



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Krikorian for Congress and Nathan Bailey,)
in his official capacity as treasurer;)
David Krikorian;)
Armenian National Committee)
of America;)
Hairenik Association, Inc.)
(d/b/a Armenian Weekly))

MUR 6211

STATEMENT OF REASONS
Vice Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN

In this matter, two respondents—(1) the Armenian National Committee of America, a section 501(c)(4) nonprofit corporation, and (2) the Armenian Weekly, a newspaper—used virtually identical language in communications urging their respective audiences to contribute to a federal candidate (David Krikorian). The Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that the nonprofit violated the Federal Election Campaign Act of 1971, as amended (“the Act”) and Commission regulations, by allegedly facilitating the making of a contribution to a federal candidate when it sent the e-mail fundraising appeal to its distribution list, which presumably consisted of persons outside the nonprofit’s restricted class. OGC also recommended my reason to believe with respect to the weekly newspaper, concluding that the newspaper is protected by the Act’s press exemption. We disagreed with the recommendation regarding the nonprofit.

In light of last year’s Supreme Court decision in *Citizens United v. Federal Election Commission*,¹ which struck down the Act’s prohibitions against corporations making independent expenditures and electioneering communications, the continuing viability of the Commission’s facilitation regulation is at best suspect,² at least as it applies to corporate and labor fundraising activities that are conducted independently of federal candidates and political

¹ 130 S. Ct. 876 (2010).

² 11 C.F.R. § 114.2(f). We hope to address this issue in a future rulemaking.

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party committees. Furthermore, the Court's holding in *Citizens United* rested, in large part, on the ground that the speech of some (such as the media) may not be privileged over that of others. As a result, we cannot justify prohibiting the exact same independent speech by one entity that we permit by another merely because the former does not qualify for the press exemption while the latter does. Therefore, for reasons discussed more thoroughly below, we voted against OGC's recommendations to find reason to believe that ANCA violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) and to take no action at this time with regard to David Krikorian and Krikorian for Congress and, instead, voted to close the file.³

I. BACKGROUND

This matter arose when a complaint was filed with the Commission alleging that (1) David Krikorian, a 2010 candidate for the Democratic congressional nomination in Ohio's Second Congressional District, and his campaign committee, Krikorian for Congress (collectively, "Krikorian"); (2) the Armenian National Committee of America ("ANCA"), a Section 501(c)(4) nonprofit corporation that fosters civic awareness and support on issues important to Armenian Americans; and (3) the Armenian Weekly, a newspaper owned by Hairenik Association, Inc., violated the Act's prohibition against making or receiving corporate contributions. Specifically, the complaint alleged that Krikorian received illegal corporate contributions resulting from: e-mails distributed by ANCA to its mailing list that asked recipients to make campaign contributions to Krikorian,⁴ and the Armenian Weekly publishing virtually the identical solicitation in its publication. The complaint, however, provides no evidence, nor even alleges, that the solicitations made by ANCA and the Armenian Weekly were coordinated with Krikorian. Nor does the complaint allege that either ANCA or the Armenian Weekly acted as a conduit for contributions to Krikorian.

OGC recommended that the Commission find reason to believe that ANCA violated Section 441b(a) of the Act and 11 C.F.R. § 114.2(f) by using corporate resources to facilitate the making of campaign contributions to Krikorian. However, OGC recommended finding no reason to believe that the Armenian Weekly violated the Act and Commission regulations, even though it distributed the same communication to its subscribers that ANCA e-mailed to its distribution list. OGC reasoned that the Armenian Weekly qualified for the press exemption⁵

³ We concur with OGC's recommendation to find no reason to believe ANCA violated 2 U.S.C. § 441d and to find no reason to believe Armenian Weekly violated 2 U.S.C. §§ 441b(a) and 441d. With regard to David Krikorian and Krikorian for Congress, instead of taking no action at this time, we supported finding no reason to believe that either of those respondents violated the Act.

⁴ In its response to the complaint, ANCA did not address whether the e-mail solicitations went to persons outside its restricted class. The definition of "restricted class" is set forth at 11 C.F.R. § 114.1(j) ("A corporation's restricted class is its stockholders and executive or administrative personnel and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families.").

⁵ See 2 U.S.C. § 431(9)(B)(i) (exempting from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate"); *Id.* § 434(f)(3)(B)(i) (providing similar exemption from the definition of "electioneering communication");

and, thus, was not subject to the same prohibitions that applied to ANCA. Finally, with respect to Krikorian, OGC recommended taking no action at this time.

II. ANALYSIS

A. **Post-*Citizens United*, the Commission's corporate facilitation regulations no longer appear to be valid when applied to corporate fundraising activities that are conducted independently of federal candidates and political party committees.**

Section 441b(a) of the Act bans both contributions and expenditures by corporations and labor organizations. In *Citizens United*, however, the Supreme Court struck down the ban on corporate independent expenditures and electioneering communications because such spending does not give rise to corruption or the appearance thereof.⁶ Thus, corporations may now engage in independent political spending, including express advocacy communications, provided such activities are not coordinated with a federal candidate or a political party committee. The corporate contribution ban, however, remains in place.

