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REG_2010_01_Madison_Center_for_Free_Speech_James_02_02_2012_10_35_40_FEC Rulemaking Petition 1-26-10 - NPRM Response 2-2-12.pdf



JAMES MADISON CENTER FOR FREE SPEECH

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February 2, 2012

Federal Election Commission
Att'n: Robert Knop, Assistant General Counsel
Washington, D. C.

Re: *Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 76 FED. REG. 80803 (FEC Dec. 27, 2011) ("NPRM")¹

Submitted *via* <http://www.fec.gov/fosers>

Ladies and Gentlemen:

The James Madison Center for Free Speech appreciates the Federal Election Commission's ("FEC's") considering the rulemaking petition of

¹*Available at* <http://sers.nictusa.com/fosers/showpdf.htm?docid=99892> (all Internet sites visited Feb. 2, 2012). The draft that the FEC approved, <http://sers.nictusa.com/fosers/showpdf.htm?docid=99813>, is at <http://sers.nictusa.com/fosers/showpdf.htm?docid=99692>. Pages 50 to 71 contrast current and proposed regulations with redlining.

January 26, 2010,² submits these comments in response to the NPRM, and requests an opportunity to testify on March 7, 2012. *See* NPRM at 80803.

Citizens United v. FEC holds, *inter alia*, that Federal Election Campaign Act (“FECA”) bans, 2 U.S.C. 441b (2002),³ on independent expenditures, *see generally* *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), and electioneering communications, *see generally* 2 U.S.C. 434.f.3.A.1 (2002), are unconstitutional. The rulemaking petition asks that the FEC:

- Repeal 11 C.F.R. 114.2 (2007) and 114.14 (2007)⁴ insofar as they implement the Section 441b bans *Citizens United* strikes down.
- Acknowledge that Section 441b no longer bans corporations, unions, or membership organizations from engaging in independent spending for political speech beyond their

²*Available at* <http://sers.nictusa.com/fosers/showpdf.htm?docid=23470>.

³FECA is available at <http://fec.gov/law/feca/feca.pdf>.

⁴FEC regulations are available at http://www.access.gpo.gov/nara/cfr/waisidx_11/11cfrv1_11.html.

restricted classes, *see generally* 2 U.S.C. 431(9)(B)(iii) (2002); 11 C.F.R. 114.3 (2002), and repeal 11 C.F.R. 114.4 (2007) insofar as it implements Section 441b and bans such speech.

- Repeal 11 C.F.R. 114.9 (2006) insofar as it implements Section 441b and bans independent spending for political speech.

- Repeal 11 C.F.R. 114.10 (2002), and

- Repeal 11 C.F.R. 114.15 (2007), the FEC's version, *see Citizens United*, 130 S.Ct. at 889-90, 895, of the appeal-to-vote test of *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457, 469-70, 474 n.7 (2007) ("*WRTL-IP*").

After addressing Sections 114.14, 114.15, and 114.10, these comments address Sections 114.2, 114.3, 114.5, and 114.9.

Section 114.14

The NPRM proposes repealing Section 114.14. NPRM at 80814. This is correct. Section 114.14 has the ban on FECA electioneering communications that *Citizens United*, 130 S.Ct. at 896-914, strikes down.

The NPRM also asks whether the disclosure requirement in 11

C.F.R. 104.20(7) (2007) should distinguish

- “Donations” from individuals for electioneering communications from
- “Donations” from corporations or unions for electioneering communications and treat these donations as “contributions.”

See NPRM at 80814. However, what is the basis for applying different disclosure requirements to individuals, corporations, and unions here?

Besides, as the NPRM notes, if corporate and union “donations” for FECA electioneering communications are “contributions,” then the ban on corporate and union contributions for electioneering communications applies. See 2 U.S.C. 441b(a); *id.* 441b(b)(2); NPRM at 80814.

However, the only interest that suffices to ban or otherwise limit⁵ “campaign finances” is the prevention of corruption of candidates or officeholders, or its appearance.⁶ Corruption means *quid-pro-quo*

⁵As opposed to “regulate.” See, e.g., *Buckley*, 424 U.S. at 66-68.

⁶*FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) (“NCPAC”) (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Buckley*); see *Citizens Against Rent Control*, 454 U.S. at 297 (referring to candidates and officeholders); see also *Arizona Free Enterprise Club’s Freedom PAC v. Bennett*, 564 U.S. ___, ___, 131 S.Ct.

corruption. *Citizens United*, 130 S.Ct. at 909-10 (citations omitted).

Suppose that an organization:

- Seeks to engage in independent spending for political speech, including FECA electioneering communications.

