CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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VIA ELECTRONIC SUBMISSION SYSTEM

Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Comments on Notice 2015-09 Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United)

Dear Ms. Rothstein:

These comments are submitted on behalf of the Center for Competitive Politics ("the Center")[1] in response to Notice 2015-09 Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United), published in the Federal Register on July 29, 2015.[2] Originally advanced by Chair Ann Ravel and Commissioner Ellen Weintraub,[3] the petition was subsequently resubmitted by two members of the public representing advocacy organizations: Public Citizen and Make Your Laws.[4] For clarity and ease of citation, this comment will cite to Mr. Holman and Public Citizen's petition ("the Petition"), though in all material aspects the petitions are the same.

[1] The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] 80 Fed. Reg. 45116 (July 29, 2015).

[3] Ann M. Ravel and Ellen L. Weintraub, Petition for Rulemaking, June 8, 2015 *available at* http://www.fec.gov/members/statements/Petition_for_Rulemaking.pdf; *see also* Agenda Document No. 15-31-B, June 11, 2015 *available at* http://www fec.gov/agenda/2015/documents/mtgdoc_15-31-a.pdf (noting the original submission by the commissioners).

[4] Craig Holman and Public Citizen, Petition for Rulemaking Regarding the Citizens United decision, June 18, 2015 *available at* http://sers fec.gov/fosers/showpdf.htm?docid=337864; Sai, Make Your Laws PAC and Make Your Laws Advocacy, Inc., MYL PAC & MYL C4 petition for rulemaking re[:] *Citizens United*, June 18, 2015 *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=337863 (incorporating by reference the Ravel and Weintraub petition).

As summarize in the Federal Register, the Petition calls for the Federal Election Commission ("the Commission" or "FEC") to open a rulemaking concerning four perceived issues: "(1) [t]he disclosure of certain financing information regarding independent expenditures and electioneering communications; (2) election-related spending by foreign nationals; (3) solicitations of corporate and labor organization employees and members; and (4) the independence of expenditures made by independent expenditure-only political committees and accounts."[5]

For the reasons set forth below, the Center believes that these topics are not appropriate subjects for rulemaking at this time. Petitioners overstate both the FEC's statutory authority to regulate in these areas and the need for additional requirements. *Citizens United* does not compel a rulemaking to expand regulation of speech. In fact, the regulatory regime contemplated by the Petition would risk endangering existing protections for nonprofit donor privacy, protections won during the civil rights movement in the 1950s and 1960s. Moreover, most of the issues raised by the Petition—such as electioneering by foreign nationals, corporate and labor solicitation of employees, and the definition of "coordination"—are already adequately addressed by existing statutes and regulations.

I. The Commission's statutory authority to regulate independent expenditures is limited.

Under 52 U.S.C. § 30106(b)(1), the "Commission shall administer, seek to obtain compliance with, and formulate policy with respect to" the Federal Election Campaign Act ("FECA") and its amendments, including the Bipartisan Campaign Reform Act ("BCRA"). This regulatory grant is extensive, and the Commission has exercised it, creating a substantial legal edifice.[6] Nevertheless, the Commission's rulemaking authority is not limitless.

At the outset, one must ask why *Citizens United v. FEC*[7]—a case that circumscribed the regulation of political activity—would serve as the basis for *greater* regulation of campaign financing. As one commissioner has noted, the FEC cannot write regulation merely in response to a Supreme Court decision; there must be a nexus between the proposed regulation and the substance of the Court's opinion.[8] This is especially true when the Supreme Court opinion is deregulatory.[9]

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[5] 80 Fed. Reg. at 45116.

[6] 11 C.F.R. § 1.1 *et seq*.

[7] 558 U.S. 310 (2010).

[8] Opening Statement of Vice Chairman Matthew S. Petersen Regarding the Commission's Hearing on the *McCutcheon v. FEC* Advanced Notice of Proposed Rulemaking, Feb. 11, 2015 *available at* http://www.fec.gov/members/petersen/statements/Opening_Statement_of_Vice_Chairman_Matthew_S_Petersen_re_McCutcheon_ANPRM_Hearing.pdf.

[9] *Id*. ("[C]onsidering that *McCutcheon* [*v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014),] dismantles a substantial piece of the campaign finance legal framework, to what extent is it appropriate to use this decision as a launching point for extending the Commission's regulatory reach?").

