNPRM, the Commission inquires whether *Citizens United* requires more stringent regulation. In particular, the Commission asks if the Court’s statement in *Citizens United* 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” *Citizens United*, slip op. at 41-42 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)) suggests a need for more robust coordination rules because the presence of prearrangement and coordination may result in or provide the opportunity for *quid pro quo* corruption.

The answer is unequivocally no. Stricter regulations are not required based on the *Citizens United* Court’s citation of a long-standing proposition from *Buckley*. The Court in *Citizens United* was specifically addressing independent expenditures and the requirement that those expenditures be separate from a candidate or a candidate’s campaign. The Court’s mere reference to the potential danger of *quid pro quo* if coordination and prearrangement exist does not create a new mandate on the Commission to further restrict speech. Indeed, without that *quid pro quo* justification, the coordination rules would have no justification whatsoever.

In fact, the effect of *Citizens United* is just the opposite: narrow tailoring is now even more important. The governmental interest in laws that “burden political speech” is “limited to *quid pro quo* corruption,” and “[i]ngratiation and access...are not corruption.” *Citizens United*, slip op. at 43, 45. Thus, the Court in *Citizens United* eliminated the governmental interest asserted in *Shays III* that in order to prevent third parties from ingratiating themselves with federal candidates by sponsoring some form of communication on the candidate’s behalf, there must be stricter coordinated communications rules. *See Shays III* at 925.

Because the regulations must be closely drawn to recognize the remaining cognizable governmental interest in protection from *quid pro quo* corruption, the RNC asks that the Commission recognize that the Court decision in *Citizens United* furthers the contention that the standard set forth in *WRTL* is the appropriate content standard in part because it is narrowly tailored. The proposed PASO standard is not only vague but broad, and thus would unconstitutionally chill speech. Conversely, the *WRTL* standard is not only clear but also narrowly drawn to serve the limited government interest identified in *Citizens United* and to rationally separate express advocacy from other kinds of speech. A rule less narrowly tailored will encroach on speech that the First Amendment is meant to protect.

### **III. The Common Vendor and Former Employee Conduct Standards Should be Less Restrictive after *Citizens United* in Order to Avoid Limiting Protected Speech.**

The Coordination SNPRM focuses entirely on the *content* prong of coordination and how the Supreme Court's ruling in *Citizens United* may affect a coordination analysis. However, the SNPRM fails to acknowledge the significant consequences the decision will likely have for non-profit organizations and other third-party groups that employ common vendors and former employees when considering the *conduct* prong of coordination. One such consequence is that practically speaking, their speech will be inhibited.

Unquestionably, a natural consequence of the Court's ruling—allowing for public corporations and labor organizations to make independent expenditures involving federal election activity—will mean more players in the political advertising and publicity field. But as those in the regulated community know all too well, there are only a limited number of political advertising and media companies that provide such services. It is not uncommon for a single political and media advertising vendor to have candidate committees, national and state party committees, non-profit organizations, and others, as clients.

Therefore, it is already difficult for groups that employ these common vendors and former campaign or party employees to safely comply with the Commission's 120-day restriction at 11 C.F.R. 109.21(d)(4). It will be much more difficult for these vendors to operate safely, without running into coordination issues, if there is a considerable increase in their client bases stemming from corporations and unions wanting to get their messages out. Conceivably, many corporations, trade associations, and labor unions seeking to exercise their newly vindicated First Amendment rights could be shut out of the marketplace of ideas due to the Commission's 120-day restriction for common vendors and former employees. This is just the type of political speech chilling that the *Citizens United* decision prohibits.

In light of the foregoing, the RNC believes a less restrictive approach to the common vendor and former employee portion of the coordination conduct prong is necessary. The contention made in the comments submitted by the Alliance for Justice, the Sierra Club, and the AFL-CIO that the 120-day restriction should not be retained in the Commission's final rule is bolstered by *Citizen United's* protection for corporate and union independent expenditures and the corollary that the coordination rules must be narrowly tailored to protect the government's anti-corruption interest without infringing on non-coordinated speech. The restriction should be eliminated, or the time period should be shortened. At the very least, in light of *Citizens United*, extending the restriction beyond 120 days cannot be justified.

**CONCLUSION**

The RNC thanks the Commission for the opportunity to provide these written comments on the Coordination SNPRM and hope they prove helpful to the Commission in appreciating the Supreme Court's strong message in *Citizens United* that rules that are not both clear and narrowly drawn will unconstitutionally infringe on the precious First Amendment rights of those who want to make their voices heard in the marketplace of ideas.

Sincerely,

A handwritten signature in black ink, appearing to read "JRP", with a horizontal line extending to the right.

John R. Phillippe Jr.  
Chief Counsel