Commission regulations also prohibit corporations and labor organizations from "facilitating the making of contributions to candidates or political committees."⁷ Under this rule, "facilitation means using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election."⁸ An example of facilitation is "[u]sing a corporate or labor organization list of customers, clients, vendors or others who are not in the restricted class to solicit contributions . . . , unless the corporation or labor organization receives advance payment for the fair market value of the list."⁹

Following *Citizens United*, the question arises: to what extent does the facilitation regulation remain valid? One can no longer answer this question with merely the conclusory statement that any communication soliciting federal contributions can be prohibited. Because the Supreme Court has struck down the statutory provisions prohibiting corporate and labor independent expenditures, we must determine whether specific activities or communications once prohibited under § 441b are now permitted.

In our view, the answer to the question above turns on whether the "facilitation" activity at issue is more akin to a contribution—which corporations remain prohibited from making—or an independent expenditure—which corporations are constitutionally entitled to make. To us, corporate communications that solicit contributions and that are not coordinated with federal candidates or political parties are much more comparable to independent expenditures than

⁶ *Citizens United*, 130 S. Ct. at 909.

⁷ 11 C.F.R. § 114.2(f)(1).

⁸ *Id.*

⁹ *Id.* § 114.2(f)(2)(i)(C).

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contributions. As such, these types of communications do not give rise to corruption or the appearance thereof and, thus, cannot be restricted by the facilitation regulation.

In *Citizens United*, the Supreme Court stated: "Section 441b's prohibition on corporate independent expenditures is ... a ban on speech. ... [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence."¹⁰ Without question, a solicitation for contributions to a federal candidate is as much "political speech" as a communication calling on voters to cast their ballots for a particular candidate. Simply because the subject of the former communication is a solicitation, it does not follow that we are granted the authority to regulate it—"[p]remised on mistrust of governmental power, the First Amendment stands against attempt to disfavor certain subjects or viewpoints."¹¹ Therefore, because a solicitation done independently of a federal candidate or political party committee is political speech, it is as deserving of the full panoply of constitutional protections that is afforded to independent communications.

Consequently, post-*Citizens United*, if a corporation may ask people to vote for a federal candidate in an independent communication, then surely it may also make an independent communication asking people to make a contribution to that candidate. In other words, if a corporation enjoys the constitutional right to run an independent ad saying "Vote for Smith," we fail to see how less constitutional protection could be afforded an independent ad saying "Contribute to Smith."

* * *

The facts in this matter are distinguishable from those from a pre-*Citizens United* matter—MUR 6127 (VIDA Fitness)—where the Commission found reason to believe that a corporation violated the Commission's facilitation regulation. There, the president of VIDA Fitness coordinated a political fundraiser for Obama for America at a company-owned location and e-mailed an invitation for that fundraiser to the VIDA Fitness e-mail list.¹² The invitation, which included a solicitation for contributions to Obama for America and the Democratic National Committee, had been prepared by an Obama campaign official.¹³

Here, by contrast, the solicitation was not part of any general, coordinated fundraising effort. The communication was not created by Krikorian or his federal committee. Nor did Krikorian or his federal committee "direct[] ANCA ... to solicit funds on behalf of" Krikorian.¹⁴ As the Supreme Court has noted, "[t]he absence of prearrangement and coordination of an

¹⁰ *Citizens United*, 130 S. Ct. at 898. See also *id.* at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

¹¹ *Id.* at 898.

¹² MUR 6127, VIDA Fitness Conciliation Agreement, at 3.

¹³ *Id.* First General Counsel's Report at 10.

¹⁴ MUR 6211, Krikorian Response at 1.

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expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹⁵ As such, we are not faced with concerns regarding corruption or appearance thereof. Thus, the VIDA Fitness MUR is not applicable here.

In sum, this is a speech case, not a contribution case. The Supreme Court made clear in *Citizens United* that independent corporate political speech may not be prohibited. Thus, the Commission’s facilitation regulation may no longer be used to prohibit independent corporate communications that urge persons to make contributions directly to federal candidates. As noted above, there is no evidence indicating the ANCA coordinated its e-mail solicitation with Krikorian. Therefore, we concluded the Commission cannot apply 11 C.F.R. § 114.2(f) to ANCA’s e-mail solicitations.

B. *Citizens United* calls into question the Commission’s ability to discriminate between speakers based on whether the speaker is a media entity.

At the heart of the *Citizens United* decision is the holding that the federal government may not afford greater independent speech rights to some than to others—“[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not by others.”¹⁶ In fact, “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. ... The First Amendment protects speech and speakers, and the ideas that flow from each.”¹⁷ An independent communication imploring others to make a contribution to a federal candidate is as much an “idea” to be protected as a call to vote for a candidate. Thus, since individuals are freely permitted to independently solicit contributions for federal candidates, there appears to be no basis for not allowing corporations to do the same.¹⁸

This holding required the Court to overrule its decision in *Austin v. Michigan Chamber of Commerce*,¹⁹ in which the Court upheld a Michigan state law prohibiting corporate independent

¹⁵ *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

¹⁶ *Id.* at 899.

