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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 18-34-A
AGENDA ITEM
For meeting of June 28, 2018

June 21, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: AO 2018-09 (Clements) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on June 27, 2018.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2018-09

2

3 Paul Clements
4 Clements for Congress
5 2517 Broadway Avenue
6 Kalamazoo, Michigan 49008

DRAFT A

7

8 Dear Mr. Clements:

9 We are responding to your advisory opinion request on behalf of your principal campaign
10 committee, Clements for Congress (the “Committee”), concerning the application of the Federal
11 Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to your
12 proposed use of campaign funds to pay for legal expenses incurred in seeking to gain access to
13 the ballot in an upcoming congressional election. The Commission concludes that the
14 Committee may use campaign funds to pay for such legal expenses because the expenses would
15 not exist irrespective of your candidacy.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on June 5,
18 2018, and the supplemental information you provided on June 14, 2018 (collectively “advisory
19 opinion request” or “AOR”).

20 In July 2017, you registered as a candidate for the United States House of
21 Representatives in Michigan’s 6th Congressional District, and Clements for Congress is your
22 principal campaign committee.¹ As a candidate in a district comprising more than one county,
23 you were required under Michigan state law to obtain a minimum of 1,000 signatures on your

¹ Commission records indicate that you filed your Statement of Candidacy on July 7, 2017, and that Clements for Congress filed its Statement of Organization on July 17, 2017. See Clements, Paul, Statement of Candidacy, FEC Form 2 (July 7, 2017), <http://docquery.fec.gov/pdf/034/201707070300161034/201707070300161034.pdf>; Clements for Congress, Statement of Organization, FEC Form 1 (July 17, 2017), <http://docquery.fec.gov/pdf/391/201707170300163391/201707170300163391.pdf>.

1 nominating petition, and to file the signed petition with the State Bureau of Elections no later
2 than the 15th Tuesday before the August primary, *i.e.*, by April 24, 2018. AOR003; *see* Mich.
3 Comp. Laws §§ 168.133, 168.544f.² After you filed your nominating petition and signatures, the
4 State Bureau of Elections found that your petition contained only 991 valid signatures.
5 AOR001; *see* Review of Nominating Petition, State of Michigan, Ruth Johnson, Secretary of
6 State, Department of State, Bureau of Elections (May 30, 2018), [https://www.michigan.gov/
7 documents/sos/Staff_Report_-_Clements_624241_7.pdf](https://www.michigan.gov/documents/sos/Staff_Report_-_Clements_624241_7.pdf). You state that at a June 1, 2018
8 hearing on a challenge to the sufficiency of your nominating petition, the Michigan Board of
9 State Canvassers determined that your petition lacked sufficient signatures. AOR001. As a
10 result, you are not currently permitted to appear on the ballot for the congressional primary
11 scheduled for August 7, 2018. *Id.* You have hired legal counsel “to examine the legal questions
12 involved and to prepare pleadings to reverse” the state Board of Canvassers’ decision. AOR002.

13 ***Question Presented***

14 *May campaign funds be used to pay for the legal expenses incurred in seeking to obtain*
15 *access to the ballot for the August 7, 2018 primary election?*

16 ***Legal Analysis and Conclusions***

17 Yes, the Committee may use campaign funds to pay for the above-described legal
18 expenses because such expenses would not exist irrespective of your campaign for federal office.

² Guidance from the Michigan Department of State indicates that Michigan’s 6th Congressional District is a multi-county district. *See* Filing Requirements: U.S. Representatives in Congress, [https://www.michigan.gov/
documents/sos/Filing_Req_for_US_Rep_428517_7.pdf](https://www.michigan.gov/documents/sos/Filing_Req_for_US_Rep_428517_7.pdf). That guidance also confirms that you were required under Michigan law to file a nominating petition containing at least 1,000 signatures with the Michigan Bureau of Elections by April 24, 2018. *Id.*

1 The Act and Commission regulations permit a candidate to use campaign funds for a
2 variety of specific purposes, as well as “any other lawful purpose” that does not constitute
3 conversion of campaign funds to “personal use.” 52 U.S.C. § 30114(a)-(b); 11 C.F.R.
4 §§ 113.1(g), 113.2. Conversion to personal use occurs when campaign funds are used “to fulfill
5 any commitment, obligation, or expense of a person that would exist irrespective of the
6 candidate’s election campaign or individual’s duties as a holder of [f]ederal office.” 52 U.S.C.
7 § 30114(b)(2); *see* 11 C.F.R. § 113.1(g).

