July 16, 2010

Fair Political Practices Commission
Attn: Lawrence T. Woodlock
428 J Street, Suite 800
Sacramento, CA 95814

VIA FACSIMILE: (916) 322-6440

Re: Interpreting "Express Advocacy" In The Wake Of *Citizens United*

Dear Mr. Woodlock:

On behalf of the Center for Competitive Politics, I would like to comment on the Fair Political Practices Commission Interested Persons topic for your Monday, July 19, 2010 meeting. The Center for Competitive Politics is a nonpartisan, nonprofit group dedicated to protecting First Amendment political rights. CCP seeks to promote the political marketplace of ideas through research, litigation and advocacy. Your staff's suggested interpretation of recent Supreme Court precedent on "express advocacy" is fundamentally flawed, and it would not serve the goals of the Act, the interests of the Commission, or the people of California to proceed along this path.

Your analysis proceeds from a flawed notion of the legal effect of the Court's holding in *McConnell v. FEC* (540 U.S. 93 (2003)), *Wisconsin Right to Life v. FEC* (551 U.S. 449 (2007)), and ultimately *Citizens United v. FEC* (558 U.S. 50 (2010)). Briefly, the *McConnell* decision upheld a federal "electioneering communication" law against a facial challenge, by concluding that it reached communications that were the "functional equivalent" of express advocacy. As you are aware, the standard for assessing the constitutionality of a law against a facial challenge requires that the Court find the law unconstitutional in virtually all its applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court concluded that the electioneering communication standard, focused as it was on broadcast communications within 30 days of a primary or 60 days of a general election that featured a candidate, was facially valid.

Of course that isn't the end of the story. In *Wisconsin Right to Life v. FEC*, the Court considered an as-applied challenge to this same law. This time, looking at a specific political message exhorting certain Senators to vote a particular way (which also was to run in the "electioneering" period) the Court found the "electioneering" restriction unconstitutional. Justice Roberts, writing for himself and Justice Alito, concluded this by observing that the message at issue was not the functional equivalent of express advocacy. In their view, a court would find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Three other Justices would have overruled *McConnell's* holding that the electioneering communication law was constitutional. Justice Souter, writing for the four dissenting Justices, defended a broad interpretive approach to determining "electioneering" justified in great part by the 1990 *Austin v. Michigan Chamber of Commerce* opinion (494 U.S. 652 (1990)). The *Austin* holding, as you know, has since been overruled.

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In *Citizens United v. FEC*, the Court found that Section 441b of the Federal Election Campaign Act, which prohibited corporations both from making express advocacy expenditures and from engaging in electioneering communications, was unconstitutional. In so doing, it concluded that *Hillary: The Movie* contained the *functional equivalent* of express advocacy. It then held more broadly that the Constitution would permit neither a ban on corporate electioneering communications nor a ban on independent expenditures.

Given California law and precedents, it is hard to see how this line of decisions "warrants reconsideration by the Commission of what may now be an unnecessarily restrictive interpretation of what can be regulated as 'express advocacy.'" Nothing in this line of decisions "reconsiders" the scope of express advocacy. All discuss the limitations the Constitution places on Congress to regulate additional "electioneering" speech. The Court ultimately *restricted* the speech Congress could regulate in the 30 and 60 day periods before elections. The Court in *Citizens United* even *reiterated* the express advocacy standard for expenditures as it was articulated in *Buckley v. Valeo* (424 U.S. 1, 41-44 (1976)).

California has no electioneering communications statute, nor any law remotely resembling this federal law. Thus, there is no reason to think these cases require or allow any change in interpretation by the FPPC. It would be far beyond the regulatory authority of the FPPC to in effect "enact" an electioneering communications statute (even a disclosure one) via administrative rulemaking, then define "expenditure" using this new broad and unjustified standard.

Moreover, the FPPC would be abandoning a standard that is familiar, clear, and capable of withstanding legal challenges. It would be turning its back on the 2003 decision in *California Pro-Life Council v. Getman* (328 F.3d 1088 (9th Cir. 2003)) notwithstanding the Commission's status as a party in that litigation. We know of no change in circumstances that would counsel (or even permit) the FPPC to adopt a different standard, or would justify the disruption and uncertainty that inevitably arises from a change to such a fundamental building block of the state's campaign finance regime.

Thank you for this opportunity to comment on your query. Please do not hesitate to contact us if we can be of service to the Commission.

Very Truly Yours,

Allison Hayward
Vice President of Policy
Center for Competitive Politics