October 27, 2015

By Electronic Mail

Daniel A. Petalas
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2015-09 (Senate Majority PAC and House Majority PAC)

Dear Mr. Petalas:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request (AOR) 2015-09. The request, submitted on behalf of Senate Majority PAC and House Majority PAC, two independent expenditure-only political committees (a.k.a. Super PACs), seeks an advisory opinion regarding twelve questions pertaining to the interaction between Super PACs, prospective federal candidates and actual federal candidates. The first set of questions "involves so-called 'pre-candidacy' activities between individuals contemplating federal candidacy and federal Super PACs. The second set delves into the type of conduct that triggers federal candidacy. Finally, the third set focuses on Super PAC activity once an individual has become a candidate for federal office." AOR 2015-09 at 1-2.

At the outset, we note that this is not a valid AOR. Under the Federal Election Campaign Act (FECA) and the Commission's regulations:

> The written advisory opinion request shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests."

11 C.F.R. § 112.1(b) (emphasis added); *see also* 52 U.S.C. § 30108(a) ("with respect to a specific transaction or activity by the person" requesting the opinion).

Despite the clear language of the regulation and statute, requestors have asked several general questions of interpretation, posing hypothetical situations regarding the activities of unnamed third parties. Much of the request seeks an advisory opinion on the legality of the activities of other unnamed groups and candidates—specifically, "potential candidates" that requestors refer to as "Senate Contender" and "House Contender," as well as "contemplated

Super PACs" that requestors refer to as "New Senate Super PAC" and "New House Super PAC." AOR 2015-09 at 4. Although the regulation requires the requestor of an advisory opinion to set forth a "specific transaction or activity" that it plans to undertake, requestors in this matter have described activities that hypothetical "potential candidates" and "contemplated Super PACs" would undertake.[1]

We also note that requestors submit their request apparently to obtain a negative answer, stating that they have "serious doubts about the permissibility" of activities they describe in the AOR—activities others have already engaged in during this election cycle. Requestors repeat, over and over, their belief that the activities they propose are illegal.[2]

Although the AOR is devoid of necessary facts, we agree with requestors that much of the activity they describe in the AOR is not permissible under the FECA and the Commission's regulations. However, we see this request as little more than political game playing. The requestors submit this AOR based on the knowledge that the Commission will likely split 3-3 on these questions—as it does on almost every significant question it addresses—and, therefore, that the Commission will neither approve nor disapprove the proposed activities. And the requestors

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[1] And the hypothetical nature of the request causes substantive problems in answering it. For example, requestors make no mention of the incumbency status of the "potential candidates" on whose behalf they pose questions. To the extent requestors pose questions regarding the "soft money" restrictions of 52 U.S.C. § 30125(e) with respect to "potential candidates," the Commission must make clear that these soft money restrictions apply not only to candidates, but also to any "individual holding Federal office." Consequently, under no circumstances is an incumbent federal officeholder permitted to engage in the soft money-related activities described in the AOR, whether or not that incumbent is also a candidate. This illustrates the difficulty of answering the hypothetical questions posed in the AOR.

[2] *See* AOR 2015-09 at 4 ("The PACs have serious doubts about the permissibility of many of these activities."); AOR 2015-09 at 4 ("As noted above, SMP and HMP have serious doubts about the permissibility of what the Republican candidates have done this cycle…."); AOR 2015-09 at 5 ("To date, however, SMP and HMP have not adopted this model because of serious doubts about its legality under federal law and the risk of civil and criminal enforcement."); AOR 2015-09 at 5-6 ("SMP and HMP presume that contemplated activities would amount to impermissible 'establishment' and 'control' of a soft money entity if they took place after the individual became a candidate. … [F]ederal law appears to contemplate—and prohibit—exactly this scenario…."); AOR 2015-09 at 7 ("Creating a broad exception from the regulation for pre-candidacy activities would be inconsistent with the regulatory scheme…."); AOR 2015-09 at 7 ("Again, SMP and HMP have serious concerns about the permissibility of this activity."); AOR 2015-09 at 8 ("SMP and HMP believe that such conduct is not permissible under federal law."); AOR 2015-09 at 8 ("This language would appear to prohibit a 527 organization from using soft money to pay for 'testing-the-waters' expenses. However, if that activity is now permitted, SMP and HMP would consider following suit."); AOR 2015-09 at 9 ("This election cycle, many individuals have pushed the 'testing-the-waters' exemption well beyond what was previously understood to be permissible.").

indicate that in the likely event of a deadlock, they will engage in the proposed conduct even though they think the conduct is illegal.

