

March 22, 2006

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Supplemental Notice 2006–5: Coordinated Communications

Dear Mr. Deutsch:

These supplemental comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission’s Supplemental Notice of Proposed Rulemaking (“SNPRM”) 2006–5, published at 71 Fed. Reg. 13306 (March 15, 2006), which re-opens the comment period in the rulemaking on coordinated communications, and seeks comment on new data which the Commission has introduced into the record of this proceeding.

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics filed joint comments at the initial stage of this proceeding,¹ and a representative of each organization testified at the public hearing held in this matter.

I. Introduction: The Commission’s New Data Is Not Responsive to the Central Issue.

The CMAG data entered into the record by the Commission proves only the obvious: that candidates run more campaign ads close in time to election day than temporally distant from it, and that the number of campaign ads run by candidates increases as election day approaches. This should come as a surprise to no one. We certainly do not dispute the point.²

This data is not, however, dispositive of the central issue before the Commission.

¹ See Comments of the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics on Notice 2005–28 (January 13, 2006) (with appendices); *available at* http://www.fec.gov/pdf/nprm/coord_commun/coordination_nprm_comments.shtml.

² For instance, at the Commission hearings on this matter, a representative of Democracy 21 testified, “I don’t contest the proposition that more money is spent within 120 days than is spent outside 120 days or that more money is spent...within 60 days than between 60 and 120 days....I think that’s not the issue.” Transcript of Hearing of January 25, 2006 at 71 (Simon testimony).

The key problem with the current regulation is neither that it uses a time-frame test for coordination, nor that it uses the 120-day period as the time frame. As our opening comments state, we *support* a time frame test as an element of the coordination rules, and in particular, we support the use of a 120-day period.³

Rather, the problem with the current regulation is that, outside the 120 day pre-election window, the only test for coordination is whether an ad contains express advocacy.⁴ Yet as the D.C. Circuit noted, that test is “functionally meaningless,” *Shays v. FEC*, 414 F.3d 76, 99 quoting *McConnell v. FEC*, 540 U.S. 93, 193 (2003). The court said that using the express advocacy test as the standard outside the 120-day window “in effect allow[s] a coordinated communication free-for-all for much of each election cycle.” 414 F.3d at 100.⁵

Thus, in our view, the question before the Commission is not whether to keep the 120-day rule or replace it with a different time frame, but whether to *supplement* that standard with some test — but one more robust than the “meaningless” test of express advocacy — that would apply to those non-express advocacy campaign ads that do run outside the 120-day time frame.⁶

In this light, the task before the Commission is to decide whether, as we believe, a supplemental test is necessary, or whether, as the *Shays* court put it, the express advocacy and re-publication tests are “adequate *by themselves* to capture the universe of electorally oriented communication outside the 120-day window.” 414 F.3d at 100 (emphasis added).

Further, the Commission has to address the “most important” question raised by the *Shays* court: whether “candidates and collaborators” would “simply shift coordinated spending” to outside the 120 pre-election period if the current rule remains unchanged. 414 F.3d at 102.

Only if there has been a showing that non-express advocacy campaign ads that have been run, or will be run, outside the 120 day time frame are insignificant, could the Commission

³ Our comments make clear that we support a time frame test for non-“major purpose” spenders, such as corporations, labor unions and individuals. See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 33 (“Our proposed rule incorporates the advantages of the time frame test of the 2002 rule for any person other than a federal political committee....”). However, we urge the Commission to modify the time frame test in order to eliminate the “gap” between the primary election and the beginning of the 120-day pre-general election period. See *id.*

⁴ Re-publication of campaign material also meets the “content” test outside the window. 11 C.F.R. § 109.21(c)(2). For purposes of this discussion, however, we assume that, as a practical matter, express advocacy is the only test outside the 120-day window.

