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September 17, 2012

Mr. Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

2012 SEP 21 PM 1:35

OFFICE OF GENERAL COUNSEL

FEDERAL ELECTION COMMISSION

RE: Advisory Opinion Request of Messrs. John Raese and Sean Bielat, and the Tea Party Leadership Fund

Dear Mr. Herman:

Pursuant to 2 U.S.C. 437f(a)(2), Mr. John Raese, Mr. Sean Bielat and the Tea Party Leadership Fund formally request an Advisory Opinion from the Federal Election Commission ("Commission") within twenty (20) days. The Tea Party Leadership Fund, a non-connected political action committee, seeks to make contributions to Mr. Raese and Mr. Bielat, and they wish to accept such contributions, totaling $5,000 each, but the Tea Party Leadership Fund and it's thousands of grassroots donors are unconstitutionally prevented from exercising their speech and associational rights by an arcane statute enforced by the Commission.

Multicandidate committees may make contributions to candidates of up to $5,000 per election, 2 U.S.C. § 441a(a)(2)(A), which is greater than the $2,500 per election permitted to committees who have not attained multicandidate committee status. *See* 2 U.S.C. § 441a(a)(1)(A). Section 441a(a)(4) defines "multicandidate committee" as a political committee which has been "registered...for a period of not less than six months, has received contributions from more than 50 persons [and] made contributions to 5 or more candidates for Federal office."

Mr. John Raese is the 2012 Republican candidate for the United States Senate from West Virginia. As a challenger, he is interested in associating politically with like-minded contributors to the full extent of the law. Similarly, Mr. Sean Bielat is the 2012 Republican challenger for the House of Representatives from Massachusetts' Fourth congressional district. He is equally interested in associating politically with like-minded contributors to the full extent of the law.

The Tea Party Leadership Fund is a non-connected Hybrid PAC (FEC ID # C00520825) whose registration with the Commission was filed on May 9, 2012. It has made contributions to 7 candidates and received contributions from at least 4500 persons to its contribution account and contributions from more than 70 persons to its *Carey* account. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). The Tea Party Leadership Fund has already contributed $2,500 each to Mr. Raese and Mr. Bielat, and to 5 other federal candidates, and wishes to contribute an additional $2,500 each to Mr. Raese and Mr. Bielat, as well as to other candidates in amounts approaching $5,000 per election, and wonders whether it must wait six months to do so. *See* 2 U.S.C. § 441a(a)(2)(A).

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Questions Presented

1. *May Tea Party Leadership Fund make contributions to candidates of up to $5,000 per election before the six-month waiting period of 2 U.S.C § 441a(a)(4)has run?*

2. *May Messrs. Raese and Bielat accept contributions above $2500, but not exceeding $5000, per election from TPLF before the six-month waiting period has run?*

Discussion

The Act's contribution limits "operate in an area of the most fundamental First Amendment activities" and the protections provided by that "'constitutional guarantee ha[ve their] fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo,* 424 U.S. 1, 14-15 (internal citations omitted). It is equally true that the First Amendment protects political association and "[g]overnmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449, 461-62 (1958).

In 1974, Congress defined the term "'political committee' [to] mean[] an organization registered as a political committee under section 303 of the Federal Election Campaign Act of 1971 for a period of not less than 6 months, which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." Federal Election Campaign Act Amendments of 1974, § 101(b)(2), Pub. L. 93-443, 88 Stat. 1263, 1275-76 (Oct. 15, 1974).

At that time, no individual could make a contribution in excess of $1,000 to any candidate per election, and there was an aggregate contribution limit to any and all candidates and political committees of $25,000 per calendar year. *Id.* at 1276, § 101(b)(3). The 1974 Amendments also instituted a $5,000 contribution limit per candidate per election for PACs and party committees, with no aggregate limit on the amount PACs and party committees could contribute to all candidates. *Id.* at 1275; § 101 (b)(2).

The *Buckley* Court reviewed the six-month waiting period in 1975, issuing its opinion in early 1976. 424 U.S. 1 (1976).

> Section 608(b)(2) permits certain committees, designated as "political committees," to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee under 2 U.S.C. § 433 (1970 ed., Supp. IV) for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office.

424 U.S. at 35. The Court held that the six-month limit exists to prevent circumvention of the base contribution limit to candidates:

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> Appellants argue that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of *bona fide* groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of *preventing individuals from evading the applicable contribution limitations by labeling themselves committees.*

424 U. S. at 35-36 (emphasis added).

In 1976, however, as a response to the Court's opinion in *Buckley v. Valeo*, Congress enacted *additional* contribution limits. The 1976 Amendments to the Act prohibited individuals from contributing more than $5,000 to a PAC and limited multicandidate committees to contributing $15,000 per year to a national party committee. Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). What is more, the Amendments enacted the so-called nonproliferation provisions, a prophylactic to prevent circumvention of the base contribution limits under federal campaign law. *Id.* All PACs sponsored by the same organization would be treated as "affiliated" and held to a single contribution limit. *Id.*

The 1976 Amendments had a profound effect by preventing wealthy contributors from funneling, short of illegal earmarking, candidate contributions above the base limits Congress had already determined pose no cognizable threat of corruption. *See generally* 2 U.S.C. §§ 441a(a)(1) and (2).

