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January 9, 2023

Ms. Amy Rothstein
Assistant General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: REG 2013-01 – Technological Modernization – Comments

Dear Ms. Rothstein:

Citizens United, Inc. and Citizens United Foundation respectfully submit these comments in response to Supplemental Notice of Proposed Rulemaking 2022-20 (Technological Modernization) (hereinafter “Supplemental NPRM” or “NPRM”). 87 Fed. Reg. 75,518 (Dec. 9, 2022).

Citizens United, a social welfare organization exempt from federal taxation under Section 501(c)(4) of the Internal Revenue Code, and Citizens United Foundation, a non-profit educational and legal organization exempt from federal income tax under Section 501(c)(3), are dedicated to expanding individual rights and liberty and restoring democratic controls over the government to its people. Both organizations are located in Washington, D.C., and devote their resources to educating citizens about public policy, liberty, and government officials through a wide range of media, including the internet. *See, e.g.*, FEC Adv. Op. 2010-8 (Citizens United). Accordingly, Citizens United and Citizens United Foundation have an acute interest in the Commission’s regulation of internet communications.

The Commission deserves credit for its recent work to modernize its disclaimer rules in light of technological developments. *See Internet Communication Disclaimers and Definition of “Public Communication,”* 87 Fed. Reg. 77,467 (Dec. 19, 2022). But as currently proposed, the Supplemental NPRM goes too far; whether intentional or not, commissioners must recognize the serious threats to the online free speech rights of all Americans that lurk in the Supplemental NPRM. In particular, in the manner proposed, expansion of the definition of “public communication” in 11 C.F.R. § 100.26 could go well beyond merely adding new disclaimer requirements for paid online advertising initiatives. Indeed, if adopted in its broadest form, the Supplemental NPRM would sharply reduce substantive freedoms currently protected under the FEC’s Internet Exemption by regulating as contributions or expenditures (a) the technology and staff costs incurred by individuals and organizations to “create or generate content” (i.e., to produce internet messages) and (b) to “republish” or “boost” (i.e., to post or re-post or disseminate) online communications, for which no advertising fee is paid to a third-party advertising platform.

At bottom, Citizens United and Citizens United Foundation do not believe that any sort of supplemental rule is warranted here. But if the Commission nonetheless proceeds to finalize a supplemental rule, the FEC should limit its scope and make clear in regulatory text and the accompanying Explanation & Justification that any new language is merely intended to clarify existing law regarding a new "promotional" advertising product rather than to expand regulation over the internal costs incurred by individuals, groups, and organizations to produce or disseminate political messages over the internet.

Finally, we note that the Commission's consideration of the Supplemental NPRM comes at a time when a federal district court has tasked the Commission with carefully distinguishing between exempt versus non-exempt "input" costs incurred by a political committee to generate and disseminate online political content. *See Campaign Legal Center v. Federal Election Commission*, Civ. A. 19-2336 (D.D.C. Memorandum Opinion dated December 8, 2022) ("Mem. Op."). For the reasons set forth below, the Commission should not use this supplemental rulemaking to undermine the Internet Exemption in response to that order.

THE SUPPLEMENTAL NPRM

In broad terms, the Commission's Supplemental NPRM proposes to expand the definitions of "public communication" and "internet public communication" to encompass – in addition to traditional advertising fees, which are already covered – communications "promoted for a fee" on a third-party website, digital device or application, or advertising platform. 87 Fed. Reg. at 75,518. To accomplish this, the Commission proposes to insert the phrase "or promoted [for a fee]" into these definitions as follows:

> § 100.26 Public communications (52 U.S.C. 30101(22)).
>
> * * * * *
>
> The term general public political advertising shall not include communications over the internet, except for communications placed **or promoted** for a fee on another person's website, digital device, application, or advertising platform.

AND

> § 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).
>
> * * * * *
>
> (c) * * *
>
> (5) Specific requirements for internet public communications. (i) For purposes of this section, internet public communication means any public communication over the internet that is placed **or promoted** for a fee on another person's website, digital device, application, or advertising platform.

(Emphasis added.) Importantly, because of the way the elided portions of the regulations are structured, the effect of including "promoted" communications in these definitions is to make

them subject not only to the FEC's disclaimer regime, but also to many other requirements that are linked to that definition (e.g., the FEC's coordination regulations).

