Supplemental authority re. REG 2015-03

Sai . <sai@makeyourlaws.org> Wed, Jul 15, 2015 at 4:06 PM
To: "Ann M. Ravel" <CommissionerRavel@fec.gov>, "Matthew S. Petersen" <CommissionerPetersen@fec.gov>
Cc: Robert Knop <rknop@fec.gov>

Dear Chair Ravel and Vice-Chair Petersen —

This email is intended to supplement the authorities cited in the appendix of our petition for rulemaking on contribution laundering, REG 2015-03. I request that it be put on the record as an addendum to the commencing document.

We would like to draw the Commission's attention to the Supreme Court's opinion in *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 561 US 186 (2010).*

In particular, we highlight the following language, which directly addresses anonymous political speech:

Majority opinion (written by C.J. Roberts):

* 2818: "We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny. … To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.""

* 2819: "[The State's] interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is "essential to the proper functioning of a democracy.""

* 2820: "Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs' argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process."

J. Scalia, concurring in the judgment:

* 2836: "As I said in McIntyre, "[w]here the meaning of a constitutional text (such as `the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine." 514 U.S., at 378, 115 S.Ct. 1511 (dissenting opinion). Just as the century-old practice of States' prohibiting anonymous electioneering was sufficient for me to reject the First Amendment claim to anonymity in McIntyre, the many-centuries-old practices of public legislating and voting are sufficient for me to reject plaintiffs' claim."

* 2837: "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (McIntyre) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."

The right to privacy in issue advocacy is clearly stronger than the right to privacy in election advocacy, let alone contributions of money (or things of value) that go to influence the outcome of an election.

The Court's opinion in *Doe v. Reed* clearly emphasizes that public disclosure — even under the "exacting scrutiny" applied to regulation of political speech — is a narrowly tailored means of promoting the compelling state interest in the "transparency and accountability in the electoral process". This agrees with every other case we cited — *including* the *Citizens United* line of cases.

We urge the Commission to follow the Court's reasoning on disclosure, and promulgate regulations mandating disclosure of the original sources of election-related contributions, as proposed in our petition.

We look forward to robust public discussion of our proposal, and prompt Commission action thereafter.

Sincerely,
Sai
President, Make Your Laws PAC & C4
https://www.makeyourlaws.org/fec/laundering

* We extend our thanks to Prof. Rick Hasen for pointing out this case and the language from J. Scalia's opinion in particular.