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March 22, 2006

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

Re: Comments of Alliance for Justice in Response to Supplemental Notice of Proposed Rulemaking 2006-5, "Coordinated Communications"

Dear Mr. Deutsch:

These comments are submitted on behalf of our client, Alliance for Justice, located at 11 Dupont Circle, NW, Second Floor, Washington, DC 20036. Alliance's mission and composition is further described in our extensive comments filed in response to NPRM 2005-28. We welcome the opportunity to provide these comments on behalf of Alliance for Justice in response to Supplemental Notice of Proposed Rulemaking ("NPRM") 2006-5.

Our original comments stressed the importance of clear guidance and bright lines to avoid the chilling effect that uncertainty in the law has on the speech of nonprofit citizen advocacy groups. Of course, a bright line may provide clear guidance and yet suffer from overbreadth, sweeping into its ambit far more protected speech that can be justified by the amount of campaign-related speech it reaches. We continue to believe, as stated in those comments, that these competing concerns are best reconciled by setting a 120-day bright line under the content test which can serve as a safe-harbor for the risk-averse, but also instituting carve-outs within that 120-day period for communications that are demonstrably not election-related.

The Court in *Shays v. FEC*, 76 F.3d 76, directed the Commission's inquiry to the question, "Do candidates in fact limit campaign-related advocacy to the four months surrounding elections, or does substantial election-related communication occur outside that window?" *Id* at 102. The data licensed from TNS in connection with this SNPRM certainly demonstrates dramatically that at least for the broadcast media covered by the data, the portion of candidate communications made outside the 120-day window is tiny. Indeed, for both House and Senate the data might support an even shorter time frame. For Senate races, approximately one-half of one percent of media spots ran outside the 120-day mark, and over 90% were within a 60-day window. For House races, less than 3% of all media spots ran outside the 120-day window, and 90 days captures more than 90% of all of them.

The Presidential race itself is significantly more complicated, and the associated data is correspondingly challenging to interpret. Certainly from graph P1 it is evident that a significant number of advertisements ran many hundreds of days before the general election. However, the majority of those would have been captured by a 120 day rule if directed to the electorate in the jurisdictions with the earliest caucuses and primaries. Certainly it must be the case that the ads run by Democratic candidates in the days before the first primaries were not directed to or intended to influence the general election, as there was a real contest among a number of candidates for the party's nomination. A comparison of the charts depicting ads run by Democratic and Republican candidates supports the conclusion the ads run more than 240 days before the general election were in connection with the primary campaign. Similarly, chart P9 indicates that general election advertising (which we can expect to be directed to battleground states) did not occur at all more than 240 days before the election. Since the 120-day rule is triggered by both conventions and elections, only those spots running more than 219 days before the election would not be captured. Charts P9 and P7 indicate that well over 90% of the Presidential candidates' advertising occurred in the time period covered by the current content rule.

As the *Shays* appellate court noted, the *McConnell* court looked at the pattern of advertising of candidates to extract criteria that could be used to conclude that communications by outside groups were campaign-related. *Shays* at 100. A rule that captures well over 90% of media spots in all races, and over 97% of them in races other than the Presidential, bears a reasonable correlation to actual candidate behavior. It should be sufficient to support a presumption that speech in that time period is made "in connection" with a federal election, and that outside of it is not. It is not an absolutely perfect line, but more than 120 days seems demonstrably to be "the period before an election when non-express advocacy likely relates to purposes other than "influencing" a federal election. *Id.* at 101. Of course, it is unfortunate that the only data available pertain solely to purchased broadcast advertising and not other "public communications" covered by the Commission's rules. However, absent any reason to conclude that non-broadcast communications beyond the 120-day window are more likely than broadcast ads to be "in connection with" an election, the Commission should be justified in drawing its conclusions about all communication media based on the subset for which data is available.

Sincerely,

/s/ *Elizabeth Kingsley*
Elizabeth Kingsley