

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

THE HISPANIC LEADERSHIP)	
FUND, INC.)	
)	
Plaintiff,)	
)	Case No. 1:12-CV-893-TSE-TRJ
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	

**MEMORANDUM OF CAMPAIGN LEGAL CENTER AS *AMICUS CURIAE* IN
SUPPORT OF THE FEDERAL ELECTION COMMISSION**

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FINANCIAL INTEREST DISCLOSURE STATEMENT

Pursuant to LCvR 7.1(A), *amicus* Campaign Legal Center (CLC) states that it has no parent, subsidiary, or affiliated entities (corporate or otherwise) that have issued stock or debt securities to the public; no publicly held entity (corporate or otherwise) owns 10% or more of its stock. CLC has nothing to report under LCvR 7.1(A)(1)(a).

TABLE OF CONTENTS

FINANCIAL INTEREST DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION & SUMMARY OF ARGUMENT..... 1

ARGUMENT..... 3

I. Disclosure Laws Are A “Cornerstone” To Effective Campaign Finance Regulation And Represent The “Least Restrictive” Means Of Preventing Corruption And Maintaining A Well-Informed Electorate 3

CONCLUSION. 8

TABLE OF AUTHORITIES

Cases:

Buckley v. Am. Const. Law Found., 525 U.S. 182 (1999)3

Buckley v. Valeo, 424 U.S. 1 (1976)..... *passim*

Burroughs v. U.S., 290 U.S. 534 (1934).....3

Citizens United v. FEC, 130 S. Ct. 876 (2010)..... *passim*

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).....5

Davis v. FEC, 554 U.S. 724 (2008)4

Doe v. Reed, 130 S. Ct. 2811 (2010)4, 8

FEC v. Beaumont, 539 U.S. 146 (2003)4

FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)8

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007)4

Grosjean v. American Press Co., 297 U.S. 233 (1936)3

Human Life of Wash. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).....7

McConnell v. FEC, 540 U.S. 93 (2003).....4, 6, 8

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003).....6

U.S. v. Harriss, 347 U.S. 612 (1954).....7

Statutes and Regulations:

2 U.S.C. § 431(18)3, 9

2 U.S.C. § 434(f).....3, 6, 9

Administrative Rules and Materials:

11 C.F.R. § 100.173, 9

11 C.F.R. § 100.293, 9

Miscellaneous Resources:

Center for Responsive Politics, *Outside Spending*,
<http://www.opensecrets.org/outsidespending/index.php> (last visited Aug.
27, 2012)2

Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77
N.Y.U. L. Rev. 245 (2002)5

Louis Brandeis, *Other People's Money* (Nat'l Home Library Found. ed. 1933)2

INTEREST OF *AMICUS CURIAE*

Amicus curiae Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works in the area of campaign finance law, and participates in state and federal court litigation throughout the nation regarding contribution limits, disclosure, political advertising, enforcement issues, and other campaign finance matters. CLC also participates in rulemaking and advisory opinion proceedings at the Federal Election Commission (FEC) to ensure that the agency is properly enforcing federal election laws and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations that violate the law. The CLC filed written comments with the FEC in the American Future Fund advisory opinion proceeding referred to repeatedly and relied upon by plaintiff Hispanic Leadership Fund (HLF), which are attached to this memorandum as an Appendix.

INTRODUCTION & SUMMARY OF ARGUMENT

The Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), made it possible for corporations, including plaintiff Hispanic Leadership Fund (HLF), to spend unlimited funds on federal candidate election ads. The Court, however, recognized the tremendous importance of voter access to information regarding who is paying for such ads. The Court explained: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.* at 916.

HLF seeks to air ads referring to the “White House” and the “Administration” and using audio recordings of President Obama’s voice between now and the November presidential election—and also seeks to deny voters the information necessary to make informed decisions

and give proper weight to HLF's messages. In short, HLF wishes to evade constitutional disclosure requirements, and would do so at great cost to the electorate.

