

May 11, 2012

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

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.¹

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.

¹ 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.²

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 through 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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² 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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