In addition to asking about the explicit regulatory text, the Supplemental NPRM also posits a series of questions about how the Commission should apply the law, as amended, in the following scenarios:

> (1) a person is paid to republish content containing express advocacy or soliciting a contribution on a third party's website, digital device, application, or advertising platform in order to increase the circulation or prominence of that content;
>
> (2) a website, digital device, application, or advertising platform is paid directly to "boost" or expand the scope of viewership of content containing express advocacy or soliciting a contribution in order to increase the circulation or prominence of that content; and
>
> (3) a person is paid to create or generate content containing express advocacy or soliciting a contribution, which then appears on a third party's website, digital device, application, or advertising platform.

Id. at 75,519.

<u>BACKGROUND</u>

Before discussing the problems associated with the current regulatory proposal—and in particular, its impact on the regulation of internal production and publication costs for the online communications of individuals and organizations—it is helpful to understand the regulatory and legal processes that led to the existing regulation.

A. Early Attempts at Regulation and the Leo Smith Opinion

Throughout the 1990s, the Commission struggled to fit online communications and the use of new technologies into the regulatory system devised in the 1970s to address rising expenditures on high-cost television and radio advertising. *See generally,* Lee E. Goodman, "The Internet: The Promise of Democratization of American Politics," *Law and Election Politics – The Rules of the Game* (ed. Matthew J. Streb) (2d ed. 2013) at 56. The Commission's early regulatory treatments were case-by-case and unguided by a consistent, definitive rule or even logic. *Id*.

The confusion culminated in 1998 in an advisory opinion issued to a citizen named Leo Smith. Mr. Smith owned a small business that designed websites, and he used his computer and technology resources to design and post a website urging the citizens of Connecticut to vote against incumbent Congresswoman Nancy Johnson. Mr. Smith then asked the Commission whether his anti-Johnson website constituted a regulated "expenditure."

The Commission responded in the affirmative, concluding that virtually all technological "inputs" to Mr. Smith's website were indeed regulated:

> The web site would be viewed as something of value under the [Federal Election Campaign Act of 1971, as amended ("Act")] because it expressly advocates the election of a Federal candidate, and the defeat of another Federal candidate. Therefore, it meets

> the requirements of 2 U.S.C. § 431(9) and 11 CFR 100.8(a)(1). The Commission concludes that **the costs associated with the creation and maintaining of the web site, as described in your request, would be considered an expenditure under the Act and Commission regulations**.

FEC Adv. Op. 1998-22 (Leo Smith) at 3 (emphasis added).

As part of its conclusion, the Commission held that Mr. Smith was required to calculate all of his "overhead costs" incurred in creating, hosting, and maintaining the website, which "would include, for example, the fee to secure the registration of domain name, the amounts you invested in your hardware, and the utility costs to create the site." *Id.* at 4. The Commission even instructed Mr. Smith to "apportion" the cost of his personal computer among all of his varied uses and to report that cost to the agency as an "expenditure." *Id*. The Commission further advised Mr. Smith that his website was subject to disclaimer, independent expenditure reporting obligations, and coordination and contribution limits.

The breadth of costs regulated under the Leo Smith advisory opinion cast the use of websites, emails, blogs, links and emerging platforms into a regulatory bewilderment that persisted for several years. In addition to the practical problems it presented for citizens and organizations seeking to post political messages, the regulation of the "overhead costs" incurred to create and maintain—and possibly even promote—a website appeared divorced from the only constitutionally-permissible purpose of regulating political messages—*i.e.*, the prevention of *quid pro quo* corruption of politicians. *See* Goodman at 52-56.

The Commission tried to walk back some of the Leo Smith opinion in subsequent advisory opinions, but the confusion remained. *See, e.g.,* Advisory Opinion 1999-17 (George W. Bush for President Exploratory Committee) (allowing some uses of a home computer for campaign purposes without triggering an in-kind contribution). By 2002, however, the folly of the case-by-case approach was unmistakable. So the agency promulgated a rule that ultimately exempted **all** internet communications from regulation by excluding them from the definition of "public communication." *See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064 (July 29, 2002).

It was not long until the 2002 rule was challenged in federal court, with the plaintiffs arguing that a blanket exclusion of all internet communications was overly broad. In 2004, the U.S. District Court for the District of Columbia agreed and remanded the rule back to the Commission to reconsider the breadth of the exclusion. *See Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005).