⁵ In the *Christian Coalition* case, Judge Green called the argument that express advocacy should be the content test for the coordination rules to be “untenable,” “fanciful,” “unpersuasive,” “pernicious,” and designed to “frustrate both the anti-corruption and disclosure goals of the Act.” *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 87-88 & n.50 (D.D.C. 1999).

⁶ In our earlier comments, for instance, we suggested that the supplemental test should be whether an ad “refers to the character or the qualifications or fitness for office of a clearly identified candidate for federal office.” See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 28–31.

justify leaving the current content test in place. Both the data we submitted with our earlier comments, and the CMAG data now submitted by the Commission, demonstrate that this showing simply has not been, and cannot be, made.

In addressing these questions, the Commission should keep in mind that the coordination rules have a particularly important role in the campaign finance laws, because they serve to police the integrity of the statutory limits and source prohibitions on contributions, and thus serve the same compelling interests in deterring corruption and the appearance of corruption as are served by the limits and prohibitions on direct contributions.

Spending by a corporation or labor union within 120 days of an election for a non-express advocacy public communication that clearly identifies a federal candidate and is directed to the electorate of that candidate is prohibited only if the ad is “coordinated” with the candidate — *i.e.*, is the product of coordinated conduct — in which case the spending is treated as an in-kind contribution.⁷

But because, under the current regulations, express advocacy is the only content test for coordination outside the 120-day period, then spending for the *same non-express advocacy ad* run more than 120 days before the election would *never* be considered “coordinated” as a matter of law — no matter how coordinated in fact the conduct might be between the corporate or union spender and the candidate, even to the extent of a candidate drafting the text of an ad that plainly promotes and supports his campaign, which a corporate spender then simply funds.

Thus, as a practical matter, the Commission’s coordination rule authorizes unlimited *in-kind contributions* to candidates from any source, including corporations and labor unions, in the form of expenditures coordinated in fact with the candidates, so long as the coordinated spending does not involve express advocacy and takes place prior to the 120-day pre-election period.

Although a corporate or union officer could not walk up to a candidate and hand the candidate a check for \$100,000 as a contribution, that same corporate or union officer could take an ad script from a candidate that promotes his campaign, and agree to spend \$100,000 in soft money to run the ad where and when the candidate directs him to, so long as the spending takes place outside the 120-day period.

Given that the coordination rules thus go to the heart of the campaign finance laws, the question for the Commission is whether a regulation which, in the view of the court, allows a

⁷ The same spending is not prohibited if it is done independently of a candidate, because the ban on corporate and union independent expenditures in 2 U.S.C. § 441b applies only to express advocacy communications. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); 11 C.F.R. § 114.2(a). Thus, for instance, a corporation on the day before the election can pay for a newspaper ad that promotes a federal candidate but does not expressly advocate his election, so long as the ad is developed and run independently of the candidate. But the Commission has never construed section 441b to apply an express advocacy test for coordinated communications, and the courts have rejected that idea. *See* n.5, *supra*. (Note, however, that a non-express advocacy broadcast ad aired within 60 days of an election, even if independent of a candidate, would be subject to the Title II provisions governing an “electioneering communication.”)

“coordinated communication free-for-all for much of each election cycle,” and which authorizes unlimited in-kind soft money contributions to federal candidates in the period more than 120 days before an election, poses a serious threat to the integrity of the statute so as to require modification of the rule by providing *some* standard, other than a “functionally meaningless” one, for coordination outside the 120-day period.

II. A Substantial Number of Ads Air Outside the 120–day Period.

The potential danger to the statute described above is not merely a theoretical matter. Campaign ads are in fact aired outside the 120-day period covered by the existing rule.

It is unquestionably true that most campaign ads are run within 120 days of an election. But the Court of Appeals in *Shays* ordered the Commission to consider whether *substantial* election-related communication occurs outside the 120-day window. 414 F.3d at 102. Just because *most* ads are run within 120 days of an election does not mean that the ads running outside of the 120-day period are *insubstantial*, either in the number of such ads or in dollar value. Indeed, the material we submitted for the record with our earlier comments, additional data we submit with these supplementary comments (detailed below), and the new data proffered by the Commission that prompted this SNPRM, all demonstrate that a substantial number of campaign ads are in fact run outside the 120-day window.