Similarly, the courts have long limited the authority of administrative agencies to tinker with the clear terms of a governing statute. Under the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, a court first asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[10] If Congressional intent is not clear, *Chevron*'s second step asks "whether the agency's answer is based on a permissible construction of the statute."[11] The agency must satisfy step one before moving to step two. Administrative agencies, including the FEC, are not free to contradict or go beyond the statute.[12]

Even if the regulation survives *Chevron* review, the Administrative Procedure Act ("APA") compels courts to set "aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[13] The Supreme Court examined the meaning and scope of the APA in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.* ("*State Farm*").[14] Under the APA and *State Farm*:

> [T]he 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….Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[15]

In weighing the reasoned analysis of the agency, courts examine "the thoroughness, validity, and consistency of an agency's reasoning."[16] Furthermore, the D.C. Circuit has held that "a permissible statutory construction under *Chevron* is not always reasonable under *State Farm:* we might determine that although not barred by statute, an agency's action is arbitrary and capricious

[10] 467 U.S. 837, 842-43 (1984).

[11] *Id*. at 843.

[12] *Id*. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") (collecting cases from 1896 to 1981).

[13] 5 U.S.C. § 706(2)(A).

[14] 463 U.S. 29, 42-43 (1983).

[15] *Id*. at 43 (internal citations and quotation marks omitted).

[16] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (citing *Wrecking Co. v. United States*, 434 U.S. 275, 287, n.5 (1978) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

because the agency has not considered certain relevant factors or articulated any rationale for its choice."[17]

The danger of regulatory overreach is real, as litigation against the FEC has shown. For example, in *Shays v. FEC*,[18] Judge Colleen Kollar-Kotelly struck down multiple regulations promulgated by the Commission in response to the passage of BCRA. After walking through BCRA and the Commission's Explanation and Justification for the rules promulgated pursuant to BCRA, the district court nonetheless found that many of this Commission's regulations were in excess of its rulemaking authority.[19]

Furthermore, and especially relevant here, the *Shays* case concerned, in part, a clear legislative grant.[20] Congress specifically ordered the Commission to "promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination."[21] Nonetheless, Judge Kollar-Kotelly struck down the Commission's rule as contrary to statute.[22] In the Judge's words, BCRA's language was "not the result of a desire to allow the Commission freedom to create whatever content rules it wanted" but instead the regulatory framework must be informed by "the basic understanding [of how] established campaign finance law treats coordinated communications expenditures as contributions…."[23] Even assuming that there is a mandate to regulate, the Commission is compelled to do so narrowly and with fidelity to the Congressional framework.

These limitations strongly suggest that a rulemaking is inappropriate in these circumstances. As discussed in the next section, *Citizens United* does not compel the promulgation of further regulation. The other issues—regulation of foreign nationals, solicitation of employees and union members, and coordination—are thoroughly covered by existing rules. Consequently, the Commission should be wary of attempting to add regulatory burdens while lacking support from either the statute or court decision.

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[17] *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (internal citations and quotation marks omitted).

[18] 337 F. Supp. 2d 28 (D.D.C. 2004) *aff'd* 414 F.3d 76 (D.C. Cir. 2005).

[19] *See, e.g., id*. at 130-31 (summarizing which regulations failed judicial review under either *Chevron* and/or *State Farm*).

[20] *Id*. at 55-56 (discussing BCRA, Pub. L. 107-155 § 214(b)-(c), 116 Stat.81, 94-95 (2002) *codified at* 52 U.S.C. § 30116 note).

[21] 52 U.S.C. § 30116 note.

[22] *Id*. at 65 (finding the regulation failed at *Chevron* step two analysis).

[23] *Id*. at 64.

II. Supreme Court precedent protects donor privacy.

The Petition's primary recommendation concerns "full public disclosure of corporate and labor organization independent spending, consistent with both the *Citizens United* decision and the FECA's requirement that outside spending groups disclose their donors."[24]

The Petition claims that, contra the Court's ruling in *Citizens United*, the public lacks information concerning the sources of vast amounts of political independent spending. Citing news articles and blogs, the Petition claims that "[c]ontrary to the Court's directive… millions of dollars in anonymous spending has surged into federal elections. Nearly a third of 2012 election cycle outside spending—$310 million—came from 'dark money' groups that do not disclose their donors. In the 2014 midterm elections, it is estimated that dark money accounted for over a third of outside spending, upwards of $190 million."[25]

The Center believes that the Petition overstates the need for rulemaking in this area for three reasons: First, claims about the impact of "dark money" spending, itself an inappropriately rhetorical term, has been overstated. Second, contrary to the Petition, *Citizens United* did not call for, nor produce a need for, additional disclosure regulations. Third, the Supreme Court has long stated that the value of additional disclosure must be weighed against the danger to privacy of association and belief such disclosure creates.

a. The disclosure system for independent expenditures is adequate to the governmental interests at stake.