The six-month waiting period enacted in 1974 had, by 1977, become a "prophyla[ctic]-upon-prophylaxis," *see FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007), rendering it useless to the prevention of corruption or circumvention, and serving little purpose other than as an intolerable prior restraint.

Even if, as *Buckley* held, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," 424 U.S. at 21, under exacting scrutiny, there is a no-broader-than-necessary tailoring requirement. The controlling opinion in *California Medical Association v. FEC*, 453 U.S. 182 (1981) (*CalMed*), requires "that contributions to political committees can only be limited if those contributions implicate the governmental interest in preventing actual or potential corruption [of candidates], and if the limitation is no broader than necessary to achieve that interest." *Id.* at 263 (Blackmun, J., concurring in part and in the judgment). This reaffirms *Buckley's* requirement that "[a] restriction that is closely drawn must nonetheless 'avoid unnecessary abridgement of associational freedoms.'" *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. Apr. 16, 2012) (quoting *Buckley v. Valeo*, 424 U.S. at 25).

The six-month waiting period is no longer closely drawn to prevent actual or potential corruption after Congress' enactment of the 1976 Amendments. Indeed, it has become little more than an intolerable prior restraint.

The United States Supreme Court has made clear that prior restraints—laws requiring permits, licenses, waiting periods or other official permission to speak—are particularly suspect. "Any system of

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prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). While a political committee is not required to obtain a permit or license, the waiting period of 2 U.S.C. § 441a(4)(a) is functionally and legally identical to licensing laws in that they delay proposed speech activity while the speaker jumps through bureaucratic hoops.

In *Thomas v. Collins*, the Supreme Court stated that "[a]s a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and assembly." 323 U.S. 516, 539 (1945). The Court applied this principle in a recent case, holding that even purely ministerial restrictions may not be imposed as a precondition to speech. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). In *Watchtower Bible*, the Court considered a town ordinance that required door-to-door canvassers to register and obtain a permit before calling on residents at their homes. *Id.* at 165. The law was challenged by a Jehovah's Witness group that planned to distribute pamphlets. While noting that the ordinance was generally applicable, the Court found its application to religious and political causes problematic. *Id.* at 165. Thus, even though the permits were free and had apparently never been refused, the Court struck down the requirement as a prior restraint. The Court stated: "Even if the issuance of permits...is a ministerial task...a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Id.* at 165-66. The Court made special note of the fact that a registration requirement bans spontaneous speech.

Registering with the Commission and waiting for six months to pass before a political committee can contribute $5,000 per election to a candidate is a prior restraint that does nothing to prevent corruption. In this particular instance, Tea Party Leadership Fund has thousands of mostly small dollar donors and an average contribution of less than $40, and only 5 contributions of $1,000. The six month period will have run mere days after the election, forever depriving the requestors and the thousands of individuals who contribute to the Tea Party Leadership Fund their right to association and speech.

It is true under federal law that only after a group of individuals accepts or spends $1,000 and demonstrates a major purpose of campaign activity, *see Buckley*, 424 U.S. at 79, must the group register with the Commission, and they have ten days after crossing the threshold to do so. 11 CFR 102.1(d). But the requirement that a political committee register with the Commission and be required to wait an additional six months to make a $5,000 contribution to a candidate is a prior restraint on speech unjustified by a important or compelling government interest when the group has amply established (by receiving contributions from vastly more than 50 persons and making contributions to more than 5 candidates) that it is indeed a committee making contributions on behalf of a great many persons.

Thomas and *Watchtower Bible* illustrate that simply requiring registration with the State before making a meaningful contribution is an unconstitutional prior restraint, in part because it burdens "spontaneous speech." *Cf. Watchtower Bible*, 536 U.S. at 167. The Supreme Court struck the registration requirement in *Watchtower Bible*, despite acknowledging that it was generally applicable and seemed to be directed at preventing fraud.

What is more, the Commission should have no concern in allowing the Tea Party Leadership Fund to contribute to candidates in the non-corrupting amounts available to any multicandidate

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committee. To paraphrase the Supreme Court in *Davis v. FEC*, "[G]iven Congress' judgment that liberalized limits for [multicandidate committees] do not unduly imperil anticorruption interests, it is hard to imagine how the denial of liberalized limits to [groups who have yet to wait six months] can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden." *Davis v. FEC*, 554 U.S. 724, 741 (2008).

Conclusion

Thank you for the opportunity to present these questions. We look forward to your timely reply.

Respectfully submitted,

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