Nowhere is this problem more obvious, or more egregious in its impact, than for ads that fall in the “gap” period between the primary election and the beginning of the 120-day pre-general election period. For states with early primary election dates, the “gap” extends from February or March, until July, *of the election year*. To say that ads run by a corporate or union spender that refer to a candidate, and that support or promote the re-election of that candidate (or attack his opponent), may be fully and explicitly coordinated with and controlled by that candidate because they do not contain express advocacy is an invitation to abuse. No less problematic is the converse case — where a late primary is not held until the early fall, so there is no “gap” period, but the 120-day pre-primary period does not begin until May. In those states, a corporate or union spender could fully coordinate with a candidate on non-express advocacy ads that promote his campaign, and run those ads for the first four months *of the election year*. If nothing else, the Commission must address these aggravated consequences in the election year itself of its current, flawed rule.

In our earlier submission, we included more than 170 ads by candidates, parties and outside groups that have actually been aired in recent campaigns in the pre-120 day period. Attached to these comments, as an addendum to **APPENDIX VI** of our January comments, we include the scripts of a thirteen more television and radio ads intended to influence — but running more than 120 days before — the 2006 congressional primary elections.

Even if the number of ads outside the 120-day window is small as a percentage of the overall number of candidate ads in an election cycle, those ads can have significance in a given race, and more importantly, can represent a significant amount of money that is being spent by a corporation, union or wealthy individual to pay for such ads.

For instance, as we discussed in our January comments, a section 501(c)(6) corporation made a \$500,000 ad buy in Pennsylvania last November — 178 days before the primary election — to run ads that clearly promoted Senator Rick Santorum (R-PA), who is in a closely contested and important 2006 Senate race.⁸ Under the Commission's 120-day rule, these ads could have been *fully coordinated* with the Santorum campaign. That would have amounted to a *de facto* \$500,000 in-kind corporate contribution to the Santorum campaign that would be lawful under the Commission's current coordination regulation.

So too, as we discuss below, the CMAG data submitted by the Commission shows that substantial campaign advertising does take place outside the 120-day window, and that candidates spend significant sums on such ads.

III. The CMAG Data on Ads Airing Prior to the 2004 Presidential Primaries/Caucuses in Battleground States.

According to the Commission's new data, 8.44% of all ads run prior to the 2004 presidential primaries/caucuses in media markets contained within a single battleground state were aired more than 120 days before the primaries/caucuses. See Graph P7. This amounts to more than 3,800 ads which, according to the Commission's data on graph P8, were valued at more than \$802,544 (4.89% of \$16,411,945).

On its own terms, this is a substantial amount of spending outside the 120-day window. But the CMAG data presented by the Commission almost surely understates the spending. By presenting data only for media markets *contained fully within a single battleground state*, the Commission's data underestimates the number and value of ads that have been run in battleground states. For example, although the Commission identifies Pennsylvania as a

⁸ The text of the ad reads:

ANNOUNCER [v/o]: Most Saturdays they get together in the park, 8 a.m. sharp.

Pennsylvania families relax a little more these days because Rick Santorum is getting things done everyday.

Over \$300 billion in tax relief, eliminating the marriage penalty, increasing the per child tax credit – all done.

And now Rick Santorum is fighting to eliminate unfair taxes on family businesses.

Call and say thanks because Rick Santorum is the one getting it done.