Requestors write, for example, that although they "have serious doubts about the permissibility" of prospective candidate involvement in the creation of a single-candidate Super PAC to support that individual's candidacy, they will nevertheless engage in such activities "if the FEC does not disapprove of the practice" because they are "unwilling to cede strategic advantages to their competitors." AOR 2015-09 at 4. In other words, requestors state that they are planning to engage in activities they believe are illegal if the Commission deadlocks and consequently does not issue an opinion confirming requestors' belief that the activities are illegal.

Thus, the game here is to entice the Commission into a deadlock vote and then take advantage of the deadlock by engaging in the admittedly illegal activities. Requestors thus seek to have their cake—taking the public position that these soft money activities are illegal—but then to eat it too—by claiming a right to engage in such activities based on the Commission's likely failure to provide guidance. The Commission should not indulge this artifice.

In any event, the requestors are wrong in their suppositions about the effect of a deadlocked vote. If the Commission splits 3-3 on an advisory opinion vote, the requestors (and others who might rely on the AOR) are not given any "safe harbor" from potential enforcement actions for activities discussed in the AOR. *See Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 419 (E.D. Va. 2012) ("the FEC has reached no conclusion and has declined to issue a safe harbor ruling covering the advertisements"). To be perfectly clear, if the Commission deadlocks, individuals engaged in the activity described in this AOR are still subject to enforcement actions and punishment.

And if there is a deadlock vote, and if requestors or their agents engage in the activities that they themselves describe in this AOR as illegal, their violations will then be knowing and willful. Given the woefully small chance that the Commission will shoulder its responsibility to enforce the law, we will not hesitate to bring such knowing and willful violations to the attention of the Department of Justice (DOJ) for investigation and potential criminal prosecution.

Requestors' Questions

Requestors begin by noting that in the "2016 election cycle, there have been significant changes in the relationship between Super PACs and individuals who are not yet federal candidates, but later become candidates under the law." AOR 2015-09 at 2 (emphasis added). "These changes have centered," requestors explain, "on various individuals delaying considering themselves as candidates … while they establish, solicit funds for, and coordinate on strategy with Super PACs that have agreed to support the individual's potential candidacy." *Id*. (emphasis added).

Requestors go on to summarize a variety of activities by Jeb Bush, Scott Walker and others during the first half of this year—activities engaged in before these individuals publicly acknowledged that they were running for President (e.g., setting up a Super PAC and arming it

with information about "his eventual campaign's plans," filming interviews and other footage for use by Super PACs in future ads supporting "the individuals' future candidacies," etc.). AOR 2015-09 at 2-3. Requestors pose four questions related to such "pre-candidacy" activities, followed by five "candidacy trigger" questions and, finally, two "post-candidacy" questions.

The Campaign Legal Center and Democracy 21 forcefully disagree with the premise of requestors' "pre-candidacy" questions: that Jeb Bush, Scott Walker and others were "individuals who [were] not yet federal candidates" when they engaged in the activities described in the AOR. AOR 2015-09 at 2. In March we filed complaints with the Commission alleging that Bush and Walker, as well as Rick Santorum, were candidates at the time they set up Super PACs, 527 entities and other groups, raised unlimited contributions for these groups, filmed footage to be used in future ads supporting these candidates, etc.[3]

In May we filed a complaint with the Commission (and also with the Department of Justice) against Bush and Right to Rise Super PAC, alleging that Bush and Right to Rise Super PAC violated 52 U.S.C. § 30125(e), which prohibits a candidate, and any "entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a candidate, from raising and spending funds that do not comply with federal contribution limits and source prohibitions, *i.e.*, soft money.[4]

Given that requestors allude to Bush, Walker and others as "individuals who [were] not yet federal candidates," AOR 2015-09 at 2, we assume that the requestors are referring to the activities undertaken by Bush and Walker as the type of activities that would not otherwise make them candidates for purposes of the "pre-candidacy" questions presented in the AOR.

But requestors are stating a premise that is false—or at least, one that the Commission should not accept, pending its disposition of the complaints before it asserting that the very types of activities set forth in the AOR are candidate activities, not "pre-candidacy" activities. The Commission should not be lulled into pre-judging those complaints by accepting the requestors' very controversial assumptions about the legal character of the activities described. This

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[3] *Campaign Legal Center and Democracy 21 v. John Ellis "Jeb" Bush* (FEC) (filed Mar. 31, 2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Jeb%20Bush_Complaint_3.31.15.pdf; *Campaign Legal Center and Democracy 21 v. Richard John "Rick" Santorum* (FEC) (filed Mar. 31, 2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Rick%20Santorum_Complaint_3.31.15.pdf; *Campaign Legal Center and Democracy 21 v. Governor Scott Walker* (FEC) (filed Mar. 31, 2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Scott%20Walker_Complaint_3.31.15.pdf.

