July 22, 2013

Comment on AOR 2013-09

By Electronic Mail

Lisa J. Stevenson
Deputy General Counsel, Law
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2013-09 (Special Operations Speaks PAC and Col. Robert L. Maness)

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2013-09, a request submitted on behalf of Special Operations Speaks PAC ("SOS") and Col. Robert L. Maness, a candidate for U.S. Senate. Notwithstanding the fact that SOS has not met the "made contributions to 5 or more candidates for Federal office" requirement for "multicandidate political committee" status under 2 U.S.C. § 441a(a)(4), requestors ask the Commission whether SOS may make, and whether Col. Meness may accept, a contribution exceeding the $2,500 limit applicable to non-multicandidate political committees, up to the $5,000 limit applicable to multicandidate political committees. AOR 2013-09 at 1.

Requestors acknowledge that the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976), "reviewed the requirements for multicandidate committees" and upheld the requirements as a constitutionally permissible means to "prevent individuals from circumventing base contribution limits[.]" AOR 2013-09 at 3-4 (quoting *Buckley*, 424 U.S. at 35-36). Nevertheless, requestors argue that the statutory "five-candidate requirement is unconstitutional both facially and as applied to SOS." AOR 2013-09 at 5. Requestors imply that the Commission should conclude that the five-candidate requirement is unconstitutional and, on this basis, issue an advisory opinion declaring the statutory requirement unconstitutional and promising not to enforce it.

Advisory opinions are for the purpose of addressing questions "concerning the application of the [Federal Election Campaign] Act," 11 C.F.R. § 112.1(a), not for declaring portions of the Act unconstitutional. Federal law is clear here and the Commission has no authority to declare this statutory five-candidate requirement unconstitutional. It is well-settled law that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)); *see also Weinberger v. Salfi*,

422 U.S. 749, 764 (1975). As the Court of Appeals for the D.C. Circuit said in *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), an "agency may be influenced by constitutional considerations in the way it interprets . . . statutes [but] it does not have jurisdiction to declare statutes unconstitutional." *Id.* at 47. The request made here to do so is particularly remarkable given that the Supreme Court in *Buckley* directly addressed and specifically upheld the provision at issue. Requestors cite no authority that would authorize the Commission to declare a statutory provision unconstitutional and unenforceable.

Furthermore, requestors' argument that the five-candidate requirement impermissibly burdens their First Amendment speech and associational freedoms is wholly without merit. SOS has already contributed $2,600 to Col. Maness. AOR 2013-09 at 1. SOS has freely associated with and expressed its support of Col. Maness. The five-candidate requirement for multicandidate political committee status has not operated as an unconstitutional restraint on First Amendment activity. As the *Buckley* Court explained:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views . . . . <u>The quantity of communication by the contributor does not increase perceptibly with the size of his contribution</u>, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but <u>does not in any way infringe the contributor's freedom to discuss candidates and issues</u>.

Buckley, 424 U.S. at 20-21 (emphasis added).

Through its contribution of $2,600 to Col. Maness, SOS already has associated with and expressed its support of Col. Maness. Contributing an additional $2,400 to Col. Maness would "not increase perceptibly" SOS's association with and support of Col. Maness, and the five-candidate requirement "does not in any way infringe [SOS's] freedom to discuss candidates and issues." *Buckley*, 424 at 21.

The Commission has no choice in this matter but to opine that the five-candidate requirement for multicandidate political committee status established by section 441a(a)(4) remains in full force and effect—and that if requestors make and accept contributions exceeding $2,600 before meeting all of the statutory requirements for multicandidate political committee status, they will violate federal law. The Commission cannot decide the law is unconstitutional. Indeed, the Commission's obligation is to <u>defend</u> the constitutionality of campaign finance laws enacted by Congress. When requestors file the inevitable lawsuit for which this AOR is the obvious predicate, the Commission must meet requestors in court and defend the law once again.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

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