(Text on screen: Senator Rick Santorum; (717)231-7540; Paid for by Americans for Job Security

A copy of the ad script from the *National Journal* is attached as an exhibit in App. VI-14 to our opening comments.

battleground state, graphs P7 and P8 do not contain ad data from the Philadelphia media market, Pennsylvania's largest media market and the fourth largest media market in the nation, nor from the Pittsburgh media market, the state's second-largest media market.⁹ Neither media market meets the criterion of being contained with a single battleground state. Thus, whatever ads were run in those two major markets are not captured by the CMAG data. Similarly, graphs P7 and P8 do not contain ad data from the battleground state of Colorado's largest media market, Denver; nor from the battleground state of Nevada's second-largest media market, Reno; nor from the battleground state of Ohio's third-largest media market, Cincinnati; nor from the battleground state of Wisconsin's second-largest media market, Green Bay; nor from the battleground state of Washington's second-largest media market, Spokane.¹⁰

In short, major party candidates in the 2004 presidential primary elections/caucuses spent hundreds of thousands of dollars running thousands of ads more than 120 days prior to the primary elections or caucuses. Under the Commission's existing coordination regulations, such ads could lawfully have been coordinated with, and paid for by, corporations, labor unions and other special interest organizations — thus undermining the statutory limits on the amounts and sources of in-kind contributions. We submit that such coordinated activity should be considered substantial, particularly in light of the threat posed by the 120-day rule to undermine provisions of law at the heart of the statute.

IV. The CMAG Data on Ads Airing Prior to the 2004 Presidential General Election in Battleground States.

The Commission's Graphs P9 and P10 display data regarding ads aired prior to the 2004 presidential general election in battleground states. The data make clear that 30.67% of 2004 presidential general election ads ran more than 120 days before the general election. This amounts to more than 62,700 ads which, according to the Commission's data on Graph P10, were valued at more than \$45,868,132 (26.62% of \$172,307,036).

Although Graphs P9 and P10 do note the dates of the Democratic and Republican national conventions, the graphs do not display the data in time frames relative to the convention dates. (Nor has the Commission produced separate graphs using the convention start date as "day zero.") Consequently, it is impossible to determine from the graphs how much advertising occurred more than 120 days prior to the conventions. Nevertheless, it is possible to estimate, based on these graphs, that between five and ten percent of the ads represented on the graphs aired more than 120 days before the conventions. Furthermore, given that both parties' nomination contests had been decided at the time when these ads ran, and the presumptive

⁹ See Neilson Media Research, *210 Designated Market Areas: Nielson Media Research Local Universe Estimates*, available at <http://www.nielsenmedia.com/DMA.html>.

¹⁰ *Id.*

nominees were known, it is clear that the ads were intended to influence the *general election*, not the party conventions.¹¹

Also, for the reasons stated in the preceding section, the Commission's data underestimates, perhaps substantially, the actual number and value of ads by presenting data only for media markets *contained fully within a single battleground state*, and thus eliminating several major media markets.

In short, major party candidates in the 2004 presidential general election spent more than \$45 million running approximately 62,700 of ads more than 120 days prior to the general election. Such advertising is plainly not insubstantial and, if coordinated with corporations, labor unions and other special interests, would undeniably undermine statutory limits on the amounts and sources of in-kind contributions.

V. The CMAG Data on Ads Airing Prior to the 2004 Congressional Primaries/Caucuses.

The Commission's data sets for ads aired prior to the 2004 congressional primaries/caucuses are incomplete.

The Commission's data set on Senate primaries contains no ads by 2004 Senate candidates aired in 2003, yet such ads were in fact aired.¹² Colorado Senate candidate Mike Miles, for example, began airing television ads in October 2003¹³ — more than ten months prior to Colorado's August 10, 2004 primary — yet the earliest Miles ad date in the Commission's data set is August 5, 2004.

Similarly, Illinois Senate candidate Blair Hull began airing television ads in June 2003¹⁴ — more than eight months before the state's March 13, 2004 primary — yet the earliest Hull ad date in the Commission's data set is January 9, 2004. Illinois Senate candidate Gerry Chico began airing television ads in October 2003,¹⁵ yet the earliest Chico ad date in the Commission's data set is January 19, 2004.