[4] *Campaign Legal Center and Democracy 21 v. John Ellis "Jeb" Bush and Right to Rise Super PAC* (FEC) (filed May 27, 2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/2015-05-27%20Bush%20Super%20PAC%20Complaint_FINAL.date-stamped.pdf.

highlights precisely why FECA and the Commission's corresponding regulation do not permit AORs based on the activities of hypothetical third parties.

Nevertheless, to the extent requestors conclude that the activities they propose in Question 1 would be impermissible, we agree for the reasons detailed in our May complaint against Bush and Right to Rise Super PAC, as well as for the reasons underlying the Commission's AOs cited by requestors in footnote 17 of the AOR,[5] and for the reasons underlying the two-year cooling off period established by 11 C.F.R. § 300.2(c)(4)(ii), cited by requestors in footnote 18 of the AOR.[6]

Similarly, to the extent requestors conclude that the activities they propose in Questions 2 and 3 would be impermissible, we agree for the reasons detailed in our May complaint against Bush and Right to Rise Super PAC, as well as for reasons articulated by requestors, including that "[c]reating a broad exception from the [coordination] regulation for pre-candidacy activities would be inconsistent with the regulatory scheme—allowing individuals contemplating candidacy to finance their activities with funds that do not comply with federal source restrictions or contribution limits.…" AOR 2015-09 at 7.

The laws and regulations relevant to Question 4, as well as the "candidacy trigger" questions, are detailed in the complaints filed with the Commission on March 31 by the Campaign Legal Center and Democracy 21 against Bush, Walker, Santorum and also Martin O'Malley,[7] as well as in the white paper published by the Campaign Legal Center in February,

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[5] Requestors explain:

> The FEC's guidance to date has given SMP and HMP serious pause about this argument. In advisory opinions addressing nonfederal committees of newly-elected federal officeholders, the FEC has assumed that these entities were "established" by a federal candidate for purposes of the soft money ban—even though that establishment occurred well before the individual had become a federal candidate.

AOR 2015-09 at 5 & n.17 (citing AO 2007-01 (McCaskill), AO 2009-06 (Risch)).

[6] Requestors explain:

> Moreover, federal law appears to contemplate—and prohibit—exactly this scenario, where an individual establishes as organization and then wishes to relinquish control of it to avoid the soft money ban. To prevent such circumvention, the law imposes a two-year cooling-off period before such an entity can raise or spend soft money.

AOR 2015-09 at 5 & n.18 (citing 11 C.F.R. § 300.2(c)(4)(ii)).

[7] *See* complaints cited *supra* note 3 and *Campaign Legal Center and Democracy 21 v. Martin O'Malley* (FEC) (filed Mar. 31, 2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/CLC%20%20D21%20v.%20Martin%20O%27Malley_Complaint_3.31.15.pdf

entitled *Testing the Waters and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way*.[8]

As requestors acknowledge, federal law clearly prohibits the use of "soft money" to pay for "testing the waters" activities, *see* 11 C.F.R. § 100.72, and an individual who has made a private determination to run for office is clearly a candidate under the law. *See, e.g.*, AO 1981-32 (Askew). The Commission has emphasized that the "factual context" of activities matters. Where factual context indicates that an individual has "moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities designed to heighten his political appeal to the electorate," then the activity would cease to be within the "testing the waters" exemption, and "candidacy would arise." AO 1981-32 at 5.

The "candidacy trigger" questions posed in the AOR, regarding hypothetical prospective candidates, lack the factual context necessary for the Commission to answer in a meaningful way. Instead, the "potential candidates" that requestors refer to as "Senate Contender" and "House Contender" should seek advisory opinions from the Commission regarding their planned activities—as was done throughout the 1980s by individuals seeking clarification regarding activities constituting "testing the waters" and potentially triggering candidate status. *See, e.g.*, AO 1981-32 (Askew), AO 1982-03 (Cranston); AO 1985-40 (Baker / Republican Majority Fund); AO 1986-06 (George H.W. Bush / Fund for America's Future).

Conclusion

For the reasons detailed above and in FEC complaints filed by the Campaign Legal Center and Democracy 21, and as the requestors have stated in their AOR, the proposed activities are illegal and should be found illegal if this was a proper AOR. However, since this is not a proper AOR, the Campaign Legal Center and Democracy 21 respectfully urge the Commission to reject requestors' submission as an invalid AOR because it asks general questions of interpretation, posing hypothetical situations, and regards the activities of unnamed third parties.

We appreciate the opportunity to submit these comments.

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[8] Paul S. Ryan, The Campaign Legal Center, *Testing the Waters and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way* (2015), *available at* http://www.campaignlegalcenter.org/sites/default/files/Testing%20the%20Waters%20and%20the%20Big%20Lie_FINAL_2.19.15%20%2528typo%20corrected%208.7.15%2529.pdf.

Sincerely,

/s/ J. Gerald Hebert */s/ Fred Wertheimer*

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