Contrary to HLF's assertions that it is being "deprive[d] of a legal right—to engage freely in constitutionally protected speech and association," Compl. at 9, and that it "will likely have to mute itself and curtail its own speech during the upcoming electioneering communication period," Compl. at 10, HLF is in no way constrained in its ability to speak by the laws at issue in this case. As the Supreme Court noted in *Citizens United*, disclosure requirements "do not prevent anyone from speaking." 130 S. Ct. at 918 (internal citations omitted).

More than \$70 million has been spent so far this year on election ads by corporations, unions, individuals and other outside groups.¹ This dollar total will rise dramatically between now and Election Day. If this Court determines that HLF's ads referring to the "White House" and the "Administration" and using audio recordings of President Obama do not refer to a clearly identified candidate, well-funded outside groups wishing to hide their fundraising and spending from voters will undoubtedly follow HLF's lead. This Court will have eviscerated campaign finance disclosure requirements in presidential elections—at least with respect to ads by outside groups opposing or praising an incumbent president running for reelection.

Justice Brandeis famously wrote nearly a century ago: "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933), *quoted in Buckley v. Valeo*, 424 U.S. 1, 67 (1976). If this Court permits HLF and others to evade the light of disclosure through the simple expedient of replacing "President Obama" with "White House" or the "Administration" in its

¹ Center for Responsive Politics, *Outside Spending*, <http://www.opensecrets.org/outsidespending/index.php> (last visited Aug. 27, 2012).

ads, this Court will have created fertile ground for the corrupting influence of secret money in politics to flourish.

As the FEC makes clear, “[r]ead in context, the way the advertisements used ‘White House,’ ‘Administration,’ images of the White House, and an audio clip of President Obama made apparent that they unambiguously refer to President Obama, a candidate for federal office.” FEC Mem. In Opp. To Pl.’s Mot. For Prelim. Inj. at 15. Consequently, HLF’s ads will be subject to federal law “electioneering communication” disclosure requirements, which advance vital public governmental interests and do not prevent anyone from speaking. For these reasons, this Court should declare that the application of 2 U.S.C. §§ 431(18) and 434(f), as well as 11 C.F.R. §§ 100.17 and 100.29, to HLF’s proposed ads is constitutional, should deny HLF’s motion for preliminary injunction, and should dismiss HLF’s complaint.

ARGUMENT

I. Disclosure Laws Are A “Cornerstone” To Effective Campaign Finance Regulation And Represent The “Least Restrictive” Means Of Preventing Corruption And Maintaining A Well-Informed Electorate.

The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment precepts. Indeed, disclosure has been called a “cornerstone” to campaign finance regulation. *See Buckley v. Am. Const. Law Found. (Buckley II)*, 525 U.S. 182, 222–23 (1999) (O’Connor, J., dissenting). In *Burroughs v. United States*, 290 U.S. 534 (1934), the Court wrote that it “cannot be denied” that disclosure “would tend to prevent the corrupt use of money to affect elections[.]” *Id.* at 548. Similarly, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court made clear that “informed public opinion is the most potent of all restraints upon misgovernment.” *Id.* at 250.

When evaluating the constitutionality of campaign regulations, the Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of

the First Amendment burdens imposed. Although disclosure laws can implicate the First Amendment rights to speak and associate freely, they also advance the public’s interest in maintaining an informed electorate and open government. Because disclosure is considered a “less restrictive alternative to more comprehensive regulations of speech” that advance these interests, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations. *Citizens United*, 130 S. Ct. at 915; *see also Buckley*, 424 U.S. at 68.² As the Court noted in *Citizens United*, disclosure requirements “do not prevent anyone from speaking.” 130 S. Ct. at 918 (internal citations omitted).