Concern about undisclosed campaign spending has been artificially inflated by erroneous media comments about "secret" contributions to campaigns, as well as a widely held but mistaken belief that, after *Citizens United*, corporations and unions may contribute directly to candidate campaigns.

Similarly, concerns that nonprofit organizations formed under Sections 501(c)(4), 501(c)(5), and 501(c)(6) of the Internal Revenue Code have been engaging in extensive political campaigns—what critics, including the Petition, have unhelpfully dubbed "dark money"—have been vastly overstated.

According to figures from the Federal Election Commission and the Center for Responsive Politics ("CRP") (cited by the Petition[26]), approximately $7.3 billion was spent on federal races in the 2012 election cycle.[27] Approximately $309 million was spent by organizations that did not

[24] Holman, "RE: Petition for Rulemaking Regarding the Citizens United decision," (cover letter for the Petition).

[25] Pet. 2-3.

[26] *Id*.

[27] We derive the $7.3 billion figure by adding the FEC's 2012 election cycle summary data for "Total Disbursements" ($6,982.2 billion) and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2012 (approximately $309 million), as the FEC does not report this information. FEC, FEC SUMMARIZES CAMPAIGN ACTIVITY OF THE 2011-2012 ELECTION CYCLE at 1, (Apr. 19, 2013)

provide itemized disclosure of their donors.[28] That is just under 4.3 percent of the total money spent in the 2012 election cycle. Placed in context, a shade over four percent of total spending on federal races does support the emergency rhetoric used by Petitioners and others. Similarly, in the 2014 election cycle, roughly $173 million was spent by non-itemizing groups compared to roughly $5.3 billion spent on federal races overall. That is just 3.3 percent of total political spending—a full percentage point decrease from the 2012 cycle.[29]

These numbers, moreover, tend to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. Several of these groups also spent substantial funds on issue ads or express advocacy under the *FEC v. Massachusetts Citizens For Life, Inc.* (*"MCFL"*)[30] exemption, or on candidate-related issue ads, even before *Citizens United*, suggesting that the growth in "undisclosed" spending is even less than many who favor more regulation lead the public to believe.[31]

In summary, candidates, parties, PACs, and Super PACs already disclose all of their donors. Other groups that spend in elections—primarily § 501(c)(4) social welfare organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations—disclose their spending and the names of donors who have contributed specifically for that spending, but not the names of other

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available at http://www.fec.gov/press/press2013/pdf/20130419release.pdf; Center for Responsive Politics, Graph "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees," http://www.opensecrets.org/outsidespending/disclosure.php. The Petition states that nondisclosed spending amounts to $310 million for this cycle – the difference is unexplained as the Petition also cites to the same CRP source data. The discrepancy has little impact on other calculations.

[28] Center for Responsive Politics, Graph, *id*.

[29] We derive the $5.3 billion figure by adding the Commission's 2014 election cycle summary data for "Total Disbursements" by "2014 Congressional Candidates" ($1.6 billion), "Party Committees" ($1.2 billion), and "PACs" ($2.3 billion) for a combined total of $5.1 billion combined, and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2014 (approximately $173 million), as the FEC does not report this information. FEC, FEC STATISTICAL SUMMARY OF 24-MONTH CAMPAIGN ACTIVITY OF THE 2013-2014 ELECTION CYCLE at 1 (Jan. 29, 2015) *available at* http://www.fec.gov/press/press2015/pdf/20150403release.pdf; Center for Responsive Politics, Graph, *id*. The Petition states that nondisclosed spending amounts to $190 million for this cycle—the difference is unexplained as the Petition also cites to the same CRP source data. The discrepancy has little impact on other calculations.

[30] 479 U.S. 238 (1986); *see also* FEC, "Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures" 60 Fed. Reg. 35292, 35293 (July 6, 1995) ("new section 114.10 has been added to implement the *MCFL* Court's conclusion that nonprofit corporations possessing certain essential features may not be bound by the restrictions on independent expenditures contained in section 441b").