- Is *not* a foreign national and therefore has a First Amendment right to engage in such speech, *see id.* at 911 (citing 2 U.S.C. 441e), and

- Wants to receive contributions for FECA electioneering communications from a corporation or union that is *not* a foreign national and which therefore also has a First Amendment right to engage in independent spending for political speech, including FECA electioneering communications. *See id.*

Independent spending for political speech presents no danger of *quid-pro-quo* corruption or its appearance. *Citizens United*, 130 S.Ct. at

2806, 2825-28 (2011) (“*AFEC*”) (considering only corruption); *Citizens United*, 130 S.Ct. at 908-09 (same); *Davis v. FEC*, 554 U.S. 724, 736-44 (2008) (same); *WRTL-II*, 551 U.S. at 478 (same) (quoting *Buckley*, 424 U.S. at 45); *Randall v. Sorrell*, 548 U.S. 230, 241-42, 244-45, 247-48 (2006) (same).

908-10. The next question is: What does this mean for contributions for independent spending for political speech? *See Yamada v. Kuramoto*, 744 F.Supp.2d 1075, 1083 (D. Hawaii 2010), *appeal dismissed*, (9th Cir. June 10, 2011).

Under unanimous case law, government may not limit contributions to organizations engaging in only independent spending for political speech, *see Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011) (“WRTL-SPAC”); *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir.) (*en banc*), *cert. denied*, 562 U.S. ____, 131 S.Ct. 553 (2010); *EMILY’s List v. FEC*, 581 F.3d 1, 9-11, 14 & n.13, 15 n.14 (D.C. Cir. 2009); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008) (“NCRL-III”),⁷ when the contributor has a First Amendment right to engage in the same spending for political speech as the “contributtee.” *See Long Beach Area Chamber*

⁷A Supreme Court concurrence agrees. *See California Med. Ass’n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (holding that “contributions to a committee that makes only independent expenditures pose no ... threat” “of actual or potential corruption”). This is the controlling opinion in *California Medical Association. EMILY’s List*, 581 F.3d at 9 n.8 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

of Commerce v. City of Long Beach, 603 F.3d 684, 698-99 (9th Cir.), *cert. denied*, 562 U.S. ___, 131 S.Ct. 392 (2010); *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-21 (9th Cir. 2011); *Yamada*, 744 F.Supp.2d at 1085-87 (applying *Long Beach*, granting a preliminary-injunction motion in part, and inadvertently denying a motion the plaintiffs did not make); *Republican Party of N.M. v. King*, No. 11-cv-900, manuscript order at 12-13 (D.N.M. Jan. 5, 2012);⁸ *Farris v. Seabrook*, No. 11-5431 RJB, manuscript order at 17-18 (W.D. Wash. July 15, 2011),⁹ *aff'd*, ___ F.3d ___, ___, No. 11-35620, slip op. at 508-09 (9th Cir. Jan. 19, 2012).¹⁰

The same principle applies to contributions for independent spending for political speech to organizations engaging in both

⁸*Available at*
<http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0004222812-0000000000> *and*
<http://www.jamesmadisoncenter.org/cases/files/2011/10/D.-38-ORDER-granting-and-denying-PI.pdf>.

⁹No hyperlink, Westlaw cite, or Federal Supplement cite appears to be available.

¹⁰*Available at*
<http://www.ca9.uscourts.gov/datastore/opinions/2012/01/19/11-35620.pdf>.

independent spending for political speech and other speech, if, for example, the “contributor”-organizations separate the contributions they receive for independent spending for political speech from contributions they receive for other speech. *See Thalheimer v. City of San Diego*, No. 09-cv-2862-IEG(BGS), manuscript order at 17-18, 30-31 (S.D. Cal. Jan. 20, 2012);¹¹ *Alabama Democratic Conference v. Strange*, No. 5:11-cv-02449-JEO, manuscript order at 21-22 (N.D. Ala. Dec. 14, 2011);¹² *Carey v. FEC*, 791 F.Supp.2d 121, 125, 130-32 (D.D.C. 2011).

The FEC may be able to avoid a constitutional problem with 11 C.F.R. 104.20(7) by (1) continuing to call corporate and union donations for electioneering communications “donations,” or (2) calling the “donations” “contributions” and establishing that the ban on corporate and union electioneering communications, 2 U.S.C. 441b(a); *id.* 441b(b)(2); NPRM at 80814, does not apply when “contributor”-organizations

¹¹*Available at*
<http://www.jamesmadisoncenter.org/cases/files/2011/06/San.Diego-D.-133-SJ-Order.pdf>.

¹²*Available at*
<http://www.scribd.com/doc/75711998/24-Order-Granting-Pl-Mot-for-SJ>.

