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Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Comments
AOR 2004-30

Re: Comments on Advisory Opinion Request 2004-30

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in regard to Advisory Opinion Request 2004-30, a request for an advisory opinion by Citizens United, which seeks advice on a proposed broadcast of a self-described documentary film it is producing that refers to Senator John Kerry, the Democratic nominee for President. The AOR also seeks a ruling on proposed broadcast advertisements that Citizens United seeks to sponsor and that it claims are intended to promote its film, as well as a related book also about Senator Kerry.

1. The broadcast of the film. The Commission's regulations provide that an "electioneering communication" is a (i) broadcast ad that refers to a clearly identified candidate, (ii) "is publicly distributed" within 30 days of a primary election or 60 days of a general election for an office sought by that candidate, and (iii) is "targeted" to the electorate of the candidate. 11 C.F.R. § 100.29(a). "Publicly distributed," in turn, is defined to mean "aired, broadcast, cablecast or otherwise distributed *for a fee* through the facilities of a television station...." *Id.* at § 100.29(b)(3)(i) (emphasis added).

Thus, if a broadcaster airs the Citizens United film "The Many Faces of John Kerry" without charging a "fee" for doing so, the broadcast of the film will not fall within the definition of "electioneering communication." On the other hand, if Citizens United pays a fee to have the film aired, and if it is aired within the pre-election window, it would constitute an "electioneering communication" (unless, as we discuss below, it falls into one of the exceptions to that term). Paying for the airing of its film is essentially no different than paying for the airing of an ad about a candidate – both would squarely fall within the definition of "electioneering communication."

2. The broadcast of advertisements about the book or the film. If Citizens United pays for advertisements about its book or its film, and those advertisements, as described in the AOR, meet the basic definition of "electioneering communication" – they refer to Senator Kerry, and they are broadcast within 60 days of the general election – then they constitute "electioneering communications" under the law. This is consistent with the Commission's recent ruling in Ad.Op. 2004-15 (June 25, 2004) (holding that the broadcast of advertisements about a documentary by a nonprofit corporation would constitute an "electioneering communication").

3. The press exemption. Citizens' United requests an opinion on whether its paid broadcast of its film, or paid advertisements about its film or book, all of which constitute "electioneering communications," would be exempt from the statute because they fall under the "press exemption" set forth in 2 U.S.C. § 434(f)(3)(B)(i); 11 C.F.R. § 100.29(c)(2). This exemption applies to:

A communication appearing in a news story, commentary or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned by any political party, political committee, or candidate.

This exemption from the definition of electioneering communication is essentially identical to a comparable press exemption from the definition of "expenditure." 2 U.S.C. § 431(9)(B)(i), 11 C.F.R. § 100.132.

The Commission has a developed body of law through advisory opinions that construe and apply the press exemption similarly in both contexts. The Commission has repeatedly said that "several factors must be present for the press exemption to apply." Ad.Op. 2004-07 (April 1, 2004) (citing advisory opinions). They are:

First, the entity engaging in the activity must be a press entity described by the Act and Commission regulations. Second, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC*, 509 F.Supp. 1210, 1215 (S.D.N.Y. 1981): Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function").

Ad.Op. 2004-07 (citations omitted)

As we discuss below, Citizens United fails the first prong of this test: it is not a "press entity" as the Commission has construed and applied that term in the past. Therefore, any electioneering communications which it sponsors are not exempt from the statutory regulations, including disclosure requirements and source prohibitions, that apply to such electioneering communications.

Citizens United is an advocacy organization, not a “press entity.” This conclusion is based on the standards developed by the Commission in past cases on this question, as applied to the facts about Citizens United.

Citizens United was a plaintiff in *McCormell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003). In findings of fact made by the district court in that case, the court described Citizens United as follows:

Citizens United is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Bossie Decl. ¶2. It is dedicated to the principles of limited government and national sovereignty and to defending the rights its members believe are secured in the United States Constitution; its principle function is the dissemination of information concerning such beliefs and advocacy. *Id.* ¶3.

McCormell v. FEC, 251 F.Supp. 2d 176, 224 (D.D.C. 2003) (three judge court). Citizens United maintains a separate segregated fund, Citizens United Political Victory Fund. *Id.*¹

As part of its lawsuit in *McCormell*, Citizens United described itself as an advocacy organization:

Citizens United is a nonpartisan organization, dedicated primarily to principles of limited government and national sovereignty and to the defense of rights secured under the United States Constitution....Citizens United accepts contributions from individuals and business entities, including corporations, and represents its views, and the views of its members and contributors, on legislative and public policy issues before federal, state and local officials and the general public...²

The Citizens United website similarly describes the organization as engaged in advocacy:

Citizens United is an organization dedicated to restoring our government to citizens control. *Through a combination of education, advocacy, and grass roots organization*, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the

¹ In its AOR letter, Citizens United states “it has no immediate plans to establish a separate segregated fund for purposes of making electioneering communications.” Ltr. of July 8 at 2. It then states in a footnote that it already has a separate segregated fund, although it “does not intend” to use those funds to pay for electioneering communications. The salient point, however, is that Citizens Union has a PAC, and could use funds from its PAC to pay for electioneering communications, if it chose to do so.