¹¹ According to the notes on graphs P9 and P10, the CMAG data controls for the primary date, and only advertisements run after the primary election in a given state are represented on the graphs. See "Presidential Graphs – Notes" at 2 (General Election Graphs).

¹² The Commission's Senate data set contains information on a small number of 2002 ads related to 2002 general elections and a December 7, 2002 runoff election for a Louisiana Senate seat, but contains no 2003 ads for 2004 Senate election campaigns. It appears as though CMAG did not begin collecting ads for the 2004 Senate elections until January 2004.

¹³ See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 26 and App. V–12.

¹⁴ See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 27 and App. V–57.

¹⁵ See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 27 and App. V–41.

Likewise, the Commission’s data set on House primaries contains no ads by 2004 House candidates aired in 2003, yet such ads were in fact aired.¹⁶ For example, North Carolina House District 5 candidate Jim Snyder began airing ads in August 2003¹⁷ — eleven months prior to North Carolina’s July 20, 2004 primary — yet the Commission’s data set includes no ads by Snyder, who dropped out of the race in November 2003. North Carolina House District 5 candidate Jay Helvey began airing ads in December 2003,¹⁸ yet the earliest Helvey ad in the Commission’s data set is January 1, 2004.

Due to the omission of important congressional candidate advertising data from the Commission’s data sets, the Commission can validly draw no conclusions from its data regarding the substantiality of congressional candidate advertising more than 120 days before primary elections.

VI. The CMAG Data Has Significant Limitations and Does Not Address the “Most Important” Question Raised by the Court.

Even to the extent that the CMAG data purports to show that most candidate ads are run within 120 days of an election, the data has significant limitations for purposes of showing that ads run outside that time period are insubstantial. Because of these limitations, the data is likely to materially understate the number of ads run outside the 120-day period and the amount of money spent on such ads. For this reason, we do not believe that the Commission can properly rely on the CMAG data to draw the conclusion that only an insubstantial number of campaign ads are run outside the 120-day period.

Some of these limitations are noted above — *e.g.*, the exclusion in key states of major media markets that are not wholly contained within a state, and the apparent failure to include 2003 data in the congressional primary election data sets. But there are other important limitations as well.

A. CMAG Data Sets Contain Only Television Ads.

The CMAG data addresses only TV ads, and there is no evidence in the record to draw conclusions about how many campaign ads are run outside the 120-day window by means of other types of “public communications” — such as radio ads, newspaper ads, direct mail, or phone banks, all of which are subject to the coordination rules. There is no basis in the CMAG data, or otherwise in the record, for the Commission to conclude that there is only an insignificant amount of campaign activity in these other media outside the 120-day period.

¹⁶ The Commission’s House data set contains a small number of ads related to a December 7, 2002 runoff election in Louisiana’s House District 5 and a January 2003 special election in Hawaii’s House District 2, but contains no 2003 ads for 2004 House election campaigns. It appears as though CMAG did not begin collecting ads for the 2004 House elections until January 2004.

¹⁷ See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 27 and App. V–126.

¹⁸ See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 27 and App. V–123.

B. CMAG Data Sets Contain Only Candidate Ads, Not Ads Run By Parties and Outside Groups.

The CMAG data includes only ads run by candidates themselves. Although ads run by candidates have high probative value because they are unquestionably campaign ads even in the absence of express advocacy, candidate ads alone do not come close to capturing the relevant universe of campaign ads for purposes of analyzing the coordination rules. Obviously, ads run by political parties are highly relevant as well and, as our earlier submission shows, ads by the political parties extolling their candidates are indeed run outside the 120-day window.¹⁹

Similarly, the CMAG data fails to include any ads run by outside groups. Again, our submission shows that such groups, typically non-profit corporations, do run ads outside the 120-day period, as the Santorum ad run by Americans for Job Security, discussed above, illustrates. We have submitted numerous other ads run by outside groups in this period.²⁰

Indeed, campaign ads by the parties or by outside groups might play a more significant role than candidate ads in the very early stages of a campaign. Candidates may tend to save their money for advertising close to the election, but parties and outside groups may be willing to spend early money as a way to help their candidates. Reliance on such early ads might very well increase significantly if spending by the outside groups could be overtly coordinated with a candidate, as would be permitted under the current regulation. But the CMAG data does not address the extent of ads run by parties or outside groups. Accordingly, there is no basis in the CMAG data, or otherwise in the record, for the Commission to conclude that there is only an insignificant number of campaign ads run by political parties or outside groups, prior to the 120-day period.