Disclosure obligations are subject only to “exacting scrutiny”—they are valid so long as there is “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted). To withstand exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010), *quoting Davis v. FEC*, 554 U.S. 724, 744 (2008). Ultimately, the fact that disclosure laws can have an appreciable effect on individual rights does not end the constitutional inquiry, because “important First Amendment-related interests lie on

² By comparison, campaign contribution and expenditure limitations are subject to more searching review because they are considered more “restrictive” of First Amendment rights. As the “most burdensome” campaign finance regulations, expenditure restrictions are subject to strict scrutiny and reviewed for whether they are “narrowly tailored” to “further a compelling interest.” *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 476 (2007); *see also Buckley*, 424 U.S. at 44–45. Contribution limits are deemed less burdensome of speech, and are constitutionally “valid” if they “satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest.” *McConnell v. FEC*, 540 U.S. 93, 136 (2003), *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Finally, disclosure requirements are the “least restrictive” campaign finance regulations and are subject only to “exacting scrutiny.” *Buckley*, 424 U.S. at 68.

both sides of the constitutional equation.”³ Although disclosure requirements may burden constitutionally protected rights, such requirements have reliably been upheld as constitutionally valid because they serve the First Amendment’s overall purpose of promoting open and responsive democratic governance.

The Court in *Buckley* applied exacting scrutiny and upheld disclosure provisions contained in the Federal Election Campaign Act Amendments of 1974 (FECA), 88 Stat. 1263 (1974). 424 U.S. at 68. Although the *Buckley* Court acknowledged that “compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights,” the Court found “that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the ‘free functioning of our national institutions’ is involved.” 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court identified three “substantial” governmental interests served by disclosure requirements. First, “disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office.” *Id.* at 66–67 (footnotes omitted). In addition to this informational interest, the Court also found that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Id.* at 67. Finally, “recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations” of the federal campaign finance laws. *Id.* at 67–68.

³ See Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). In general, “campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy.” *Id.*

More recently, the Supreme Court relied upon this analysis in *McConnell v. FEC*, 540 U.S. 93 (2003), where the Court by an 8-to-1 vote upheld the “electioneering communication” reporting and disclosure requirements at issue in this case. *Id.* at 194–99 (opinion of the Court); *id.* at 321–22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* 2 U.S.C. § 434(f)(2). The *McConnell* Court held that the three “important” state interests identified by *Buckley*—providing the electorate with information, deterring corruption, and enabling enforcement of the law—“apply in full” to the “electioneering communication” disclosure requirements. *Id.* at 196. The Court also noted that invalidating the disclosure provisions would dissuade the First Amendment interests of the public:

BCRA’s disclosure provisions require these [entities] to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs’ disdain for BCRA’s disclosure provisions is nothing short of surprising. ... Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: ‘The Coalition-Americans Working for Real Change’ (funded by business organizations opposed to organized labor), ‘Citizens for Better Medicare’ (funded by the pharmaceutical industry), ‘Republicans for Clean Air’ (funded by brothers Charles and Sam Wyly). ... Given these tactics, Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs’ argument for striking down BCRA’s disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.”

Id. at 196–97 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal citations omitted) (emphasis added). The Court here should take note that the name “Hispanic Leadership Fund” closely resembles the kind of “dubious and misleading” names mentioned by the Court in *McConnell* as grounds for upholding the disclosure requirement.

Importantly, the Court upheld the “electioneering communication” disclosure requirements as “to the entire range of ‘electioneering communications,’” *McConnell*, 540 U.S.

at 196, even though it had acknowledged that the definition of “electioneering communications” potentially encompassed both express advocacy and “genuine issue ads.” *Id.* at 206 (noting that “precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties”). In so holding, the majority suggested that the governmental interests that had led the *Buckley* Court to uphold FECA’s disclosure provisions also supported disclosure of electioneering communications, even if some percentage of “genuine issue ads” were covered by the “electioneering communication” disclosure requirement. The “electioneering communication” disclosure requirements, the Court found, vindicated rather than violated the truly relevant First Amendment interest: that of “individual citizens seeking to make informed choices in the political marketplace.” *Id.* at 197.