² Declaration of David N. Bossie at ¶3 (Attached to July 22, 2004 AOR letter) (emphasis added).

founding father's vision of a free nation, guided by the honesty, common sense, and good will of its citizens.³

Thus, Citizens United is an advocacy group, and as such, is not a "press entity." Its status is akin to the situation addressed in Ad.Op. 1989-28, where the Commission concluded that a similarly organized section 501(c)(4) advocacy group, the Maine Right to Life Committee, Inc., also did not qualify for the press exemption. In terms similar to the description of Citizens United, above, the Commission described MRLC as follows:

You explain that MRLC is a statewide, nonprofit, section 501(c)(4) membership organization incorporated in the State of Maine in 1974. It was formed "to promote the sanctity of all human life, including unborn children, and to educate the public on issues relating to abortion, infanticide, and euthanasia.

Like Citizens United, MRLC had an affiliated separate segregated fund. MRLC claimed the benefit of the press exemption based on its activities in distributing voter guides and newsletters to educate the public. But the Commission rejected the claim:

The Commission has previously concluded that the news media exemption, 2. U.S.C. § 431(9)(B)(i), applies to a press entity engaged in the normal press-business of covering and commenting on political campaigns ... [W]hile MRLC's specific corporate purposes include publication and distribution of articles on particular subjects from a "prolife" viewpoint, MRLC is essentially a nonprofit, tax exempt corporation with charitable, social, benevolent, and educational purposes. It is not engaged in the news media business, and is not the type of entity contemplated by Congress when it adopted the cited press exemption in 1974.

Id. (citations omitted) (emphasis added).

Citizens' Union similarly is "essentially a nonprofit, tax exempt corporation with charitable, social, beneficial and educational purposes." It too "is not engaged in the news media business," and is not the "type of entity contemplated by Congress" for the press exemption.

An advocacy group like MRLC or Citizens United stand in contrast to the kinds of clearly identified "press entities" which the Commission has previously recognized as being within the coverage of the press exemption. These include, for instance: Viacom/MTV Networks (Ad. Op. 2004-07; Ad.Op. 2003-34); Daniels Cablevision (Ad.Op. 1998-17); C-SPAN (Ad.Op. 1996-48); A.H. Belo Corp. (Ad.Op. 1996-41), and Bloomberg (Ad.Op. 1996-16).

³ See http://www.citizensunited.org/citizens_united.html (emphasis added).

The fact that Citizens' United publishes books or other information, or produces films, all in furtherance of its advocacy purposes, does not, in itself, suffice to convert it from an advocacy organization into a "press entity" for purposes of the press exemption. Nor does the fact that Citizens United "considers itself" part of the new media, AOR Ltr. Of July 8, 2004 at 2. As the district court in *McConnell* noted in an analogous context (in part about Citizens United), litigants cannot benefit from the Press Clause of the First Amendment "merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." 251 F.Supp.2d at 236.

Rather, the Supreme Court has defined the "press" more carefully for these purposes. In sustaining a comparable press exemption to the Michigan elections laws against an equal protection challenge, the Court said, "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public....A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-8 (1990); see also *McConnell*, 619 S.Ct. at 697.

These standards, and the standards the Commission has applied to the same exemption in the past, make clear that Citizens' Union is not "part of the media industry" involved "in the regular business of imparting news to the public." Rather, like MRLC and other advocacy groups, it is "essentially a nonprofit, tax exempt corporation with charitable, social, benevolent or educational purposes." Ad.Op. 1989-28.

Because Citizens' United is not a "press entity" within the meaning of the press exemption, it does not meet the first standard for application of the exemption. Thus, any electioneering communication funded by Citizens' Union must adhere to the disclosure requirements and source prohibitions for such spending contained in 2 U.S.C. § 434(f) and § 441b(c).

Given this disposition of the AOR, the Commission need not – and should not – reach other questions that may arise in the future about the scope of the media exemption as it may apply more generally to the distribution of documentary films, and advertisements about such films.

We appreciate the opportunity to provide these comments to you.

Sincerely,



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