B. The 2006 Internet Exemption – Only Ads Disseminated for a Fee are Regulated

In 2005, the Commission initiated another rulemaking in accord with the federal courts' decisions. *See Internet Communications*, 70 Fed. Reg. 16,967 (Apr. 4, 2005). The Commission received over 800 comments and held two public hearings. *Id*. The result, in April 2006, was unanimous adoption of the Internet Exemption that has protected free and unfettered political speech by American citizens for nearly two decades. *See Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

At the heart of the rulemaking was the definition of "public communication" and the application of that term to political messages disseminated via the internet. In this latest rulemaking, the Commission grounded its analysis in the statute. Congress, the Commission observed, had defined a "public communication" to mean communications disseminated via "broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 52 U.S.C. § 30101(22). Notably, the internet was not included on this list, which made sense given that the internet is a unique medium because of the degree of autonomy, control and costlessness in disseminating electronic messages from a personal computer. Therefore, commissioners concluded the medium deserved a different regulatory approach. The FEC also took congressional direction from the phrase "general public political advertising," reasoning that the word "advertising" directs the Commission to regulate fee-based communication systems rather than free, soapbox-styled advocacy.

Based on those principles, the Commission's post-*Shays* rule distinguished between paid internet advertising, which should be regulated like paid newspaper or television advertising, and unpaid internet dissemination, which would not be regulated. As the Commission's Explanation and Justification underscored:

> Communications placed for a fee on another person's website . . . are analogous to the forms of 'public communication' enumerated by Congress in [52 U.S.C. § 30101(22)] . . . . [B]ecause Congress did not include the Internet in the list of media enumerated in the statutory definition of 'public communication,' an Internet communication can qualify as a 'public communication' only if it is a form of advertising . . . . By definition, the word 'advertising' connotes a communication for which a payment is required, particularly in the context of campaign messages.

71 Fed. Reg. at 18,594.

To implement this understanding, the Commission adopted a two-pronged rule. First, internet activities engaged in by individuals and groups, acting independently or in coordination with candidates, were excluded from the definition of "contribution" and "expenditure" if the individuals or groups are not compensated for their internet activities. However, "public communications" (as defined in 11 C.F.R. § 100.26) funded by individuals and groups are expressly regulated, even if the individual or group is not compensated for its activities. 11 C.F.R. §§ 100.94(e); 110.155(e).

Second, internet communications containing express advocacy were excluded from the definition of regulated "public communications" when disseminated for free. But Internet communications containing express advocacy or soliciting contributions are still regulated if they are "placed for a fee on another person's website, digital device, application, or advertising platform." 11 C.F.R. § 100.26.

During its deliberations, the Commission also fully considered whether the costs incurred to create or produce content later disseminated online for free should count as a regulated expenditure. For example, a public comment submitted to the Commission observed that "[t]ypically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials" and proposed that the Commission establish a threshold (e.g., $25,000) over which the costs of preparing content for distribution via the

internet would lose the exemption and be regulated. *See* Comment on Notice 2005-10 (Internet Communications) by Democracy 21, Campaign Legal Center, and Center for Responsive Politics at 12 n.10, 16 (June 3, 2005). The Commission rejected that idea in the final rule. Instead, the Commission keyed exclusively on the payment for public display and dissemination on a third-party's website, in order to purchase access to that third-party's established audience, as the thing of value being purchased and therefore regulated. *See* 71 Fed. Reg. at 18,594-95 (pointing out the distinction between an "advertiser [that] is paying for access to an established audience using a forum controlled by another person, rather than using a forum that he or she controls to establish his or her own audience.").

The Commission also expressly vacated and superseded the Leo Smith advisory opinion that required counting input and overhead costs as regulated expenditures. *See* 71 Fed. Reg. at 18,605 n.49 (stating that "Advisory Opinion 1998-22 is superseded to the extent that it treated as an 'expenditure' an individual's use of computer systems and services for uncompensated Internet activity."); *see also* FEC, *AO 1998-22*, https://www.fec.gov/data/legal/advisory-opinions/1998-22/ (noting that Advisory Opinion 1998-22 has been "Superseded in part by the 2006 Internet Communication Regulations, 71 FR 18,589, 18,605 n. 49 (April 12, 2006)").

Thereafter, it was widely accepted within and outside the Commission that production costs associated with free online communications are unregulated. In Advisory Opinion 2008-10 (VoterVoter.com), for example, the Commission recognized that "[t]he costs incurred by an individual in creating an ad [are] covered by the Internet exemption from the definition of 'expenditure' **so long as the creator is not also purchasing TV airtime for the ad he or she created**." FEC Advisory Opinion 2008-10 (VoterVoter.com) at 7 (emphasis added). The Commission publicly has reaffirmed this rule many times since the VoterVoter.com advisory opinion. *See, e.g.,* The FEC Record (Dec. 2008) (quoting the exemption of creation costs in Adv. Op. 2008-10); FEC Corporate & Labor Guide Supplement (Aug. 2011) at 36 (same); FEC Non-Connected Supplement (Aug. 2011) at 22 (same).