In *Citizens United*, the Court again by an 8-to-1 vote upheld the federal law “electioneering communication” disclosure requirements at issue in this case and reiterated the value of transparency in “[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages.” 130 S. Ct. at 916. The *Citizens United* Court explicitly rejected the argument that disclosure requirements must be confined to speech that is the functional equivalent of express candidate advocacy, noting, for example, that the “Court has upheld registration and disclosure requirements on lobbyists.” *Id.* at 915 (“[W]e reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.”), citing *U.S. v. Harriss*, 347 U.S. 612, 625 (1954); see also *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) (“Given the Court’s analysis in *Citizens United*, and its holding that the government may impose disclosure

requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.”).

The Supreme Court continued its strong support of disclosure laws most recently in *Doe v. Reed*, where the Court upheld by an 8-to-1 vote a Washington State law providing for the disclosure of ballot measure petition signatories, reasoning that “[p]ublic disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot.” 130 S. Ct. at 2820. Justice Scalia explained in concurrence:

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Id. at 2837 (Scalia, J., concurring).

CONCLUSION

“The history of Congress’ efforts at campaign finance reform well demonstrates that ‘candidates, donors, and parties test the limits of the current law.’” *McConnell*, 540 U.S. at 174–75 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001)). HLF is testing the limits of the current law in this case—for the sole purpose of avoiding “electioneering communication” disclosure requirements. The Supreme Court has made clear the vital importance of disclosure laws and that disclosure requirements “do not prevent anyone from speaking.” *Citizens United*, 130 S. Ct. at 918 (internal citations omitted). Corporations including HLF have been freed by *Citizens United* to make unlimited political expenditures, but they must provide voters with the information needed to “make informed decisions and give proper weight to different speakers and messages.” *Id.* at 916.

For these reasons, this Court should declare that the application of 2 U.S.C. §§ 431(18) and 434(f), as well as 11 C.F.R. §§ 100.17 and 100.29, to HLF's proposed ads is constitutional, should deny HLF's motion for preliminary injunction, and should dismiss HLF's complaint.

Respectfully submitted,

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Dated: August 29, 2012

Appendix

May 11, 2012

By Electronic Mail

Anthony Herman, Esq.
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Re: Comments on Advisory Opinion Request 2012-19 (America Future Fund)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-19, a request submitted on behalf of America Future Fund (AFF), which asks the Commission whether “any of eight proposed television advertisements include one or more references to a clearly identified candidate for Federal election, as that phrase is used in the definition of ‘electioneering communication.’” AOR 2012-19 at 1. AFF does not want to “subject itself to the burden of filing electioneering communications reports for these advertisements” and does not want to disclose its donors whose funds pay to produce and air the ads. *Id.*

The scripts of seven of AFF’s eight proposed ads include phrases such as “The White House says,” “the Administration stopped,” “Call the White House,” “White House will not mark the two-year anniversary of Obamacare” and “Romneycare’s evil twin,” as well as images of the White House. *See id.* at 12-19 (Exhibits 1-8). All of these phrases and images constitute references to a clearly identified candidate for Federal office.⁴

Consequently, the Commission should advise AFF that all of its proposed ads except Advertisement #4 refer to a clearly identified candidate and, if broadcast within the applicable pre-election windows as proposed, will constitute electioneering communications. 2 U.S.C. § 434(f)(3).

I. An Unambiguous Reference Making the Identity of a Candidate Apparent is a Reference to a “Clearly Identified” Candidate.

An “electioneering communication” is a broadcast ad within a defined pre-election time frame that “refers to a clearly identified candidate for Federal office.” 2 U.S.C.

⁴ Advertisement #4, by contrast, refers to HHS Secretary Kathleen Sebelius and generically to “the government.” We do not believe these general references constitute a reference to President Obama.

§434(f)(3)(A)(i)(I). The Commission’s “electioneering communication” regulation defines the phrase “refers to a clearly identified candidate” to mean:

[T]he candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as “the President,” “your Congressman,” or “the incumbent,” or through an unambiguous reference to his or her status as a candidate such as “the Democratic presidential nominee” or “the Republican candidate for Senate in the State of Georgia.”