[31] Bradley A. Smith, "Testimony to United States Senate Committee on Rules and Administration" at 4 (July 23, 2014) *available at*: http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-07-23_Smith-Testimony_CCP_DISCLOSE_Senate-Rules-And-Administration-Hearing.pdf.

members and supporters. Spending that falls into this latter category is a very small fraction of total political spending, is not new, and declined as a percentage of total spending in 2014. In considering regulations that expand disclosure requirements, the FEC should first consider the extent of the current federal disclosure regime. "Viewed through this lens, the rhetoric of 'secret money' in American politics is far overblown."[32]

b. *Citizens United v. FEC* upheld the current disclosure regime and cannot be read to demand new regulation.

The Petition misunderstands the "disclosure" affirmed by eight justices in *Citizens United* and fails to note that those justices upheld only the disclosure regime before them at the time, and only as applied to specific communications.[33] Contrary to the Petition's request, *Citizen United* considered the current disclosure laws sufficient.

Thus, *Citizens United* neither made nor requested changes to campaign disclosure laws. Nor have disclosure provisions been upended in any of the Court's other recent decisions. Indeed, in *McCutcheon v. FEC*, Chief Justice Roberts cited with approval to the present regulations.[34] Similarly, in *SpeechNow.org v. FEC*, the D.C. Circuit decision that permitted independent-expenditure-only committees, the Court upheld the challenged disclosure provisions and the Supreme Court denied certiorari.[35]

Nor did *Citizens United* usher in an era of new political spending that the court did not consider when approving the current disclosure regime. Politically-related spending by § 501(c)(4) organizations is not new and long predates *Citizens United*. Express advocacy in favor of or against candidates was permitted for certain types of nonprofit organizations since the Supreme Court's 1986 ruling in *MCFL*. That decision allowed qualified nonprofit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision. In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates. For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> Renee Mullins (voice over): I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over

[32] *Id*. at 7.

[33] *Citizens United*, 558 U.S. at 367 ("we find the [disclosure and disclaimer] statute valid as applied to the ads for the movie and to the movie [*Hillary*] itself").

[34] *McCutcheon*, 134 S. Ct. at 1460 (Roberts, C.J., controlling opinion).

[35] 599 F.3d 686, 698 (D.C. Cir. 2010).

> again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.[36]

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[37] This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *WRTL II*. In short, political spending by § 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

Given the fact that spending by § 501(c) organizations is not new and that *Citizens United* did not call for additional disclosure, there is no legal impetus for a new rulemaking in this area. The mere fact that spending has increased is insufficient, especially where undisclosed political spending remains low.

c. Supreme Court precedent specifically protects the privacy of donors to multipurpose nonprofit organizations.

The Petition fails to consider the dangers posed by new disclosure regulations meant to reveal the donors to § 501(c) organizations engaging in incidental political speech. This Commission does not have that luxury.

The Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization that this publicly available personal information can be used by individuals and organizations to threaten and intimidate those with whom they disagree. In *NAACP v. Alabama*, for instance, the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[38] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[39]

Much as the Supreme Court sought to protect from retribution those citizens who supported the cause of civil rights, donors and members of groups supporting unpopular candidates and causes still need protection today. Justice Thomas's opinion in *Citizens United* made this point,

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[36] Bradley A. Smith, "Disclosure in a Post-Citizens United Real World," 6 ST. THOMAS J. L. & POL'Y 257, 267 (2012). Draft available at http://www ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013) p. 10 (citing Byrd Vote-TV, Oct. 25 2000 http://www.gwu.edu/~action/ads2/adnaacp.html).

[37] *Id*.

[38] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[39] *Id*. at 462.

noting the danger of harassment stemming from the disclosure of information concerning citizens' political associations. Justice Thomas made specific reference to the experience of Proposition 8 supporters in California: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[40] It is hardly impossible to imagine similar events occurring in the charged environment of a federal election.