¹⁷ *Id.* See also *id.* at 908 (noting that “if § 441b’s expenditure ban were constitutional, ... wealthy individuals and unincorporated associations can spend unlimited amount on independent expenditures. Yet certain disfavored associations of citizens – those that have taken on the corporate form – are penalized for engaging in the same political speech”).

¹⁸ Our analysis here in no way runs counter to the Court’s decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (“*NRWC*”). The Court in *Citizens United* noted that *NRWC* has “little relevance” when dealing with limits on independent expenditures. Rather, according to the Court, “*NRWC* decided no more than a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment.” Thus, in *NRWC*, the Court upheld a limitation on a corporation’s ability to solicit contributions to its separate segregated fund (“*SSF*”), which in turn would be making direct contributions to federal candidates. Here, by contrast, ANCA was not soliciting funds to a connected *SSF* that would be making candidate contributions. Nor did ANCA serve as a bundler or conduit for contributions to Krikorian. Instead, ANCA merely asked e-mail recipients to give money directly to Krikorian.

¹⁹ 494 U.S. 652 (1990)

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expenditures.²⁰ In doing so, the Court in *Citizens United* focused much of its reasoning on the Act's "press exemption,"²¹ which exempts from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcast station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."²² Commission regulations have extended the scope of the exemption to cover web sites and Internet and electronic publications.²³

The Court stated that, under *Austin's* rationale, the press exemption is not mandated by the Constitution but is merely a statutory protection that Congress could potentially withdraw at any time.²⁴ The Court strongly disagreed with this reasoning, explaining that "[t]he media exemption discloses further difficulties" with the § 441b's corporate expenditure ban.²⁵ For one, the Court noted, "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."²⁶ Furthermore, according to the Court, "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."²⁷

The media exemption, however, directly provides such a privilege. As the Court noted,

So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.²⁸

²⁰ The Court's holding also required it to overrule a portion of its decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

²¹ The press exemption also applies to electioneering communications.

²² 2 U.S.C. § 451(9)(B)(i).

²³ 11 C.F.R. § 100.132.

²⁴ *Citizens United*, 130 S. Ct. at 905.

²⁵ *Id.*

²⁶ *Id.* at 906.

²⁷ *Id.* at 905 (internal quotations and citations omitted).

²⁸ *Id.* at 906.

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Here, we face a situation similar to the Court's hypothetical—ANCA and the Armenian Weekly published the exact same communication supporting Krikorian and asking others to contribute to his campaign. Yet under OGC's recommendations, only one was granted the press exemption and, thus, was free speak without restriction. According to the Court, such "differential treatment cannot be squared with the First Amendment."²⁹

Nor can we support disparate treatment based on the differences in the modes of communication. "Rapid changes in technology – and the creative dynamic in the concept of free expression – counsel against upholding a law that restricts political speech in certain media or by certain speakers."³⁰ According to the Court,

Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and content of the political speech.³¹

Thus, to the extent there are differences between an e-mail to a corporate distribution list and a weekly publication, the Court deems such differences irrelevant—"[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."³²

Therefore, since distinctions based on speaker identity, speech content, and the means of distribution are illegitimate, any Commission determination that would punish ANCA for engaging in the exact same speech activity that the Armenian Weekly is free to undertake would be constitutionally problematic. Instead, *Citizens United* clearly counsels us to refrain from prohibiting or punishing independent speech by either ANCA or the Armenia Weekly.

²⁹ *Id.*

³⁰ *Id.*

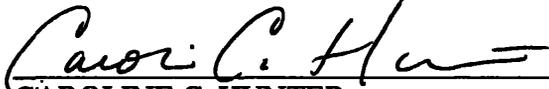
³¹ *Id.* at 913 (internal quotations and citations omitted).

³² *Id.* at 891. *See also id.* at 890 ("[A]ny effort by the Judiciary to decide which means of communications are to preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority.").

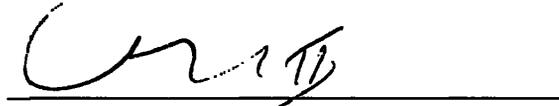
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III. CONCLUSION

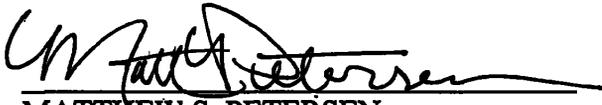
For the foregoing reasons, we voted to reject OGC's recommendation to find reason to believe that ANCA violated the Act and to take no action at this time against David Krikorian and Krikorian for Congress.³³


CAROLINE C. HUNTER
Vice Chair

1/24/11
Date


DONALD F. MCGAHN II
Commissioner

1-24-11
Date


MATTHEW S. PETERSEN
Commissioner

1/24/2011
Date

³³ As noted above, with regard to David Krikorian and Krikorian for Congress, instead of taking no action, we supported finding no reason to believe that either of those respondents violated the Act.

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