11 C.F.R. § 100.29(b)(2) (emphasis added).

As the Commission explained in its 2002 Explanation and Justification for section 100.29(b)(2), the Commission’s regulations contained a definition of “clearly identified” prior to the enactment of the “electioneering communication” provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA).

Section 100.29(b)(2) defines the phrase “refers to a clearly identified candidate.” This phrase is already defined in the Commission’s rules at 11 CFR 100.17 The final rule tracks the language of the current rule in 11 CFR 100.17. This approach appears to be consistent with legislative intent. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold indicating that a communication “refers to a clearly identified candidate” if it “mentions, identifies, cites, or directs the public to the candidate’s name, photograph, drawing or otherwise makes an ‘unambiguous reference’ to the candidate’s identity”).

Electioneering Communications, Final Rules and Explanation and Justification, 67 Fed. Reg. 65190, 65192 (Oct. 23, 2002) (emphasis added) (“Electioneering Communications E&J”). Indeed, the definitions of “clearly identified” at sections 100.29(b)(2) and 100.17 are indistinguishable.

Thus, under longstanding federal law, where the identity of the candidate is “apparent through an unambiguous reference,” the candidate is “clearly identified.”

II. All of AFF’s Proposed Advertisements Except #4 Refer to a Clearly Identified Candidate.

Advertisement #1

Advertisement #1 shows an image of the White House and includes the phrases “this Administration,” “The White House says,” “the Administration stopped,” “Call the White House” and “Tell the White House.” *See* AOR 2012-19 at 12. President Obama’s identity is synonymous with “the White House” and “this Administration.” Thus, President Obama’s identity is apparent through each of these unambiguous references. Advertisement #1 accordingly refers to a clearly identified candidate.

Advertisement #2

Advertisement #2 utilizes President Obama's voice. *See* AOR 2012-19 at 13. President Obama, after almost four years in office, has perhaps the most recognizable voice in the country, and virtually all citizens will identify the President by hearing his voice. President Obama's identity is apparent through this unambiguous reference to him in this ad. Advertisement #2 refers to a clearly identified candidate.

Advertisement #3

Advertisement #3 includes the phrase "Call the White House." *See* AOR 2012-19 at 14. President Obama's identity is synonymous with "the White House." President Obama's identity is thus apparent through this unambiguous reference. Advertisement #3 refers to a clearly identified candidate.

Advertisement #5

Advertisement #5 shows images and footage of the White House and includes the phrase "the Administration." *See* AOR 2012-19 at 16. President Obama's identity is synonymous with the White House and "the Administration." President Obama's identity is apparent through each of these unambiguous references. Advertisement #5 refers to a clearly identified candidate.

Advertisement #6

Advertisement #6 includes the phrase "White House" twice in its text. *See* AOR 2012-19 at 17. As noted above, President Obama's identity is synonymous with the White House. President Obama's identity is apparent through these unambiguous references. Advertisement #6 refers to a clearly identified candidate.

Advertisement #7

Advertisement #7 includes multiple references to the phrase "White House" and the word Obamacare. *See* AOR 2012-19 at 18. President Obama's identity is synonymous with the White House; President Obama's name is part of the word "Obamacare." President Obama's identity is apparent through these unambiguous references. Advertisement #7 refers to a clearly identified candidate.

AFF notes that the Commission decided during its 2002 rulemaking on electioneering communications "not to adopt a broad regulatory exemption for 'communications that mention a candidate's name only as part of a popular name of a bill[.]'" AOR 2012-19 at 9. AFF further acknowledges that "'Obamacare' . . . of course includes the name 'Obama.'" *Id.* at 10. Thus, this matter is resolved by the Commission's 2002 decision that legislative names that include the names of federal candidates constitute references to those candidates. AFF nevertheless argues that its use of "Obamacare" does not constitute a reference to a candidate. *Id.* This argument lacks merit.

