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Ms. Rosemary C. Smith
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Comments of First Amendment Project of The Americans Back in Charge Foundation in Response to Federal Election Commission's Notice of Proposed Rulemaking "General Public Political Communications Coordinated with Candidates", Notice 1999-27

Dear Ms. Smith:

The Commission has invited comments concerning proposed rules on the subject of 'General Public Political Communications Coordinated with Candidates'. The First Amendment Project of Americans Back in Charge Foundation hereby submits these comments in response to the proposed rulemaking.

The First Amendment Project was established in 1997 by the Board of Directors of the Americans Back in Charge Foundation for the purpose of vigorously defending the First Amendment to the United States Constitution and its guarantees of freedom of political speech and freedom of political association; and further to strenuously oppose all efforts to destroy, restrict, amend or alter, directly or indirectly, the protections of the First Amendment through various proposals on the subject of campaign finance 'reform'.

The Commission's proposed rules at issue today demonstrate precisely why the First Amendment Project was established. With all due respect to the Commission, The First Amendment Project submits that the Commission should NOT proceed with the proposed rulemaking and should stop all consideration of the proposed rules, including each and every version thereof. We take this position for several reasons.

1. **Any and all 'confusion' regarding the Commission's enforcement standard for political communications to the general public is of the Commission's own making for failing to adhere to the bright line established by the United States Supreme Court in *Buckley v. Valeo.***

The stated justification for the proposed regulations is the Commission's seemingly laudable goal of 'clarifying for the political community' the permissible conduct on the subject of political communications to the general public. The ONLY confusion that exists stems from the Commission's stubborn refusal to accept the standard articulated by the U.S Supreme Court in 1976 in the *Buckley* decision.

The Supreme Court in Buckley provided to the citizenry (the 'political community' in the Commission's words) a bright line and clearly discernible 'rule' on this topic. The Court identified for all concerned that ONLY political speech which '**in express terms advocate(s) the election or defeat of a clearly identified candidate through the use of such phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject"** is subject to the Commission's jurisdiction. (emphasis added)

The express advocacy standard has been upheld consistently by the Supreme Court and numerous federal district and appellate courts since 1976.

NO other political or campaign speech is subject to government regulation. Period.

Only because the Commission and its legal staff continue to try to read into and glean from *Buckley* some opportunity to expand the Commission's regulatory authority does this matter of 'coordination' continue to haunt the Commission and, in turn, those who dare to engage in political speech clearly allowable under the First Amendment but seemingly unacceptable to the Commission and the General Counsel's office.

The Commission's rule defining express advocacy far exceeds the *Buckley* court's definition only because the Commission has chosen to make it so. That definition has repeatedly been found to be unconstitutional by over one dozen federal courts, most recently this month in the Eastern District of Virginia.

Notwithstanding this steady string of court losses, the Commission has consistently refused to change its definition, having declined to enter into a rulemaking to conform the Commission's rule at 11 C.F.R. § 100.22 to the *Buckley* definition, despite numerous requests to do so. Further, the Commission proposes to wholly ignore the requirement that a communication embody the *Buckley* definition of express advocacy in order to fall within the jurisdiction of *any* of the Commission's regulatory framework.

Comes now the Commission and proposes these baffling and wholly ambiguous new rules, justifying the proposal by the bizarre decision of the district court for the District of Columbia last year in *FEC v. Christian Coalition,* 52 F. Supp. 2d 46 (DCDC, 1999). (See discussion of *Christian Coalition* below.)

The Commission's action here is inexplicable. Having ignored altogether the court decisions of the past twenty-four years in which the Commission has been consistently castigated by the courts for promulgating and seeking to enforce its unconstitutional definition of 'express advocacy' and further having refused to modify the rule as a result of those many decisions, the Commission now offers a new set of rules in response to the decision of one judge in one case: *Christian Coalition.*

The proposed new rules only further compound the problems created by the Commission itself and further confuse anyone who participates in the political process, creating a chilling effect on political speech and association. This in direct contravention of the Supreme Court's decision in *Buckley.*

The Commission's new proposal, in ALL its versions and hypotheticals, runs completely afoul of the First Amendment as clearly set forth in Buckley and NO amount of tinkering with the verbiage can overcome that simple fact.

