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VIA SERS.FEC.GOV AND FIRST CLASS MAIL

Federal Election Commission
Attn.: Ms. Amy L. Rothstein
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Re: Comments on behalf of the Chamber of Commerce of the United States of America regarding the Rulemaking Petitions: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United) (Notice 2015-04)

Dear Commissioners:

The Chamber of Commerce of the United States of America ("Chamber") submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Availability of two Petitions for Rulemaking. *See* Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals and Certain Political Committees, 80 Fed. Reg. 45116 (July 29, 2015).[1]

As described in the Federal Register, the Notice of Availability seeks comments on whether the Commission, pursuant to the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), should modify its regulations with regard to: (1) the disclosure of donors to entities engaged in independent expenditures and electioneering communications; (2) election-related spending by U.S. subsidiaries of foreign companies; (3) solicitations of corporate and labor organization employees and members for independent expenditures and electioneering communications; and (4) the independence of expenditures made by independent-expenditure-only political committees, i.e., super PACs.

The Chamber offers two threshold observations. First, promulgating either of the first two regulatory changes advanced in the Petitions would run afoul of the unambiguously expressed intent of Congress, exceed the Commission's statutory

[1] On June 19, 2015, the FEC received a Petition for Rulemaking from Make Your Laws PAC, Inc. and Make Your Laws Advocacy, Inc. On June 22, 2015, the Commission received a substantively identical Petition for Rulemaking from Craig Holman and Public Citizen. All petition citations in these comments are to the latter.

authority, and invariably fail judicial review. This conclusion is supported by the plain language of the statute and Congress's repeated rejection of the Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 11th Cong. (2010) ("DISCLOSE Act")—legislation that would have enacted the legal changes the Petitions seek. Second, and contrary to the Petitions' suggestion, *Citizens United* cannot be read as either an explicit or implicit invitation to fill a statutory gap or otherwise alter the regulatory landscape regarding any of the Petitions' proposals.

I. The Chamber

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system. For more than a century, the Chamber has played a key role advocating on behalf of its membership and the American business community.

The Chamber's efforts include large-scale public advocacy to help shape the political debate. Accordingly, the Chamber has an acute interest in the Commission's governance of corporate political participation and in ensuring that Commission regulations are written in a manner that prevents abuse and does not otherwise infringe on the Chamber's First Amendment rights of free speech, of free association, and to petition the government for redress of grievances. To protect its First Amendment rights, the Chamber has participated as amicus curiae in numerous campaign finance cases, *e.g.*, Supplemental Brief of Amicus Curiae Chamber of Commerce of the United States of America, *Citizens United*, 558 U.S. 310 (No. 08-205), and it has previously submitted comments in rulemaking proceedings before the Commission. *See* Comments of the Chamber of Commerce of the United States of America (Notice 2015-06); Comments of the Chamber of Commerce of the United States of America (Notice 2014-01); Comments of the Chamber of Commerce of the United States of America (Notice 2011-18); Comments of the Chamber of Commerce of the United States of America (Notice 2007-16). The Chamber appreciates the opportunity to comment on these Petitions for Rulemaking.

II. *Citizens United v. FEC* and the Petitions for Rulemaking

1. In *Citizens United*, 558 U.S. at 342–61, the Supreme Court held that the core First Amendment right to engage in election-time speech about those who govern us and how they govern extends to corporations and, by implication, labor unions. The decision invalidated two provisions of the Federal Election Campaign Act ("FECA" or the "Act"), codified at 52 U.S.C. § 30118. It struck down the long-standing prohibition on corporations using their general treasury funds to make independent expenditures, *Citizens United*, 558 U.S. at 330–61, and Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which amended FECA, prohibiting corporations from using their general treasury funds for "electioneering communications." *See id.* at 321. BCRA defines "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified federal candidate made within 30 days of a primary or 60 days of a general election that is directed to the candidate's electorate. 52 U.S.C. § 30104(f)(3). The Court determined that these prohibitions constitute a "ban on speech" in violation of the First Amendment. *Citizens United*, 558 U.S. at 339.

The Court, however, upheld the disclaimer and disclosure requirements in Sections 201 and 311 of BCRA as applied to a movie regarding a presidential candidate that was produced by Citizens United, a corporation that was tax exempt under Section 501(c)(4) of the Internal Revenue Code, and the broadcast advertisements Citizens United planned to run promoting the movie. *Id.* at 365–71.