So settled was the principle by 2014 that it was unremarkable when the Commission's Office of General Counsel advised that a non-profit corporation's costs to produce a political video disseminated for free on YouTube.com were exempt from regulation. *See* Matter Under Review ("MUR") 6729 (Checks and Balances for Economic Growth, Inc.), First General Counsel's Report, Aug. 6, 2014. If no fee is paid to disseminate the communication as a paid advertisement, the General Counsel advised, then the production costs are not regulated expenditures. *Id.* at 6 (concluding that "any production costs [that an incorporated non-profit advocacy organization] may have incurred would not constitute contributions or expenditures and, accordingly, would not give rise to an obligation to report those costs as independent expenditures.").[1]

Under this regulatory framework, political speech on the internet has flourished. The American people have been able to disseminate and access millions of political messages in a realm of

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[1] Notably, some commissioners – apparently concerned that Americans now had too much freedom to communicate their views online and/or that the free internet had become so effective at communicating that it deserved regulation – began calling for the Commission to yet again reexamine its approach to regulating internet communications. *See, e.g.*, MUR 6729, Statement of Reasons of Vice Chair Ann M. Ravel, Oct. 24, 2014. While these dissenting voices have grown louder in recent years, they have not attained a majority on the Commission, and the retrenchment they seek in the Internet Exemption should not become governing policy for the host of reasons explained here.

speech free from government-imposed regulatory burdens and censorship. The democratic and individual benefits made possible by this freedom cannot be seriously questioned. Meanwhile, there is no documented case of corruption of a public official arising from free posts on the internet.

POTENTIAL EXPANSIONS OF INTERNET SPEECH REGULATION PROPOSED BY THE SUPPLEMENTAL NPRM

A. The Supplemental NPRM Suggests Regulation of Internal Costs to Produce and Post Free Internet Content

Both the proposed regulatory text and interpretative language presented in the Commission's Supplemental NPRM threaten to expand FEC regulation over the internet. As to the former, the Supplemental NPRM proposes to redefine and regulate for the first time "public communications" that are "promoted for a fee" on a third-party website, digital device or application, or advertising platform. At first blush, this proposal appears to offer a nuanced and reasonable update to the concept of what constitutes an advertising payment to include a new development offered by internet advertising platforms: fees paid to promote or boost political content otherwise posted for free. There is, after all, little difference between paying a platform a fee to post a banner ad on a hundred thousand computer screens, on the one hand, and paying the same platform the same fee to re-disseminate a free post on a hundred thousand computer screens. In fact, the Commission has already suggested that fees paid to internet-based advertising platforms for alternative promotion or boosting services are regulated as paid advertising. *See* 71 Fed. Reg. at 18,594 (treating "directed search results" purchased for a fee paid to the internet platform (e.g., Google or Yahoo) as covered expenditures for advertising).

Were that the limit to the reach of the language posed in the Supplemental NPRM, the proposal might be considered a clarification rather than a substantive change of any significance, and it likely would generate little controversy. However, profound regulatory expansions lurk just beneath the surface of the meaning (and potential interpretations) of what it means for an internet communication to be "promoted for a fee" and also this NPRM's proposal to cover payments to any person, not limited to payments to the advertising platforms.

For example, when the Commission initially issued its Draft Final Rule and Explanation and Justification for Internet Communications Disclaimers on November 10, 2022, the proposal included the language "promoted for a fee" in the definition of "public communication" and further proposed to add promotional "services" to the list of technologies used to disseminate political content. *See Agenda Document No. 22-52-A* (Nov. 10, 2022). The Draft Explanation and Justification explained that the addition of these new terms, "promoted for a fee" and "services," were intended to expand the definition of regulated "public communications" "to capture individuals paid to share content in cases where no payment is made to a platform." *Id.* at 15. Thus, the "promoted for a fee" language was intended to expand regulation of disbursements not to advertising platforms or websites to promote or boost a free online post, but rather to any individual who shares or re-disseminates the political content. That represented a significant and unexpected substantive expansion of regulation of internet communications with no prior notice to the public. Whether the draft rule contemplated payments to people other than advertising platforms such as "influencers" or consultants or employees of an organization, or other people, was unclear and there had been no prior notice and comment on the topic. Therefore, the Commission was wise to jettison the "promoted for a

fee" and "services" language upon final adoption of the new rule on December 1, 2022. *See Agenda Document No. 22-52-B* (Nov. 28, 2022).