Were the Commission to finally codify the express advocacy standard articulated by the *Buckley* Court and dismiss each and every complaint filed with the Commission in which the Respondent did not engage in express advocacy communications, there would be no further 'confusion'. The bright line required by the First Amendment and clearly delineated by the Supreme Court in *Buckley* would finally be a reality and the Commission would no longer be used as a political ploy in and by every federal candidate and campaign.

2. The proposed rules exceed the Commission's authority set forth in *Buckley v. Valeo.*

As stated above, the Commission has persisted for almost a quarter of a century in bringing enforcement actions against persons and parties who have engaged in political speech which the Supreme Court has found NOT to be subject to the Commission's jurisdiction, by virtue of the definition of express advocacy articulated in Buckley. There is no authority for the Commission to create any new definitions of speech to change that fact.

The Commission has been admonished repeatedly by various federal courts regarding the limitations of its jurisdiction. "It is not the role of the FEC to second-guess the wisdom of the Supreme Court." *Faucher & Maine Right to Life v FEC,* 928 F.2d 468 (1st Cir., 1991).

In awarding costs and attorneys' fees to the Respondent in an FEC enforcement action, the Fourth Circuit Court of Appeals opined: "Against this overwhelming weight of (and, in the case of the Supreme Court decisions, dispositive) authority, the FEC argued before the district court and before us the concededly "novel" position that ...*no* words of advocacy are necessary to expressly advocate the election of a candidate....This is little more than an argument that the FEC will know "express advocacy" when it sees it. ...The question for us is whether the FEC was "substantially justified" in taking the position it did, in light of the Supreme Court's unambiguous pronouncements in *Buckley* and *MCFL* that explicit words of advocacy are required if the Commission is to have standing to pursue an enforcement action. The simple answer is that it was not so justified." *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

The Commission's proposed regulations regarding 'general public political communications' exceed the jurisdiction of the Commission and are merely more of the same type of government efforts to regulate political speech and association proscribed by the First Amendment.

3. There is no factual basis for the proposed new regulations; thus, no compelling governmental interest exists for the regulations.

The Commission has neither developed nor produced a record or body of evidence to demonstrate the basis of or need for its proposed new regulations. The Supreme Court in *Buckley* found that the basis for government regulation of expenditures for political speech and association is to 'avoid corruption or the appearance of corruption.' *Buckley*, 424 U.S. @ 48.

No evidence of corruption has been adduced. Neither has the Commission made any attempt at fact finding to discern the existence of 'corruption' or corrupting influences necessitating the promulgation of these proposed rules. Nor has the Commission taken steps to meet even the minimal and amorphous standard of the 'appearance of corruption' which these proposed regulations would presumably alleviate. Absent ANY factual basis whatsoever for such regulations, the Commission lacks legal authority to expand its regulatory authority by attempting through a rulemaking to encompass within its jurisdiction political speech beyond that specifically allowed the Commission by the Supreme Court in *Buckley*.

It is not sufficient for the Commission to imagine without any facts the existence of corruption in the political process. Such is not a constitutionally permissible basis for promulgating regulations restricting the free speech and association rights of the public. As the federal district court advised the Commission in the remanded *FEC v. Colorado Republican Campaign Committee*, 41 F.Supp.2d 1197 (D.C. Colo. 1999)(" *Colorado II*"), "The FEC's factual assertions suffer numerous flaws. . .The FEC. . .combines factual assertions with argument and engages in speculation as to what could occur. . . (T)his appears throughout the FEC's asserted facts. . ." 41 F.Supp @ 1211, 1212, FN 11.

The court in *Colorado II* further found: "The only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof . . .The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly. Nor can corruption be defined to include whatever it is that (political parties) and candidates do which the FEC does not like. In order to carry its heavy burden, the FEC must establish that limiting (party coordinated) expenditures is necessary to avoid corruption or the appearance thereof." 41 F. Supp. @ 1209.

The Commission must establish the existence of whatever specific corruption it seeks to eliminate or avoid by virtue of enacting these proposed regulations. Absent the Commission's clear demonstration of the factual basis evidencing the government's compelling interest in enacting regulations on political speech, none can be constitutionally promulgated. See *Colorado Republican Campaign Committee v. FEC,* 518 U.S. 6 (1996).

4. The proposed regulations are not narrowly tailored to remedy a specific problem.

Because the Commission proposes to regulate speech protected by the First Amendment, such rules and rulemaking must meet a standard of strict constitutional scrutiny. That standard can ONLY be met if the Commission promulgates regulations narrowly tailored to address and solve only some particular, identified problem(s).