2. The Petitions for Rulemaking, originally brought by Chair Ravel and Commissioner Weintraub, petition the FEC "pursuant to 11 C.F.R. § 200.1 *et seq.* to issue new rules and to amend its current rules implementing the Federal Election Campaign Act of 1971, as amended . . . in order to respond to and comply with the Supreme Court's decision in *Citizens United v. FEC*." Pet. 2. Specifically, the Petitions claim that "[w]hile the Supreme Court ruled that corporations and labor organizations have a First Amendment right to engage in independent spending, the Court also resoundingly affirmed disclosure laws requiring political advertisers to provide information to the public about their spending and their funding sources." Pet. 3 The Petitions further contend that, because "[t]he Commission is statutorily obligated to formulate policy with respect to the Act," 52 U.S.C. § 30106(b)(1), "[t]he Commission should therefore promulgate new rules ensuring that the public is fully informed about all election-related spending, in accordance with *Citizens United*." Pet. 4. As a result, the Petitions ask the Commission to issue new rules

and revise existing rules concerning: (1) the disclosure of donors to entities engaged in independent expenditures and electioneering communications; (2) election-related spending by U.S. subsidiaries of foreign companies; (3) solicitations of corporate and labor organization employees and members; and (4) the independence of expenditures made by super PACs.

III. Comments

The Commission has no warrant to enact the additional rules sought by the Petitions. The FECA's plain language precludes the first two proposals contained in the Petitions. Furthermore, Congress comprehensively debated those issues through multiple bills and sessions and has declined to enact them. *Citizens United* does not change the analysis and did not invite the Commission to take up any of the proposals contained in the Petitions. On this record, the Commission should decline to proceed with a rulemaking

A. Issuing the new rules sought by the Petitions would be contrary to congressional intent.

The Commission may not promulgate the first two regulations sought by the Petitions—to require additional donor disclosure in connection with independent expenditures and electioneering communications or further restrict the political activities by U.S. subsidiary companies—because any such regulations would exceed the Commission's authority by contravening clear congressional intent.

According to the Petitions, the Commission has not honored its statutory obligation to "formulate policy with respect to the Act . . . , in accordance with *Citizens United*." Pet. 4. Specifically, the Petitions claim the Act and *Citizens United* require the Commission to promulgate new rules to: (1) Ensure full public disclosure of corporate and labor organization independent spending; (2) Clarify that the prohibition on foreign national campaign-related spending restricts such spending by U.S. corporations owned or controlled by a foreign national; (3) Clarify that corporations and labor organizations are prohibited from coercing their employees and members into providing financial or other support for the corporation's or labor organization's independent political activities; and (4) Ensure that the expenditures made by super PACs and other outside spending groups are truly independent of federal candidates.

Congress has not empowered the Commission to issue regulations on either of the first two topics, as manifested by the plain language of the FECA and Congress's repeated failure to pass the DISCLOSE Act. By attempting to shoehorn DISCLOSE Act provisions into this proposed rulemaking proceeding, the Petitions seek to accomplish through regulation what Congress has precluded in the FECA and recently and flatly refused to do through additional legislation. Furthermore, *Citizens United* has done nothing to alter the landscape with respect to these or the other two rules proposed by the Petitions.

1. ***The Plain Language of the FECA.*** Since 1979, the FECA has required entities that make independent expenditures to identify only those "person[s] who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). If the Commission were to accept the Petitions' invitation to promulgate a regulation that requires expanded disclosure of persons other than those who have contributed "for the purpose of furthering an independent expenditure," it would be enlarging the scope of regulation beyond the clear meaning of the statute.

Similarly, the FECA has long subjected only foreign citizens and entities organized in foreign countries to the FECA's prohibition on election-related spending by foreign nationals. 52 U.S.C. § 30121. The FECA does not apply this prohibition to U.S. companies owned or controlled by a foreign parent. A Commission regulation that does would exceed the FECA's clearly stated limits.

The FECA's plain language delimits the mandatory disclosures associated with independent expenditures and the rights of U.S. subsidiary companies. Congress clearly and unequivocally expressed its intent that the law remain unchanged when it rejected legislative amendments to the FECA that would have accomplished what the Petitions seek. In so doing, Congress did not delegate any authority to the Commission for it to make the changes itself. The Commission is not a legislature; it is an agency of limited jurisdiction, and it lacks any sort of itinerant, plenary power to pass extra-statutory rules.[2] Without an appropriate authorization from Congress, the FEC lacks authority to revise or enact the new regulations. Any more expansive regulation would outstrip the Commission's authority.

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[2] In fact, the Commission has been told repeatedly by the courts that it lacks such unbridled power. *See, e.g.*, *EMILY's List v. FEC*, 581 F.3d 1 (D.D.C. 2009); *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

Where, as here, "the intent of Congress is clear, that is the end of the matter; for the court[s], as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984). Unlike when there is a statutory gap signaling a possible delegation, a regulation that varies from Congress's unambiguously expressed intent usurps Congress's choice *not* to delegate its lawmaking power to the agency.