C. CMAG Data Does Not Reflect Diversity Among Campaigns.

The CMAG data, in gross, does not control for different kinds of campaigns. Even if it were true that candidates (or parties, or outside groups) do not engage in substantial early advertising in *most* races, they may do so in *certain particular* races, *i.e.*, highly-competitive contests, such as a Senate race that has national dimensions.²¹ Early advertising may have a

¹⁹ In the best known example of this, the Democratic National Committee spent millions of dollars running ads in the summer of 1995 promoting the re-election of President Clinton, well before the 1996 primary season, as an explicit part of the Clinton campaign re-election strategy. See Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 19. See also, *e.g.*, *id.* at App. V–92 (South Dakota Republican Party ad targeting Senator Daschle); *id.* at 27 and App. VI–24 (NRSC ad targeting Senator Byrd); *id.* at 27 and App. VI–4 (Montana Democratic Party ad targeting Senator Burns).

²⁰ See, *e.g.*, Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 20 and App. I–23 (NARAL ads targeting Bush and Dole); *id.* at 20 and App. I–19 (Republican Leadership Council ads targeting Gore); *id.* at 22 and App. III–49 (Reform Voter Project ads targeting Bush); *id.* at 26 and App. V–10 (U.S. Chamber of Commerce ads supporting Senator Murkowski).

²¹ Senator Tom Daschle’s unsuccessful re-election campaign in 2004, for instance, was a highly visible and nationally noted race. Daschle began advertising as early as July, 2003, *see* App. V-90, 94, 96, 98, 102, approximately 11 months before the June 1, 2004 primary election. The South Dakota

heightened importance in such races, and may particularly attract money from parties or outside groups, not reflected in the CMAG data. The data we submitted in our earlier comments suggests that early advertising is often clustered in specific hotly-contested races — rather than distributed evenly throughout all contests. For example, at least six candidates vying for an Illinois Senate seat in 2004 began advertising more than 120 days prior to the state’s 2004 primary election.²² Even if such highly-competitive contests constitute a comparatively small percentage of the total number of races each cycle, the role of early advertising in that small percentage of races may be very important and, consequently, should be considered *substantial*. There is no basis in the CMAG data, or otherwise in the record, for the Commission to conclude that such campaign ads, clustered in highly-competitive races, are rendered insignificant or insubstantial simply because they constitute a small percentage of total ads run.

D. CMAG Data Does Not Predict The Likelihood That Coordinated Advertising Will Shift Outside 120-Day Time Period.

Finally, the CMAG data obviously does not address the question which the D.C. Circuit deemed to be the “most important” one to be considered by the Commission: “[T]o the extent election-related advocacy now occurs primarily within 120-days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged restrictions?” *Shays*, 414 F.3d at 102.

The existing 120-day content test has been under the cloud of court challenge virtually since the day of its promulgation, and throughout the 2004 campaign covered by the CMAG data. Under those circumstances, spenders may have chosen not to risk reliance on the current rule, and therefore the effect of the rule cannot be discerned only from 2004 campaign data. But if the Commission were to re-promulgate the same rule, it would be giving a green light to a future “coordinated communication free-for-all,” 414 F.3d at 100, outside the 120 day period.

Nothing in the CMAG data provides reason to believe this will not happen. Nor has the Commission otherwise developed a record to so conclude. Indeed, in a period where the trend is towards longer, not shorter campaigns, and earlier campaign spending, particularly in highly contested campaigns,²³ the logical likelihood is that candidates, parties and outside groups will

Republican Party also ran ads attacking Daschle more than 120 days before the election, *see* App. V-92, as did Club for Growth, *see* App. V-100.