"When the Government defends a regulation on speech as a means to . . .prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994), cited in *Colorado II*, 41 F. Supp. @ 1211,

When First Amendment rights are implicated, the government must narrowly tailor its 'solution' in order that the rights implicated will not be eviscerated. *See Riley v. National Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988).

The Commission has, as indicated above, conducted NO fact finding and has identified NO evidence of corruption of any kind whatsoever. Thus, having not identified any existing problem, it is impossible for the Commission to narrowly tailor its regulations to redress only that specific problem. The Commission's proposed regulations are vague, overly broad, ill-defined, and would vastly expand the Commission's regulatory authority in a manner totally at odds with the First Amendment's requirement of a narrowly tailored solution to address a clearly defined and identified problem.

5. The district court's decision in the *Christian Coalition* case should NOT form the basis for a rulemaking by the Commission.

The Commission has stated that its proposed regulations are in response to the district court's decision in the *Christian Coalition* case. It is startling that the Commission would

contemplate even for an instant proposing regulations based on a court decision in which the judge misstates in the second paragraph of the opinion the basic tenets of the statute (Federal Election Campaign Act of 1971, as amended) and applicable case law, most particularly the Supreme Court's various decisions *including* Buckley.

Judge Green wrote at the outset of her *very* odd opinion:

". . . corporations and unions can make independent expenditures that are related to a federal election campaign so long as those expenditures are not for communications that expressly advocate the election or defeat of a clearly identified candidate for federal office."

The very definition of 'related to a federal election campaign' *requires* expressly advocating the election or defeat of a clearly identified federal candidate, as set forth in *Buckley*. No wonder the case goes down hill from the opening paragraphs. It is absolutely impossible to glean any clear rule of law from the opinion, other than to decide that notwithstanding the plethora of facts thrown at the court by the Commission, no coordination (for the most part) was found to exist (even assuming that coordination of non-express advocacy communications is prohibited).

From this case, the Commission expects to CLARIFY what is or isn't permissible speech and association? Hardly. The opinion is nonsensical, the judge having invented entirely new definitions of types of speech that have no basis in the statute, FEC regulations, or any case law articulated by any court anywhere. This situation all results from the Commission's own zeal to create law on the subject of coordination, where none has ever existed.

Now the Commission seeks to codify dicta from this unwieldy case and has initiated an effort to promulgate regulations emanating from one judge's misperceptions of the law. All from a case that should never have been brought in the first place had the Commission been following the dictates of the Supreme Court in *Buckley*.

One must concur with Commissioners Thomas and McDonald that if the Commission seeks to base its regulations and enforcement on *Christian Coalition*, then the Commission was duty bound to accept Judge Green's suggestion and appeal the decision to the circuit court. Having elected NOT to do so, the Commission should put the case on the shelf forever. Certainly the Commission should not now attempt to enact regulations based on such silliness as that found in *Christian Coalition*.

6. The Commission is inviting more litigation and confusion by adopting the proposed regulations.

Should the Commission persist in promulgating any version of this rule, it proceeds knowing that it is inviting ongoing litigation to defend the constitutionality of the rules.

The Commission should take seriously that likelihood and act responsibly to avoid such an abuse of taxpayers' funds. The Commission has previously been ordered to pay costs and fees of a Respondent in an enforcement action on this issue. See *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

What that means is the American taxpayers are forced to pay twice: first, for the costs and fees associated with the Commission's enactment of and subsequent actions to enforce regulations of questionable constitutional validity, followed by an order to pay from public funds the costs and fees associated with Respondents' defense against such enforcement.

Conclusion

In sum, The First Amendment Project strongly opposes the proposed rules in any version the Commission should consider them. We urge the Commission to do what it should have done in 1976 immediately following the Supreme Court's decision in *Buckley*, namely to abide by the Court's definitions and adhere to the bright line mandated by the First Amendment and articulated so clearly by the *Buckley* court.

The First Amendment Project of Americans Back in Charge Foundation further advises the Commission of its desire to testify at any public hearing(s) called by the Commission for the purpose of receiving testimony on the proposed regulations.

Thank you for the opportunity to present these comments.

Sincerely,
SULLIVAN & MITCHELL, P.L.L.C.

Cleta Mitchell

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