2. ***The DISCLOSE Act.*** Congress's legislative inaction with respect to the proposals in the Petitions is further proof that it has not delegated rulemaking authority to the Commission to address issues on which there is no congressional consensus. In appropriate circumstances, legislative inaction is indicative of congressional approval of the status quo. For example, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court upheld an IRS interpretation of the charitable deduction allowance, in large part because of legislative inaction. The Court cautioned that application of this principle was appropriate only in certain circumstances, but two factors made it appropriate in *Bob Jones*: (1) the subject matter was one with which Congress was intimately familiar, and (2) Congress made many attempts to override the IRS interpretation, but did not succeed. *Id.* at 600–01. Judicial antipathy to regulatory action in the face of legislative inaction is not new. Courts have long viewed such attempts to end-run Congress with disfavor. In *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), for example, the FCC asked Congress to forbid certain game shows. Congress refused, but then the agency attempted to interpret existing law to permit it to impose "the same result" through regulation. The Court disapproved, ruling the agency had "over-stepped the boundaries of [statutory] interpretation and hence ha[d] exceeded its rule-making power." *Id.* at 296–97.

Since *Citizens United*, the U.S. House of Representatives and Senate have repeatedly considered, but rejected, legislation related to issues raised in the Petitions. During the 111th Congress, immediately after the Supreme Court issued *Citizens United*, most congressional attention was focused on the DISCLOSE Act (H.R. 5175; S. 3295; S. 3628), sponsored by Representative Van Hollen. Its failed history is particularly instructive. The House of Representatives passed H.R. 5175, with amendments, on June 24, 2010, by a 219-206 vote. By a 57-41 vote, the Senate declined to invoke cloture on companion bill S. 3628 on July 27, 2010.[3] A

[3] 156 Cong. Rec. S6285 (daily ed. July 27, 2010) (Senate vote 220).

second cloture vote failed (59-39) on September 23, 2010.[4] No additional action on the bill occurred during the 111th Congress.

Three largely similar versions of the DISCLOSE Act were introduced in the 112th Congress. On March 29, 2012, the Senate Committee on Rules and Administration held a hearing on the first introduced Senate bill, S. 2219. On July 10, 2012, Senator Whitehouse introduced a second version of the bill, S. 3369. The Senate debated a motion to proceed to the measure in July 2012 but declined (by a 53-45 vote) to invoke cloture.[5] Representative Van Hollen's House companion version of the DISCLOSE Act, H.R. 4010, was referred to the Committees on House Administration and Judiciary. The bill was not the subject of additional action, although Representative Van Hollen filed a discharge petition on the measure.[6]

Representative Van Hollen re-introduced the DISCLOSE Act as H.R. 148 during the 113th Congress. In July 2014, the Senate Rules and Administration Committee held a hearing on Senate companion S. 2516. (In the 113th Congress an alternative to the DISCLOSE Act was numbered S. 791; it did not advance beyond introduction). The DISCLOSE Act was again proposed in the 114th Congress and was numbered H.R. 430 and S. 229. It too has not advanced beyond introduction.

Congress's repeated failure to pass the DISCLOSE Act demonstrates Congress's unwillingness to impose more regulation. It is not within the FEC's authority to do through regulation what the Congress refused to do through legislation.

Importantly, the DISCLOSE Act proposed—and failed—to amend FECA to address precisely what the Petitions seek with their first two proposals.

Disclosure of Donors to Organizations Engaged in Independent Expenditures and Electioneering Communications

The Petitions' first request specifically calls for additional disclosure of donors to organizations engaged in independent expenditures and electioneering communications. Pet. 6. Under the existing disclosure regime, these organizations need not disclose a donor's identity unless the donation was made specifically "for

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4 156 Cong. Rec. S7388 (daily ed. Sept. 23, 2010) (Senate vote 240).

5 158 Cong. Rec. S5072 (daily ed. July 17, 2010) (Rollcall vote 180).

6 *See* Petition No. 0004, 112th Cong., 2nd Sess., July 12, 2012, available at http://clerk house.gov/112/lrc/pd/petitions/DisPet0004.xml.

the purpose of furthering the" expenditure.[7]

The DISCLOSE Act sought to enact the same additional disclosures proposed by the Petitions. Specifically, the bill removed the "for the purpose of furthering" limitation on disclosure of an organization's donors if their donations exceeded $600.[8] Thus, the DISCLOSE Act would have required all donors above this low threshold to be disclosed.