8 The Act and Commission regulations provide a non-exhaustive list of uses of campaign
9 funds that are *per se* personal use, none of which applies to the circumstances here. *See* 52
10 U.S.C. § 30114(b)(2)(A)-(I); 11 C.F.R. § 113.1(g)(1)(i)(A)-(J). For uses of campaign funds not
11 included on this list, such as payments for legal expenses, the Commission determines on a case-
12 by-case basis whether the use is a prohibited “personal use,” *i.e.*, whether the expenses would
13 exist irrespective of the candidate’s campaign or federal officeholder duties. 11 C.F.R.
14 § 113.1(g)(1)(ii)(A). The Commission has long recognized that if a candidate “can reasonably
15 show that the expenses at issue resulted from campaign or officeholder activities, the
16 Commission will not consider the use to be personal use.” Personal Use of Campaign Funds, 60
17 Fed. Reg. 7862, 7867 (Feb. 9, 1995).

18 The Commission has considered the use of campaign funds to pay for legal expenses on
19 multiple occasions, and has explained that “campaign funds may be used to pay for legal
20 expenses incurred in proceedings that directly relate to the candidate’s campaign activities or
21 officeholder duties.” Advisory Opinion 2013-11 (Citizens for Joe Miller) at 3 (concluding that
22 legal expenses incurred in lawsuit by media outlets seeking to obtain information relevant to
23 candidacy directly related to candidacy); *see, e.g.*, Advisory Opinion 2011-07 (Chuck

1 Fleischmann for Congress) (approving use of campaign funds to pay for legal expenses of
2 campaign consultant in connection with alleged conduct regarding his role in creating campaign
3 ad); Advisory Opinion 2009-20 (Visclosky for Congress) (approving use of campaign funds to
4 pay for legal expenses of congressional staffers relating to illegal campaign contributions).³

5 Here, you describe legal expenses that you are incurring in an attempt to gain ballot
6 access for the primary election in which you are a candidate; such legal expenses are directly
7 related to your campaign and would not exist irrespective of your candidacy. Accordingly, the
8 Commission concludes that the Committee's use of campaign funds to pay for such expenses
9 would not result in an impermissible conversion of campaign funds to personal use.

10 This response constitutes an advisory opinion concerning the application of the Act and
11 Commission regulations to the specific transaction or activity set forth in your request.

12 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts
13 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
14 this advisory opinion, then the requestors may not rely on that conclusion as support for its
15 proposed activity. Any person involved in any specific transaction or activity which is
16 indistinguishable in all its material aspects from the transaction or activity with respect to which
17 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
18 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
19 affected by subsequent developments in the law including, but not limited to, statutes,

³ The Commission has not previously considered the precise question presented here of whether a candidate's legal expenses related to seeking ballot access would exist irrespective of the candidate's campaign for federal office. The Commission has, however, considered the distinct question of whether funds used to pay for a candidate's legal expenses related to a dispute over ballot access amount to "contributions" or "expenditures" under the Act. Advisory Opinion 1996-39 (Heintz for Congress). And in the context of answering that separate question (in the negative), the Commission observed that obtaining ballot access is "a condition precedent to the candidate's participation in the primary election." *Id.* at 2 (quoting Advisory Opinion 1982-35 (Al Hopfman) at 2).

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
2 on the Commission's website.

3 On behalf of the Commission,

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Caroline C. Hunter
Chair