²² *See* Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 27 and App. V–28 through V–59.

²³ The presidential election campaign of 1995–96 marked, for the first time, the launch of candidate and party advertising during the summer preceding the presidential primary election. *See* Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at 19. The 1999–2000 presidential election campaign, according to the National Journal, entailed “more ads airing earlier than ever before.” *The Ads of 1999*, NATIONAL JOURNAL (Dec. 23, 1999); *available at* Comments of the Campaign Legal Center, *et al.* on Notice 2005–28 at App. I–2. The trend continued during the 2003–04 presidential election campaign, when ads began airing in February 2003 — eleven months prior to the 2004 Iowa caucus and a year before the New Hampshire primary. *See id.* at 22 and App. III–49.

seize on a loophole that allows overt circumvention of the section 441a contribution limits and the section 441b source prohibitions, in order to engage in early campaign spending. There is nothing to prevent a wholesale shift in coordinated spending to the pre-120 day period, where so doing will freely allow candidates to take advantage of unlimited corporate or union treasury funds to pay for ads written and controlled by the candidates. Nothing the Commission has adduced in this record provides comfort to the contrary, or otherwise answers the “most important” question posed by the Court.

VII. Conclusion.

The task set by the Court is for the Commission to show that its current 120-day rule “rationally separates election-related advocacy from other activity falling outside FECA’s expenditure definition.” *Shays*, 414 F.3d. at 102. The court asked whether candidates do “in fact limit campaign-related advocacy to the four months surrounding elections,” *id* at 102, and the answer is clearly no. Both the CMAG data and the scores of actual ads we have submitted for the record demonstrate that candidates do run campaign ads outside the 120-day window.

The CMAG data fails to satisfy the standard set by the D.C. Circuit for justifying the Commission’s existing 120-day rule. Although it demonstrates that most television ads run by candidates are aired in temporal proximity to the election, it also demonstrates that, for example in the 2004 presidential race, thousands of ads with a value of millions of dollars, were run outside the 120-day window. Because these ads were all run by candidates themselves, there is no question but that these ads were for the purpose of influencing the election. Yet they all avoided express advocacy — or easily could have been altered to do so.

This data alone thus proves that the 120-day test does not “reasonably define[] the period before an election when non-express advocacy likely relates to purposes other than ‘influencing’ a federal election....” *Shays*, 414 F.3d at 101. The bare fact that an ad is aired more than 120 days before an election cannot be used as a sufficient proxy, in combination with no more than an express advocacy test, to show that there is “only a weak nexus to any electoral campaign.” *Id.* at 99.

While the ads run by candidates outside the window may not be “substantial” as a percentage of all ads run,²⁴ they are substantial both in the number of ads and dollar amounts. This substantiality is heightened in importance by the fact that, because such ads fall outside the Commission’s legal definition of “coordination,” candidates could write the ads, direct their placement, and then have the ads funded entirely with soft money by corporations, labor unions and wealthy supporters. This substantiality is further heightened by the fact that such ads are often clustered in certain highly-competitive races.

When viewed in this perspective, the Commission’s reliance on the “functionally meaningless” express advocacy standard as the sole test outside the 120-day window “will

²⁴ Although in the case of the 2004 presidential general election data presented on Graphs P9 and P10, the data indicates that a very substantial percentage of the total number of ads are run outside the 120-day pre-general election window.

permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration.” *Shays*, 414 F.3d at 102.

For this reason, we conclude that the Commission is required to promulgate an additional content standard to apply outside the 120-day time period — a standard that will capture non-express advocacy campaign ads that should be subject to the coordination rules.

We appreciate the opportunity to submit these supplemental comments.

Sincerely,

/s/ Fred Wertheimer

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Democracy 21

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