- Engage in only independent spending political speech, or
- Separate the contributions they receive for independent spending for political speech from contributions they receive for other speech,

and when contributors and “contributees” are not foreign nationals, and therefore have a First Amendment right to engage in electioneering communications.

Section 114.15

The NPRM also proposes repealing Section 114.15. NPRM at 80814. This is correct.

Section 114.15 has the FEC’s version, *see Citizens United*, 130 S.Ct. at 889-90, 895, of the *WRTL-II* appeal-to-vote test. *See* 551 U.S. at 457, 469-70, 474 n.7.

Citizens United forecloses any contention that whether FECA electioneering communications pass the appeal-to-vote test – *i.e.*, whether their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate or candidates in the jurisdiction – affects whether government may regulate them. *Compare WRTL-II*, 551 U.S. at

457, 469-70, 474 n.7, *with Citizens United*, 130 S.Ct. at 889-90, 915. In other words, “*Citizens United* eliminate[s] the context in which the appeal-to-vote test has ... any significance.” *National Org. for Marriage v. McKee*, 649 F.3d 34, 69 (1st Cir. 2011), *pet. for cert. filed*, (U.S. Nov. 2, 2011).¹³

Here is why: *WRTL-II* holds that government may ban FECA electioneering communications only when they pass the test. 551 U.S. at 457, 469-70, 474 n.7. However, *Citizens United* holds that regardless of whether they pass the test, government:

- May not ban FECA electioneering communications, *e.g.*, 130 S.Ct. at 889-90, by persons other than foreign nationals. *See id.* at 911 (citing 2 U.S.C. 441e), and
- May, subject to further inquiry, *see, e.g., id.* at 915-16 (giving an example of when disclosure is unconstitutional), regulate FECA electioneering communications by requiring

¹³*Available at* <http://www.jamesmadisoncenter.org/cases/files/2011/11/Cert-Petition-final.pdf>.

non-political-committee-like disclosure. Id. at 915 (upholding non-political-committee reporting).

Since the appeal-to-vote test:

- Applied only to FECA electioneering communications, *WRTL-II*, 551 U.S. at 474 n.7; *see also NCRL-III*, 525 F.3d at 282 (citing *WRTL-II*, 127 S.Ct. 2652, 2667 (2007)), *cited in Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009) (unpublished), *Broward*, 2008 WL 4791004 at *7 (N.D. Fla. Oct. 29, 2008), *clarified on other grounds*, 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008) (unpublished), *and National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F.Supp.2d 1132, 1144, 1150 (D. Utah 2008), and
- Is vague as to speech other than FECA electioneering communications, *see WRTL-II*, 551 U.S. at 474 n.7; *Center for Individual Freedom v. Tennant*, ____ F.Supp.2d ____, ____,

manuscript order at 35-36 (S.D.W.Va. July 18, 2011),¹⁴ *notice of appeal filed*, (4th Cir. Sept. 1, 2011),¹⁵

the appeal-to-vote test no longer serves any constitutional purpose. There is no need to retain the test or any remnant of it in 11 C.F.R. 114.15 or elsewhere.

Section 114.10

As the NPRM notes, 11 C.F.R. 114.10 is an exception to the Section 441b independent-expenditure and electioneering-communication bans. The exception is for *MCFL* corporations, or, to use the FEC's term, "qualified nonprofit corporations." *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256-65 (1986) ("*MCFL*"); NPRM at 80812. Because the bans are unconstitutional, *Citizens United*, 130 S.Ct. at 896-914, there is no need for an exception to

¹⁴*Available at* <http://www.jamesmadisoncenter.org/cases/files/2011/07/Doc-233-SJ-Order.pdf>.

¹⁵After *Citizens United* removed the appeal-to-vote test as a constitutional limit on government power, all that remains of the test is the conclusion that it is vague as to all speech. See *WRTL-II*, 551 U.S. at 492-94 (Scalia, J., concurring in part and concurring in the judgment); *Tennant*, manuscript order at 35-36.

the bans.

From a constitutional-law perspective, there is also no need for FEC regulations “to recognize explicitly the right of all [domestic] corporations” or domestic unions to engage in independent spending for political speech. NPRM at 80812 (citing 11 C.F.R. 114.10(d)). *Citizens United* already does this. *See* 130 S.Ct. at 896-914; NPRM at 80803 n.3. Nevertheless, the FEC should include this information in its regulations, because it can (1) help the public understand how the law has changed and (2) provide reassurance to those seeking to engage in political speech. *See also* NPRM at 80810 (citing 11 C.F.R. 114.4(c)(2)-(6) (providing similar information)); NPRM at 80812-14 (citing 11 C.F.R. 114.10(e)-(i) (same); 11 C.F.R. 114.10(d) (same)). It is worth emphasizing, however, that a regulation acknowledging constitutional law does not affect constitutional law. As the FEC is aware, the right of persons other than foreign nationals to engage in independent spending for political speech exists not *via* the grace of government but *via* the Constitution. *See, e.g., Citizens United*, 130 S.Ct. at 896-914.