Beyond the threat of harassment, however, disclosure has additional costs. Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime—with police on every corner and prisons stuffed with petty offenders—is not worth the cost, financial or otherwise. Studies have confirmed that the costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers. Complying with disclosure laws often requires expensive legal counsel, an accountant, and other record-keeping staff. Ordinary citizens volunteering for a candidate or issue campaign may unknowingly violate the law if disclosure requirements are overbroad or overly complex. Equally worrisome, powerful political interests may seek to use disclosure requirements to raise the cost of doing business for their grassroots competition.[41] One study of the costs of various state disclosure regulations concluded that "regulation of grassroots political activity puts ordinary citizens at risk of legal entrapment, leaves disfavored groups open to abuse from partisan regulators and robs unpopular speakers of the protective benefits of anonymous speech."[42]

In addition to the logistical challenges faced by organizations, increased disclosure requirements often create "junk disclosure" that misleads the public by associating contributors with communications they have no link to or knowledge of. When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not true of donors to § 501(c) organizations. If a group decides to make political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views or otherwise advances their interests. To publicly identify contributing individuals with expenditures of which they had no advance knowledge, and which they may even oppose, is both unfair to members and donors and misleading to the public. It is "junk disclosure" and serves little purpose other than to provide a basis for official or private harassment.[43]

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[40] *Citizens United*, 558 U.S at 481 (Thomas, J., concurring in part and dissenting in part).

[41] Bradley A. Smith, "Testimony to United States Senate Committee on Rules and Administration" at 7.

[42] Jeffrey Milyo, Ph. D., "Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation," INSTITUTE FOR JUSTICE, 22 April 2010 *available at* https://www.ij.org/images/pdf_folder/washington/mowing_down_the-grassroots.pdf.

[43] Bradley A. Smith, "Testimony to United States Senate Committee on Rules and Administration," at 7-8.

Such harassment is not entirely speculative. The Petition's push for increased disclosure requirements comes at a time when Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs.[44] A number of senators specifically urged the IRS to investigate conservative nonprofit groups. Such pressure on the Service appears to have been a major factor in the current IRS scandal, which will have longstanding repercussions for the IRS's reputation.[45] An unjustified or overbroad regulatory effort would expose the Commission to many of the same risks.

III. Existing law prohibits involvement in political activity by foreign nationals.

The Petition asks the Commission to "promulgate rules ensuring that foreign nationals, foreign corporations, and foreign governments do not impermissibly influence federal elections through their U.S. subsidiaries or affiliates."[46] Without further articulating the basis of its fears, the Petition notes the severe laws against foreign involvement in elections only in passing and demands that the Commission promulgate rules because "U.S. subsidiaries of foreign corporations need to know whether and to what extent they can spend money influencing U.S. elections."[47]

Congress specifically banned direct or indirect contributions or expenditures by foreign nationals.[48] The ban includes the making of independent expenditures and electioneering communications.[49] For the purposes of the ban, "foreign national" incorporates by reference 22 U.S.C. § 611(b) of the Foreign Agents Registration Act of 1938.[50] Section 611(b) specifically includes "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[51]

Pursuant to statute, the Commission has promulgated regulations addressing this ban. Specifically, FEC regulations prohibit *any* participation by foreign nationals in decisions involving election-related activities:

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[44] For multiple substantive legal comments concerning an IRS proposed rule on a similar topic, and a detailed timeline of scandals associated with the IRS's improper targeting of particular social welfare organizations, visit Center for Competitive Politics, "Proposed IRS Rules on 501(c)(4) Social Welfare Groups," http://www.campaignfreedom.org/irs/.

[45] Bradley A. Smith, "Testimony to United States Senate Committee on Rules and Administration," at 9.

[46] Pet. at 6.

[47] *Id*.

[48] 52 U.S.C. § 30121

[49] 52 U.S.C. § 30121(a)(1)(C).

[50] 52 U.S.C. § 30121(b)(1).

[51] 22 U.S.C. § 611(b)(3).

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.[52]

Thus, the answer to the Petition's fears is clear: a foreign national—whether a natural person or a corporation—cannot direct others to make expenditures or electioneering communications. So while a corporation's U.S. subsidiary's board may choose to make an expenditure, it cannot do so at the behest of the parent foreign corporation. Likewise, foreign nationals on a corporation's board must be separated from any decision concerning the making of expenditures or electioneering communications.