This newly proposed disclosure provision was well understood by its advocates as a clear and dramatic change from the FECA's existing disclosure regime. When advocating for passage of the bill, Congressman Van Hollen described these heightened disclosure requirements as "unprecedented." Press Release, Congressman Chris Van Hollen, *Van Hollen Statement on Passage of the DISCLOSE Act* (June 24, 2010)[9]; *see also* Press Release, Congressman Chris Van Hollen, *Van Hollen Statement on Senate Leaders' Commitment to Act on DISCLOSE* (June 22, 2010) ("the most transparency and disclosure of political expenditures in the history of our elections.")[10]; Chris Van Hollen and Mike Castle, *The Disclose Act is a Matter of Campaign Honesty*, Washington Post, June 17, 2010 ("an unprecedented amount of sunlight on campaign expenditures.").[11]

President Obama, Senator Schumer (chief sponsor of the DISCLOSE Act in the Senate), and other Members of Congress unanimously characterized the bill's provisions as "the toughest ever disclosure requirements"[12]; an "unprecedented level of disclosure . . . , not only of an organization's spending, but also of its donors"[13]; and "a series of new disclosure requirements that will create an unprecedented paper trail."[14] By pressing to amend the FECA to boost compelled

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7 52 U.S.C. § 30104(c)(2)(C); 11 C.F.R. § 104.20(c)(9).

8 DISCLOSE Act, § 211.

9 http://vanhollen.house.gov/media-center/press-releases/van-hollen-statement-on-passage-ofthe-disclose-act.

10 http://vanhollen.house.gov/media-center/press-releases/van-hollen-statement-on-senateleaders-commitment-to-act-on-disclose.

11 http://www.washingtonpost.com/wpdyn/content/article/2010/06/16/AR2010061604599.html.

12 Press Release, President Barack Obama, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), http://www.whitehouse.gov/the-press-office/statement-president-disclose-act.

13 156 Cong. Rec. S3015, S3029 (daily ed. May 3, 2010) (Statement of Sen. Schumer).

14 Press Conference, Campaign Spending Rules, Feb. 11, 2010, available at http://www.c-spanvideo.org/program/SpendingRu&start=204 (remarks of Sen. Schumer).

disclosure, these lawmakers conceded that the FECA does not authorize such disclosure in its present state. *Cf. Marsh v. Rosenbloom*, 499 F.3d 165, 174 (2d Cir. 2007) (noting "the rule of statutory construction that the legislature is never presumed to do a useless act"). Thus, for four successive Congresses, the existing law regarding disclosure was not changed and proposals like those in the Petitions were rejected.

Election-Related Spending by U.S. Subsidiaries of Foreign Companies

The Petitions' second request specifically calls for new rules to disallow U.S. companies from "engaging in election-related spending" if the company is "owned or controlled by foreign nationals." Pet. 7. Currently, the Act provides that foreign nationals are prohibited from making contributions in federal, state, or local elections, and are prohibited from making independent expenditures and electioneering communications in federal elections. 52 U.S.C. § 30121. Existing FEC regulations provide that foreign nationals shall not "direct, dictate, control, or directly or indirectly participate" in the decision-making process of a corporation, labor union, political committee, or political organization with regard to federal or nonfederal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with federal, state or local elections or regarding the administration of a political committee. 11 C.F.R. § 110.20(i).

Once again, the DISCLOSE Act attempted to further restrict political participation by U.S. subsidiaries of foreign parents as contemplated by the Petitions. Specifically, the bill would have imposed the above-described foreign national restrictions on U.S. subsidiary corporations if: (1) a foreign national indirectly or directly owns at least 20% of the voting shares; (2) the majority of the board are foreign nationals; or (3) one or more foreign nationals can "direct, dictate, or control" decision-making of the corporation with respect to its political activities. *See* DISCLOSE Act, §102. In addition, the bill would have required the CEO (or the highest-ranking corporate official) to certify, before making permissible expenditures in connection with federal elections, that the foreign-national prohibitions above do not apply to the corporation. *Id.* These proposed changes would, on their face, have imposed dramatic and new restrictions on U.S. subsidiaries of foreign companies.

B. *Citizens United* does not otherwise dictate that the Commission fill a regulatory gap.

Citizens United cannot be read as a mandate to do what the Petitions ask; the decision did not instruct the Commission to implement the DISCLOSE Act, nor do the Petitions point to any statement in the decision where the Court invited the Commission to fill a regulatory gap.

