



August 22, 2011

Via Electronic Filing

Robert M. Knop  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RE: Petition of the James Madison Center for Free Speech

Dear Mr. Knop:

The Center for Competitive Politics (“CCP”) submits these comments in support of the Petition for Rulemaking filed with the Federal Election Commission (“FEC”) by the James Madison Center for Free Speech on January 26, 2010. *See* 76 Fed. Reg. 36,001. For the reasons stated below, CCP believes the Petition cleanly and correctly aligns FEC regulations with the understanding of the First Amendment recently articulated by the United States Supreme Court. In the event that hearings are held concerning this matter, CCP requests the opportunity to have a representative provide testimony further explaining our views.

1. *Citizens United v. FEC* explicitly recognized the First Amendment right of corporations, unions, and membership organizations to engage in political speech. Regulations that implement or rely upon 2 USC § 441b are consequently invalid and should be repealed.

Much of the Petition is dedicated to the repeal of regulations concerning 2 USC § 441b, whose prohibition on corporate independent expenditures was declared invalid by the Supreme Court in *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). Several FEC regulations are facially incompatible with that decision, including major portions of 11 C.F.R. §§ 114.2, 114.3, 114.4, 114.9, and 114.14. For instance, while those portions of 11 C.F.R. § 114.2 that deal with contributions by national banks and corporations are unaffected by *Citizens United*, the ban on “expenditures... for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s)” are invalid under the Court’s decision. That provision should be withdrawn, both as an act of fidelity to the Commission’s Constitutional duties, and to assist regulated persons who might otherwise feel bound by an unconstitutional requirement. The same analysis can be easily applied to the other provisions identified in the James Madison Center’s first three requests.

Little comment is required for this section of the Petition. The Supreme Court has spoken, and the FEC need only faithfully execute its ministerial duties by striking all regulations premised on 2 USC § 441b's ban.

2. Additional regulation is inappropriate if it delays repeal of unconstitutional provisions and reflects insufficient experience with the post-*Citizens United* regulatory environment.

In considering the James Madison Center's four-page petition, the FEC has already generated reams of additional analysis and proposed regulations. It has done so despite the fact that *Citizens United* was decided more than a year and a half ago, and clearly unconstitutional regulations remain on the books. This is a failure of leadership by the FEC, which runs the risk of appearing to give the First Amendment less than its due attention. Regulations that are clearly invalid under *Citizens United* should be removed from the books immediately, and should not be linked to broader rulemaking. After all, additional rulemaking does nothing to change the inherent invalidity of these regulations.

But when considering its regulatory duties, the FEC should recall that the *Citizens United* ruling has been law for only one election cycle, in which no presidential candidate was on the ballot. CCP respectfully submits that this brief experience with the present legal landscape ill-equips the Commission to issue additional, broad regulations, with all the unanticipated consequences such regulations would entail. An agency's rulemaking authority is premised on its expertise. *See Chevron, USA v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) (deference to agency interpretation appropriate where interpretation "depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations."). But where rulemaking is insufficiently informed, the assumption of expertise is misplaced, and the agency acts arbitrarily and capriciously. *See, e.g., Business Roundtable et al. v. SEC*, No. 10-11305, slip. op. at 9 (D.C. Cir. July 22, 2011) (agency acted arbitrarily and capriciously where its predictions "had no basis beyond mere speculation").<sup>1</sup> Here, the Commission has not undertaken the work that would be necessary to support further rulemaking. Until expert research is conducted, on subjects such as public confidence in our system of elections, the role disclosure (as opposed to other issues) plays in such confidence, and the ways in which actual campaigns are being fought and funded after *Citizens United*, the FEC is not ready to undertake substantive additional rulemaking. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (citation and internal quotation marks omitted).

It may be that the Commission will choose, following the appropriate administrative procedures, to adopt additional or revised regulations. CCP will comment on such proposals should they occur. But such activities should not further delay the repeal of already-invalid provisions. And to the extent that differences of opinion exist as to the interpretation of *Citizens*

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<sup>1</sup> Available online:

[http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/\\$file/10-1305-1320103.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf).

*United*, the FEC is nonetheless duty-bound to immediately repeal those provisions that are unarguably covered by the Supreme Court's ruling.

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CCP appreciates the opportunity to comment on this Petition, and looks forward to participating in any future hearings and commenting on any proposed rulemaking.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Allen Dickerson". The signature is fluid and cursive, with a large initial "A" and "D".

Allen Dickerson  
Legal Director