Such regulations are constitutional and have been interpreted broadly. In *Bluman v. FEC*,[53] a special three-judge court heard a constitutional challenge to the ban on foreign national activity. The *Bluman* court rebuffed the challenge because the "Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States."[54] The court was clear: "we interpret the statute to bar foreign nationals… from making expenditures to expressly advocate the election or defeat of a political candidate; *and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures*."[55] The *Bluman* opinion thus addressed the Petition's precise worry: that foreign nationals would control the outlay of money for expenditures. In a unanimous order, the Supreme Court summarily affirmed the three-judge *Bluman* court.[56] Foreign nationals can speak on *issues* but cannot direct, in any way, the expenditures speaking on politics.

Given that the existing statutory ban on foreign nationals' political activity clearly includes foreign corporations, the Petition appears to request no more than make-work regulations that would swell the Federal Register to no purpose. There is no basis for opening such a rulemaking.

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[52] 11 C.F.R. § 110.20(i).

[53] 800 F. Supp. 2d 281 (D.D.C. 2011). The matter was before United States Circuit Judge Brett M. Kavanaugh, and United States District Judges Ricardo M. Urbina and Rosemary M. Collyer.

[54] *Id*. at 282.

[55] *Id*. at 284 (emphasis added).

[56] 132 S. Ct. 1087 (2012).

IV. Existing law protects employees from coercive solicitation by both corporations and labor unions.

The Petition encourages the FEC to "promulgate rules to more clearly protect employees and union members from coercion by corporations and labor organizations engaged in independent political spending."[57] The Petition fails to identify where any lack of clarity exists, and existing regulations already clearly prohibit such coercion.

FECA and its subsequent amendments specifically prohibit corporations and unions from soliciting their employees:

> [I]t shall be unlawful (i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and (ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families. [58]

This includes "contributions to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication."[59]

As the Center has stated in previous comments,[60] current law carves out exceptions to this solicitation ban for communications with a corporation's "stockholders and executive or administrative personnel and their families" on "any subject."[61] This group of people is carefully defined in the statute and regulations.[62] The statute further carves out restrictions on allowable solicitations to a corporation or union's Separate Segregated Fund ("SSF"). A corporation may generally solicit to this fund only from the "restricted class,"[63] with the exception of twice yearly written solicitations to the rest of the corporation's employees.[64]

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[57] Pet. at 6.

[58] 52 U.S.C. § 30118(b)(4)(A).

[59] 52 U.S.C. § 30118(b)(2).

[60] Allen Dickerson, et al., "Center for Competitive Politics Comments on Notice of Proposed Rulemaking 12-80" February 11, 2013 *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/02/CCP-Comment-on-NPR-12-80-LLPs.pdf.

[61] 52 U.S.C. § 30118(b)(2)(A).

[62] 52 U.S.C. § 30118(b)(7); 11 C.F.R. § 114.1(c).

[63] 52 U.S.C. § 30118(b)(4)(A)(i).

[64] 52 U.S.C. § 30118(b)(4)(B).

The statute also makes clear, as the Petition notes, that while limited solicitation to the SSF is allowable, coercion of employees to contribute to the SSF is prohibited. As stated in the Code:

> It shall be unlawful—to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction.[65]

Not only is coercion prohibited in connection with any contribution or expenditure, the corporation or labor union soliciting the funds must "inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal."[66]

Citizens United changed nothing affecting these rules. With very limited exception, solicitation of employees or union members is a violation of statute both before and after *Citizens United*. Likewise, it is necessarily the case that coercion of employees or union members is also a violation of the statute.

As the Petition notes, "The Commission, however, has also interpreted the Act to generally prohibit the use of 'coercion, such as the threat of a detrimental job action,' to induce 'any individual to make a contribution...' This approach is wholly consistent with Congress's intent to ensure that corporate employees and union member said their employers' and unions' political activities only when their support is truly voluntary."[67] The Petition is correct: the Commission has generally prohibited the "use of coercion" precisely because federal law already clearly prohibits those actions. Since *Citizens United* had no effect on the relevant laws and regulations, no clarifying rulemaking is necessary.

V. Super PACs, by definition, are independent of candidates and candidate committees. Any further regulation of "coordination" risks chilling significant political activity by means of vague and overbroad rules.

The Petition also seeks to heavily curtail outside spending groups, particularly independent expenditure-only committees.[68] Given the Court's robust defense of independent speech in the *Citizens United* decision, this Commission ought to be wary of impeding such speech.

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[65] 52 U.S.C. § 30118(b)(3)(A).

[66] 52 U.S.C. § 30118(b)(3)(C).