First, the Petitions' contention that "*Citizens United* was premised on adequate disclosure" and that such disclosure required the donor information sought by the Petitions, Pet. 4, is wholly unfounded. *Citizens United* only addressed the statute as limited by current FEC regulations, and did not even consider, much less approve, the much broader and more burdensome donor disclosure contemplated by the Petitions. In fact, the Government's brief in *Citizens United* explained that disclosure was limited to "the amount spent on the advertisement and any large contributions earmarked to underwrite it." Brief for Appellee at 30, 39, *Citizens United*, 558 U.S. 310 (No. 08-205); *see also id.* at 30 (noting that Citizens United only disclosed funds "made or pledged for the purpose of furthering the production or public distribution of" the electioneering communication). Rather than question the validity of these disclosures, the Court held that the required disclosure of "certain contributors" — i.e., those contributing large, "earmarked" amounts as explained by the Government — was a constitutional and "effective disclosure" regime. *Citizens United*, 558 U.S. at 366. Accordingly, the Petitions cannot argue that *Citizens United* compels the Commission to promulgate new regulations to increase donor disclosure.

Second, *Citizens United* did not disturb the existing regulatory regime for foreign nationals. Indeed, the Court expressly refrained from addressing the point. *See id.* at 362 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."). There is, therefore, no mandate for the Commission to pick up the mantle. While agencies can certainly update their regulations to reflect the Supreme Court's interpretations of federal law, *see, e.g.*, Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797 (Oct. 21, 2014) (revising the corporate independent expenditure and electioneering communication regulations after *Citizens United*), nowhere does the Court in *Citizens United* even hint that it was upending FECA's statutory regime for regulating political participation by foreign

nationals. Thus, there is no basis to conclude that *Citizens United* invited the Commission to address the topic.

Third, and equally baseless, is the Petitions' assertion that *Citizens United* invited the Commission to clarify through a new rulemaking that "corporations and labor organizations may not coerce employees and union members to support, financially or otherwise, corporate or union independent political spending." Pet. 8. The Act prohibits corporations and labor organizations from obtaining political funds by "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal." 52 U.S.C. § 30118(b)(3)(A). And the Commission has already promulgated rules addressing coercion of employees and union members. 11 C.F.R. §§ 114.2(f)(2)(iv); 114.5(A)(2)–(4). The Petitions point to nothing in *Citizens United* identifying a new, more serious problem with coercive measures employed to obtain political donations. Indeed, there is no evidence in the Petitions or elsewhere of any corporate independent expenditures or electioneering communications for which funding was secured by soliciting corporate employees, let alone coercing them. In this respect, the Petitions are proposing a solution in search of a problem.

Fourth, the Petitions claim *Citizens United* requires the Commission to rewrite its regulations to "ensure the independence of candidates" from super PACs and other organizations engaged in independent expenditures and electioneering communications. Pet. 9. In support of this claim, the Petitions cite to the D.C. Circuit's opinion in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) for the proposition that "the independence of independent expenditures was a central consideration" in *Citizens United*. Pet. 8–9 (quoting *SpeechNow*, 599 F.3d at 693). We agree. But nowhere in *Citizens United* does the Court instruct the Commission to, or imply that it should, revisit its coordination rules. In fact, the Court has long recognized the rights of groups closely associated with candidates, i.e., political parties, to engage in independent expenditures and has never quarreled with how the Commission has ensured the necessary independence. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615–18 (1996).

Moreover, the existing coordination regulations, 52 U.S.C. § 30116; 11 C.F.R. § 109.21, are the product of the considered judgment of every branch of the federal government. The first coordination rules were promulgated in the 1990s. *See* Coordinated Communications, 71 Fed. Reg. 33190 (June 8, 2006). In BCRA, however, Congress could not agree on how to redefine coordination. *See id.* As a

result, Congress instructed the Commission to draft new regulations and to consider five specific factors. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-55, 116 Stat. 81. The FEC complied, *see* 11 C.F.R. § 109.21(a), but soon thereafter, then-Congressmen Shays and Meehan commenced a lawsuit claiming that the Commission's coordination regulations were wrong. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004). The D.C. Circuit agreed and ordered the Commission to rewrite the regulations. *See Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). In sum, every branch of government has had a hand in rigorously fine-tuning the coordination regulations. In light of this protracted history, the Petitions' request that the FEC start anew seems wasteful.

IV. Conclusion

The FECA's clear existing statutory language coupled with Congress's rejection of legislation that would have authorized the two most significant changes sought by the Petitions deprives the Commission of rulemaking authority to do so. Furthermore, *Citizens United* provides no warrant for the Commission to proceed with the rulemaking. The Commission should not, therefore, initiate the rulemaking.

Respectfully submitted,

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