The Supplemental NPRM, however, picks up where the jettisoned language of the previous draft rule left off, and its language suggests the Commission might yet attempt to expand internet regulation in a significant way. The NPRM begins with a bland invitation to comment on the limited subject of "moderniz[ing] campaign finance regulations in light of technological advances" through the addition of the "promoted for a fee" language, but the actual questions presented go far beyond mere technological updates and promotional advertising products purchased from internet-based advertising platforms. That the Supplemental NPRM opens the door to a broader regulatory expansion is evident in topics (1) and (3):

> "[T]he Commission seeks comments about whether, both for purposes of the term 'internet public communication' and the Commission's disclaimer requirements, a distinction should be made between communications over the internet where (1) a **person is paid to republish content** containing express advocacy or soliciting a third party's website, digital device, application, or advertising platform in order to increase the circulation or prominence of that content … and (3) **a person is paid to create or generate content containing express advocacy or soliciting a contribution**, which then appears on a third party's website, digital device, application, or advertising platform."

87 Fed. Reg. at 75,519 (emphasis added).

The Commission's objective might be to reach payments paid to an advertising platform for an alternative advertising product known as "promotion," or perhaps even third-party "influencers," but the payments covered by the NPRM's statements suggest a vast potential expansion of regulation to cover the internal **production costs** of political messages disseminated for free on any website or platform any time the person posting content pays any other person to create or generate its content. They might even reach payments to any person who assists in **publishing** content on free social media platforms. That could capture an individual's payment to another person for any number of services, and it could include an organization's payments to its staff. As explained earlier, however, the Commission has not regulated production and other internal costs for internet communications since 2006.

The questions presented in this Supplemental NPRM raise special concern, in part because payments to people other than advertising platforms to disseminate messages could reasonably be perceived as just the most recent effort to expand regulation of internet activities. In particular, the internal costs incurred by organizations, including their payments to their staff and consultants to produce and post content, have been the subject of prior efforts to regulate otherwise free internet postings. For example, there have been efforts to deny incorporated non-profit organizations the protections afforded under the second prong of the Internet Exemption—the exclusions from the definitions of "contribution" and "expenditure" under 11 C.F.R. §§ 100.94 and 100.155. *See, e.g.*, MUR 6729, Vote Certification (Sept. 16, 2014) (documenting that three commissioners voted to find reason to believe that an incorporated non-profit organization violated the law over its posting of YouTube videos for free). Those active efforts place even greater significance on protecting organizations from expanded regulation of the internal costs incurred to produce or disseminate otherwise free internet speech as suggested in this NPRM.

B. The Regulatory Consequences Would Be Broad and Severe

The Supplemental NPRM also requests comment regarding the breadth of a change to the definition of "public communication":

> Finally, the Commission is soliciting comments concerning whether and how this proposed change to the definitions of 'public communication' and 'internet public communication' would **affect regulated entities broadly, including in contexts unrelated to the required disclaimers for a given communication**.

Id. (emphasis added).

By expanding the definition of "public communication" under 11 C.F.R. § 100.26, the Commission necessarily would expand regulation of internet communications. It also would narrow other provisions of the Internet Exemption protecting the internet activities of all citizens and organizations under 11 C.F.R. §§ 100.94(e) and 110.155(e), since "public communications" are not exempt under those sections.

Further, as the Commission is aware, the definition of "public communication" triggers more regulatory consequences than disclaimer requirements (which are significant regulatory burdens in and of themselves). The full-blown regulation of independent expenditures, independent expenditure reporting, coordinated communications, coordinated communication contribution limits and prohibitions, and state and local party spending all hinge on the definition of "public communication." *See generally,* 71 Fed. Reg. at 18,591-92 (summarizing a series of regulations that hinge upon the definition of "public communication").

For these reasons, any expansion of the definition of "public communication" to encompass a person's payment to another person to "create or generate content"—i.e., to produce communications—disseminated for free on the internet would have profoundly severe consequences for free speech on the internet as we know it. For that reason, the Supplemental NPRM should be viewed as a Pandora's Box or, worse, a possible Trojan Horse.