In rejecting an exemption for communications that mention a candidate's name as part of a popular bill name, the Commission explained:

Many commenters were opposed to this exemption. The argument most frequently cited in opposition to this exemption is the absence of an objective standard for the popular name of a bill or law. This lack of an objective standard would make the proposed exemption an easy means of evading the electioneering communication provisions, because a constructed popular name could be used to link a candidate to a popular or unpopular position.

....

The Commission is persuaded by the examples cited by the commenters and other examples from its own history of enforcement actions that communications that mention a candidate's name only as part of a popular name of a bill can nevertheless be crafted in a manner that could reasonably be understood to promote, support, attack or oppose a candidate. Furthermore, this type of exemption is not necessary because communications can easily discuss proposed or pending legislation without including a Federal candidate's name by using a variety of other means of identifying the legislation.

Electioneering Communications E&J, 67 Fed. Reg. at 65200-01.

AFF's Advertisement #7 is just such an attempt to evade the electioneering communication disclosure requirements. AFF's "Obamacare" ad does not "discuss proposed or pending legislation" as a means of lobbying. AFF's Obamacare ad can only reasonably be understood to attack or oppose President Obama. The Commission should reject AFF's suggestion that Advertisement #7's clear reference to President Obama does not constitute a reference to a clearly identified candidate.

AFF's attempts to analogize its reference to Obamacare in Advertisement #7 to an ad by a car dealership featuring a non-candidate who shared a candidate's name is equally without merit. *See* AOR 2012-19 at 9-10 (citing AO 2004-31). Unlike AFF's Advertisement #7, which refers to an actual candidate, President Obama, who was the architect of Obamacare, the car dealership at issue in AO 2004-31 was airing ads featuring the son of a candidate, who happened to share the candidate's name. As the Commission explained in AO 2004-31:

You represent that Russ Darrow III replaced the Candidate as RDG's spokesman in the late 1980s and began appearing in RDG advertisements at that time. Russ Darrow III has been the public face of RDG in its advertisements for over a decade. You further state that the Candidate has not appeared in any of RDG's advertisements in more than a decade.

AO 2004-31 at 2. To the extent that a "Russ Darrow" appeared in the commercials, it was the non-candidate Russ Darrow III—and this had been the case for more than a decade. Under these circumstances, the Commission reasonably concluded that the car dealership's ads featuring the

non-candidate Russ Darrow II did not refer to a clearly identified candidate. The same is not true with respect to AFF's Advertisement #7, which does refer to a clearly identified candidate.⁵

Advertisement #8

Advertisement #8 includes an image of the White House and multiple uses of the word Romneycare. See AOR 2012-19 at 19. President Obama's identity is synonymous with the White House. President Obama's identity is apparent through this unambiguous reference. Presidential candidate Mitt Romney's name is part of the word Romneycare. For the reasons discussed above with regard to the use of the term "Obamacare," Mitt Romney's identity is apparent though the unambiguous reference to "Romneycare." Advertisement #8 thus refers to two clearly identified candidates.

III. Conclusion

AFF is not constrained at all in running its proposed ads even if they include a reference to a clearly identified candidate and thus constitute "electioneering communications." At issue is whether AFF has to comply with disclosure requirements for electioneering communications – requirements that the Supreme Court has said "impose no ceiling on campaign related activities" and "do not prevent anyone from speaking." *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (internal quotations and citations omitted). For the reasons discussed above, seven of the ads proposed by AFF contain "unambiguous references" to one or both presidential candidates, and the Commission should accordingly advise AFF that those ads meet the standard in section 100.29(b)(2) as "refer[ring] to a clearly identified candidate."

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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⁵ The AOR cites comments we filed with regard to AO 2004-31 (Darrow), and attempts to portray those comments as consistent with the request made here. To the contrary, those comments stressed the "unique factual circumstances" in the Darrow AO, and that fact that the ad at issue there referred to a business and to an individual who was not a candidate. Comments of Democracy 21 and Campaign Legal Center *et al.* on AOR 2004-31 (Aug. 13, 2004) at 2-3. By contrast, the references here are to a candidate in the guise of using the colloquial name of legislation that includes the name of the candidate.

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