To the extent the FEC retains text from Section 114.4(c)(2)-(6),

Section 114.10(e)-(i), or Section 114.10(d), the FEC would serve the public well by placing it with similar regulations elsewhere and combining repetitive language. For example, by the NPRM's own description, current Sections 114.10(e)(2) and (g) repeat requirements that already exist elsewhere. *See* NPRM at 80813-14.

Further, the current requirement that speakers “inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates[.]” *id.* at 80813 (citing 11 C.F.R. 114.10(f)), should not require the public to decipher “political purposes” or “supporting or opposing[.]” Instead, the FEC should limit the requirement to those who may use donations for independent expenditures or FECA electioneering communications. This is consistent with *FEC v. Survival Education Fund*, which allows disclosure of contributions earmarked for political speech that the Supreme Court has held is regulable, even when the speaker is not a political committee. *See* 65 F.3d 285, 294-95 (2d Cir. 1995). Such speech includes independent expenditures, *Buckley*, 424 U.S. at 44 & n.52, 80, and FECA electioneering communications. *Citizens United*, 130 S.Ct. at 914-16.

Section 114.2

The NPRM's discussion of 11 C.F.R. 114.2 correctly proposes removing 11 C.F.R. 114.2(b)(2)(ii) and (b)(3). NPRM at 80807.

The NPRM has two alternatives for Section 114.2(b)(2)(i). Alternative A eliminates the ban for independent expenditures, noncoordinated FECA electioneering communications, and other independent spending for political speech. Alternative B eliminates the ban only for independent expenditures and noncoordinated FECA electioneering communications. *See id.* at 80806-07.

Independent expenditures are the highest grade of independent spending for political speech. *See McConnell*, 540 U.S. at 190-94. Those who have a First Amendment right to engage in independent expenditures have a First Amendment right to engage in any independent spending for political speech. Thus, Alternative A is preferable.

Sections 114.3 and 114.4

Current 11 C.F.R. 114.3 and 114.4 addresses speech to corporations' and unions' restricted classes and beyond the restricted classes, respectively. NPRM at 80807-12.

The NPRM's discussion of 11 C.F.R. 114.3 has two alternatives for Section 114.3(c)(4): Alternative A and B. NPRM at 80807-09.

The NPRM's discussion of 11 C.F.R. 114.4 has two alternatives for Section 114.4(d): Alternatives A and B. NPRM at 80811-12.¹⁶

Consistent with *Citizens United*, the FEC should not limit political speech when it is independent, *see* 130 S.Ct. at 896-914, and when the speaker is not a foreign national. *See id.* at 911 (citing 2 U.S.C. 441e). Because each Alternative A implicitly recognizes this principle, and neither Alternative B does, each Alternative A is preferable.

To respond to additional questions regarding 11 C.F.R. 114.3 and 114.4:

- It would appear that one could make Sections 114.3 and 114.4 “more readily understandable” by combining and shortening them. NPRM at 80807.
- Requiring disclosure, subject to further inquiry, *see, e.g., Citizens United*, 130 S.Ct. at 915, of independent expenditures,

¹⁶The redlined draft is particularly helpful here. *See* <http://sers.nictusa.com/fosers/showpdf.htm?docid=99692> at 60-64.

see NPRM at 80808 (citing 11 C.F.R. 114.3(b)), is consistent with *Buckley*, 424 U.S. at 80; *cf. Citizens United*, 130 S.Ct. at 914-16 (addressing disclosure of FECA electioneering communications).

- When an independent expenditure reaches both the restricted class and beyond the restricted class, NPRM at 80808, it would suffice to treat the entire independent expenditure as reaching beyond the restricted class. There is no need to complicate corporate or union speech with allocation regulations. *Cf.* 11 C.F.R. 106.

- The proposed changes to 11 C.F.R. 114.4(c)(5), (6), and (8), see NPRM at 80810, are consistent with *Citizens United*, 130 S.Ct. at 896-914.

Sections 114.9

The NPRM also seeks comment on 11 C.F.R. 114.9, which addresses the use of corporate and union facilities for federal elections. NPRM at 80812.

Consistent with *Citizens United*, the FEC should not limit political

speech, or require reimbursement for such political speech, when it is independent, *see* 130 S.Ct. at 896-914, and the speaker is not a foreign national. *See id.* at 911 (citing 2 U.S.C. 441e).

Respectfully submitted,

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/s/ James Bopp, Jr.

/s/ Randy Elf

By

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