AN ORGANIZATION'S INTERNAL STAFF COSTS SHOULD NOT BE REGULATED AS "PUBLIC COMMUNICATION"

A. An Organization's Internal Staff Costs Should Not Be Regulated Like Fee-Based Advertising

Because the questions posed in the Supplemental NPRM suggest an expansion of the definition of "public communication" to include any payment to any person to create, generate, disseminate or boost an internet communication otherwise posted for no fee on the world wide web, the NPRM appears to be yet another attempt to get at the internal staff and overhead costs incurred by non-profit organizations. The Commission should acknowledge the NPRM's potential implications for organizations, particularly non-profit organizations, that naturally incur internal costs to pay staff or consultants to disseminate their political messages on the internet. This of course includes incorporated non-profit organizations that have the same rights as individuals and unincorporated associations of individuals to incur costs to speak. The Commission should not adopt any regulatory language that restricts the internet freedom of organizations.

There are two specific concerns for organizational speakers implicated by the Supplemental NPRM. First, like individuals and groups of individuals, organizations incur costs to produce and disseminate their free messages online. Taken literally, that could include an organization's internal costs, including payment to staff to act for the organization. The second concern is that regulating staff and other internal costs of an organization might be used as a way to regulate organizations, including incorporated organizations.

Regarding the first point, the Internet Exemption protects the "uncompensated" services of the individual or group. Those who desire to expand regulation over the internet activities of non-profit organizations appear to look past the fact that the organizations are indeed "uncompensated" for their internet speech while instead focusing on the compensation the organizations pay to their staff or overhead as the key point in the analysis. While an individual necessarily pays outside vendors to purchase computers, software, internet access, graphics and intellectual property, and a host of other inputs to create or generate content for a political podcast, blog or website or YouTube channel, an organization incurs the same costs, including its staff to perform many of the same functions. The NPRM suggests that payment to any other person to create or generate or republish the content might trigger regulation as "public communication."

Regarding the second point, the Internet Exemption applies to an "individual or group of individuals." Groups of individuals who incorporate must be exempt on the same basis as groups of individuals who do not incorporate. However, those who desire to impose greater regulations on non-profit organizations may attempt to deny the same protection to incorporated organizations. This kind of discrimination is unconstitutional, as explained below. But it is important for the Commission to recognize that treating an organization's internal costs of production, including staff and overhead costs, might have that practical effect.

B. *Citizens United* Reaffirmed the Internet Exemption's Protection for Incorporated Groups and Organizations

The Commission adopted the Internet Exemption in 2006. At that time, the law prohibited corporations from making any expenditures for the purpose of influencing federal elections. 52 U.S.C. § 30118(a). Nonetheless, the Commission extended the protection of the new regulation "individuals and groups of individuals," 71 Fed. Reg. at 18,596 & n.34, including corporations and non-profit organizations, *see, e.g.*, MUR 6974 (Foundation for a Secure and Prosperous America), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, Aug. 8, 2016 (applying the exemption to a 501(c)(4) entity); MUR 6795 (Citizens for Responsibility and Ethics in Washington), Concurring Statement of Commissioners Lee E. Goodman and Caroline C. Hunter, Jan. 29, 2015 (applying the exemption to a 501(c)(3) entity); MUR 6729, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Oct. 24, 2014 (applying the exemption to a 501(c)(4) entity).

Four years after the rule's adoption, the Supreme Court struck the corporate expenditure prohibition in *Citizens United*. In that case, the Supreme Court held that a corporation is an association of citizens who do not shed their First Amendment protections simply because they choose to incorporate their association. Accordingly, the Court concluded, the government may not "suppress political speech on the basis of the speaker's corporate identity." *Citizens United*, 558 U.S. at 365 (2010).

Whatever doubt might have existed before 2010, *Citizens United* mandated that the Internet Exemption apply with equal force to incorporated associations, just like it does to individuals and unincorporated groups. That means it must apply with equal force to the input and production costs incurred by all speakers. This must include payments to individuals to create, generate, produce and post the organization's political messages online—so long as the organization does not pay a fee to an advertising platform to disseminate its message. And this must include the treatment of production costs under the definition of "public communication" set forth in 11 C.F.R. § 100.26.

Likewise, because the Internet Exemption must protect organizations on an equal basis as individuals and groups of individuals, each non-profit organization that chooses to speak on the internet without being compensated by a third-party must be treated as the volunteer speaker for purposes of applying 11 C.F.R. §§ 100.94(a)(1) and 100.155(a)(1). Where a non-profit organization speaks on the internet, it is the speaker, and its production costs, including use of its technology and computer systems and its staff time, is analogous to the costs incurred by Leo Smith and all other citizens freed from regulation in 2006.