[67] Pet. at 7 (citing 11 C.F.R. § 114.2(f)(2)(iv) and Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, Final Rule, 60 Fed. Reg. 64259, 64265 (Dec. 14, 1995)).

[68] *Id*. at 8.

Petitioners suggest that "[t]he Commission's regulations should be revised to fully and clearly prohibit coordination between candidates and outside spending groups.…"[69] But the Commission already has extensive regulations regulating coordinated communications[70] and the FEC appears to have considered these regulations sufficient when providing advisory opinions to would-be independent speakers.[71] Further tightening these regulations will only add to the complicated analysis that independent speakers must conduct before engaging in public debate concerning the issues of the day.[72]

The Commission has been able to draw lines prohibiting inappropriate coordination, as it did in 2011 when it prohibited a leadership PAC from operating a separate independent expenditure account.[73] Moreover, recent events prove that cases of illegal coordination between campaigns and outside groups are successfully prosecuted where they occur.[74]

The Petition also suggests that the Commission adopt rules prohibiting candidates from attending Super PAC events[75] even though such a rule would contradict an advisory opinion issued by the FEC in 2011 pursuant to a unanimous 6-0 vote.[76] Candidates and independent groups have operated under this guidance for two election cycles, and are on the verge of entering a third. Moreover, the Petition has provided no evidence that the appearance of candidates at Super PAC events has increased the dangers of corruption, the only rationale by which the government may restrict independent speech.[77]

Finally, the Petition suggests that "[t]he Commission should also adopt rules that deem all spending by outside groups that effectively operate as 'the alter ego of a candidate' as coordinated

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[69] *Id*.

[70] 11 C.F.R. § 109.21.

[71] AO 2010-09 ("Club for Growth").

[72] *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech…").

[73] AO 2011-21 ("Constitutional Conservatives Fund PAC") at 2.

[74] *See, e.g.*, *United States v. Harber*, No. 14-cr-373 (E.D. Va. 2015).

[75] Pet. at 8.

[76] AO 2011-12 ("Majority PAC and House Majority PAC") at 4; Certification. ("Commissioners Bauerly, Hunter, McGahn II, Petersen, Walther, and Weintraub voted affirmatively for the decision").

[77] *SpeechNow*, 599 F.3d at 694 ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption").

spending."[78] It is unclear how the Commission could draw such a line without making arbitrary decisions or defining these terms so vaguely as to create constitutional concerns. The Petition is silent on this point. As the recent experience with the Internal Revenue Service has demonstrated, the implementation of a "facts and circumstances" approach to regulating organizational status poses significant threats to First Amendment freedoms. This is especially true where the result of such a rule will be an effective ban on independent speech by such organizations.

Moreover, as the *SpeechNow* court correctly observed, "as a matter of law" there "is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"[79] Super PACs are presumptively independent organizations, and efforts to impose additional burdens upon them must demonstrate new evidence implicating the corruption interest.[80] The Petition makes no serious effort to provide that evidence, and would not form the basis of a successful defense of any new regulation adopted.

In sum, no pressing need has been shown for the Commission to go beyond the extensive coordination rules that already exist.[81] To the extent that the Commission wishes to go forward with rulemaking, it might consider merely incorporating the advisory opinions it has already issued.[82]

* * *

Thank you for considering these comments. The Center looks forward to working with the Commission to protect the First Amendment rights of multipurpose nonprofit organizations. In the event that the Commission chooses to take testimony at a public meeting, the Center requests the opportunity to provide testimony through a representative.

Please do not hesitate to contact us should you have any questions about these comments.

Respectfully Submitted,

s/ Allen Dickerson
Allen Dickerson
Legal Director

[78] Pet. at 8 (internal citation omitted).

[79] *SpeechNow*, 599 F.3d at 694-695.

[80] The phrase used in the Petition—"alter ego"—is not a term of art and would not provide sufficient guidance to the regulated community. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 95 (D.D.C. 1999) ("The mere fact that the Coalition was singing from the same page as the Bush campaign on certain issues does not establish coordination").

[81] *E.g.* 11 C.F.R. § 109.21(d)(4)(ii) (applying common vendor status to vendors that worked for a candidate, her committee, or her party with the previous 120 days).

[82] *E.g.* AO 2012-34 ("Freedom PAC and Friends of Mike H") at 1 (establishing that a candidate committee "may use campaign funds raised for [a candidate's] primary election to make a contribution" to a Super PAC).