C. The *CLC v. FEC* Court Decision Should Not Impact Consideration of this NPRM

While not directly discussed in the Supplemental NPRM, it is significant that the Commission will consider the subjects raised in this NPRM at the same time it is considering the U.S. District Court's remand order in *Campaign Legal Center v. Federal Election Commission* (Case No. 19-2336) (Boasberg, J.). That opinion concludes that the Commission applied the Internet Exemption overbroadly to exempt a large amount of varied in-kind services and activities that a political committee allegedly coordinated with a federal campaign committee. *See* Mem. Op. at 14. That opinion, coupled with the timing of the Supplemental NPRM, might be misperceived by some as a convenient opportunity to expand regulation over the "input" costs incurred to produce free internet communications under 11 C.F.R. § 100.26. But that would be a mistake. The Commission should not interpret or apply the District Court's memorandum opinion – which is currently on appeal[2] – to require the wholesale regulation of production costs, and certainly not in a long-term rulemaking in the context of this NPRM. To the contrary, the Commission should preserve the Internet Exemption and particularly its protection for internal production and publishing costs in whatever measures are taken to respond to that court opinion. Several reasons militate in favor of a restrained response to that District Court opinion.

First, the Internet Exemption in its current form, and in its multiple parts, already was considered in a direct challenge before the U.S. District Court and the U.S. Court of Appeals in *Shays*, and the Commission long ago conformed the rule to the directives of the federal courts. The Internet Exemption has become well-established in the 17 years since its adoption and should not be eroded in light of one court's obvious struggle with application of the Internet Exemption in one factually difficult case. The Commission should not overread that case to require a re-interpretation of the Internet Exemption or to diminish the broad freedom endorsed in the 2006 rulemaking for all American citizens, as individuals and as associations, to speak freely on the internet.

Second, this District Court appears to have been confused about which parts of the Internet Exemption applied to the coordination allegations. For example, the court's opinion latched

[2] On December 21, 2022, the Commission filed a Notice of Appeal in this case (Dkt. No. 72).

onto a brief passage from page 18,606 of the Commission's 25-page Explanation & Justification qualifying 11 C.F.R. §§ 100.94 and 100.155, but that passage expressly applies only to those two regulations. It does not qualify the definition of "public communication" under 11 C.F.R. § 100.26, which controls the regulation of "coordinated communications" under 11 C.F.R. § 109.21(c). There is no indication in the opinion that the District Court understood the distinction between the two prongs of the Internet Exemption or that they can operate independently of one another. While Citizens United believes an organization can provide computers to its staff to engage in the organization's own volunteer, i.e., "uncompensated" speech on the internet subject to the protections of 11 C.F.R. §§ 100.94 and 100.155 (see above), that legal issue did not necessarily control the coordination allegations at issue in the case before the District Court. Instead, the court appears to have missed the distinction entirely.

Third, to the extent the District Court's treatment could be viewed as an interpretation of "public communication" under 11 C.F.R. § 100.26, the court's reasoning was errant in some aspects and incomprehensible in others. For example, the court wrote that "the internet exemption covers only unpaid internet communications themselves, and not all offline inputs to those communications." Mem. Op. at 4. As the Commission is aware, one cannot distinguish—practically or legally—between the "communication" (i.e., video, editorial, blogpost, podcast, tweet), on the one hand, and the "inputs to those communications," on the other. The "inputs," assuming the court meant the graphics, software, research, videos, script, etc., are part and parcel the communication. No communication can exist without its production "inputs."

Later, the court attempted to distinguish between the "kind" of "inputs" that are and are not exempted, but ran into a dead end. Among the "inputs" the court would exempt are "email list rentals and donation-processing software purchased to enable email blasts." *Id*. at 14 (citing Matter Under Review 6657 (Akin for Senate)). But the court could not identify which "inputs" are not exempt under the definition of "public communication" in 11 C.F.R. § 100.26. The one "input" the court identified as **not** exempt—the purchase of computers—would vitiate the entire rule, because all free internet communications require the purchase of a computer. Memorandum Op. at 3-4. No free internet communication would ever be exempted from the definition of "public communication" if the cost of the computer is not exempt. In so ruling, the court took us back to the folly of Leo Smith where the value of computers and other overhead must be counted as coordinated expenditures.

Thus, it was for good reason that the District Court, having opened anew the same issues the Commission grappled with for three decades, announced that it "leaves the task of defining the exemption's precise parameters to the expert agency, so long as it is consistent with the principles expressed"—however inarticulately—by the court, Memorandum Op. at 14, and deferred the case back to the "expert Commission on remand to sketch the bounds of the internet exemption." The Commission should indeed assert its expertise and in the process correct the District Court's clear errors unless an appellate court does so first.

In sum, the District Court's opinion complicated what should have been a straightforward analysis. The Internet Exemption protects all "inputs" into internet communications, including the internal and overhead, technology and staff costs incurred to produce, maintain and disseminate a free internet communication.

- The "inputs" to produce communications disseminated via the internet without paying an advertising fee to a third-party website are exempt from the definition of "public communication" under 11 C.F.R. § 100.26, and therefore are exempt from the definition of "coordinated communication" under 11 C.F.R. § 109.21 (which regulates only "public communications");

- Independently, such "inputs" may also be exempt from regulation under 11 C.F.R. §§ 100.94 and 155, if they meet the requirements of those provisions (and Citizens United has a view on the speakers that are entitled to that exemption);

- Disbursements for political activities that are not "inputs" to produce such internet communications are not exempt under 11 C.F.R. §§ 100.26, or 100.94, or 100.155, and such disbursements may be subject to regulation as "expenditures" or "contributions" if they otherwise meet the definition of those terms;

- If such "expenditures" or "contributions" are provided to or coordinated with a candidate committee, constitute cognizable "things of value," and are not otherwise exempt, they can be regulated as "contributions" under 11 C.F.R. § 109.20.

From that clear starting point, the exercise was a sorting task. The court should have analyzed each alleged activity or service or good (e.g., polling data that might have been coordinated with and provided privately to a campaign committee[3]) and, if confused, resolved the issue on other grounds, or remanded any particular activity for further analysis and sorting by the Commission. But the court severely erred by suggesting that the internal costs incurred to create, generate, produce or disseminate—what it termed "inputs" to free internet communications—are not fully exempt from the definition of "public communication" under 11 C.F.R. § 100.26.

In sum, because the District Court's opinion renders such a flawed approach to the law of production costs for free internet communications, the Commission should not embed its reasoning into a permanent regulation – particularly a proceeding like this, where Administrative Procedure Act and due process problems would abound. An appellate court, on appeal, or the Commission, on remand, should correct the errors.

CONCLUSION

Nearly seventeen years ago the Commission unanimously acknowledged that "[t]he Internet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities." 71 Fed. Reg. at 18,603. Recognizing the internet as a "unique and evolving mode of mass communication and political speech . . . distinct from other media," the Commission declared it would take a "restrained regulatory approach" with respect to online political activity. *Id*. at 18,589. In this spirit, the Commission promulgated the Internet Exemption to "remove any potential restrictions" on the ability of citizens to engage in civic and democratic life via the internet. *Id.* The Internet Exemption has been successful in allowing millions of Americans—individuals, groups and organizations—to speak freely online about politics and their government without the kind of

[3] Polling data publicized on the internet and made available to the public are not "contributions." *See* 11 C.F.R. § 106.4(c).

encumbrances once imposed on Leo Smith. The Commission should not reverse course now by regulating production costs of any individual or organization.

Accordingly, if the Commission proceeds to issue a final rule, Citizens United and Citizens United Foundation urge the Commission to take the following actions:

1. Reject any regulation of production, overhead, or internal dissemination costs incurred by individuals and organizations to disseminate political messages without paying a fee to a third-party advertising platform to disseminate the message;

2. Reject the regulation proposed in point (3) of the NPRM, payment to any person to "create or generate content";

3. Clarify that any regulation of payments to third parties for a "promotional" or "boosting" service must be limited to payments to third-party commercial advertising platforms, and must not cover payments by individuals, groups or organizations to their friends, staff or consultants to publish the organizations' own content;

4. Reaffirm that costs incurred by a speaker to create, generate, maintain, produce and disseminate a free communication via the internet are exempt from the definition of "public communication" under 11 C.F.R. § 100.26, as well as the volunteer speaker exemptions set forth in 11 C.F.R. §§ 100.94 and 100.155; and

5. Reaffirm that the Internet Exemption, codified at 11 C.F.R. §§ 100.26, 100.94, and 100.155, applies equally to individual citizens, unincorporated associations of citizens, and incorporated associations of citizens.

Sincerely,

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