AOR 2011-21

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October 17, 2011

By Hand Delivery
Anthony Herman, Esq., General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20013



**Re: Constitutional Conservatives Fund PAC (CCF) Advisory Opinion Request**

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437f, Constitutional Conservatives Fund PAC requests an Advisory Opinion from the Federal Election Commission regarding the applicability of limitations on accepting contributions of greater than $5000 from individuals, corporations, and unions by certain non-connected Committees for use in conducting Independent Expenditures.

## I. INTRODUCTION

Constitutional Conservatives Fund PAC ("CCF") is a leadership PAC registered with the FEC. CCF's honorary Chairman is United States Senator Michael Shumway Lee of Utah (the associated candidate). CCF plans to accept contributions for the purpose of making Independent Expenditures, and to segregate those funds in a separate bank account, a "non-contribution account", from other contributions accepted for the purpose of making direct campaign contributions to candidates' committees. CCF will use these segregated Independent Expenditure funds to expressly call for the election or defeat of clearly identified federal candidates, other than Senator Lee. Candidates benefiting from such Independent Expenditure

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will be entirely removed from the process of accepting such contributions and any resulting Independent Expenditure will not be coordinated, as that term is used at 11 CFR § 109.21, with that candidate, or the candidates authorized campaign committee, or agents.

## II. BACKGROUND

CCF is a non-connected political action committee dedicated to identifying and supporting conservative candidates who are committed to the cause of restoring constitutionally limited government and who understand that the federal government has become too big, too expensive, and too intrusive as Congress has ignored important constitutional limitations on its own power.

## III. DISCUSSION

Like other non-connected Political Action Committees, leadership PAC's are entitled to constitutional protections when accepting contributions not subject to the limitations at 2 USC § 441(a) from any individual, corporation, or union for the purpose of conducting Independent Expenditures. Recent decisions by the Supreme Court in *Citizens United v. FEC*, the U.S. Court of Appeals for the District of Columbia in *SpeechNow v. FEC* and most recently by the U.S. District Court for the District of Columbia in *Carey v FEC* have reiterated that "independent expenditures do not create a risk of *quid pro quo* corruption or appearance of corruption." *Citizens United*, 130 S.Ct. 876, 909 (2010); *see SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C.Cir. 2010); *see Carey v FEC.*

Independent Expenditures are expenditures "expressly advocating the election or defeat of a clearly identified candidate." 2 USC § 431(17)(A). These expenditures cannot be made in

"concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 USC § 431(17)(B). On its face, this prohibition does not include other candidates for Federal office or officeholders unless acting in such a capacity for the beneficiary candidate. Association with a leadership PAC, itself not associated with the candidate on whose behalf an Independent Expenditure will be made, would not meet this test.

Independent expenditures are considered "speech" within the meaning and protections of the First Amendment. In *Buckley v. Valeo*, the Court held that "expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). A limit on such expenditures affects "political expression at the core of our electoral process and of the First Amendment freedoms" and can only be justified in the face of a compelling government interest such as corruption or the appearance thereof. *Id.* at 39, 45-48. The Court found that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. *Id.* at 39, 47-48.

The Supreme Court expressly held that "[l]aws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S.Ct. at 898. Consequently, in *SpeechNow v. FEC* the Court of Appeals for the District of Columbia, in upholding the right of an Independent Expenditure-only PAC to accept source-(only) restricted

funds, held that "independent expenditures do not corrupt or give the appearance of corruption...as a matter of law." *SpeechNow,* 599 F.3d at 694. In AO 2010-11 (Commonsense Ten), the FEC held that non-connected political committees may ". . . accept unlimited contributions from individuals, political committees, corporations, and labor organizations." FEC Advisory Op. 2010-11, at 3 (July 22, 2010).

Most recently, in *Carey v FEC*, the US District Court for the District of Columbia expressly upheld in a Preliminary Injunction the right of a non-connected committees to engage in the very activity sought here.

> "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . . The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 130 S. Ct. at 898 (citations and quotations omitted). The public interest is supported by protecting the right to speak, both individually and collectively. Here, to protect Plaintiffs' right to engage in political speech through independent expenditure campaigning is fully in accord with the public's interest in free speech and association.

LEADERSHIP PAC AS A NON-CONNECTED COMMITTEE ENTITLED TO ACCEPT SOURCE RESTRICTED FUNDS FOR INDEPENDENT EXPENDITURE

A leadership PAC is a non-connected political committee that is "directly or indirectly established, financed, maintained or controlled" by a Federal candidate or office holder, but which is not authorized by the candidate or the office holder. 2 U.S.C. § 434(i)(8)(B). A leadership PAC's primary function is to support candidates of like mind and political inclination as the candidate or officeholder associated with the leadership PAC. This support, in practice, is

primarily given through direct contributions to other candidates' authorized committees or through Independent Expenditures on behalf of other candidates.

Like all other non-connected committees, leadership PAC's are subject to amount and source limitations on the funds they may accept, 2 USC § 441a(a)(1)(C), and may in turn contribute to other political committees, 2 USC § 441a(a)(2). A leadership PAC should, therefore, be able to make unlimited Independent Expenditures advocating the election or defeat of a clearly identified federal candidate. In the wake of *Citizens United*, *SpeechNow*, and *Carey v FEC,* amount and source limitations on contributions to non-connected committee Independent Expenditure activities are unconstitutional. Therefore, non-connected committees, including leadership PACs like CCF, may accept source-restricted, but not amount-restricted, contributions into a separate, segregated non-contribution account for the purpose of conducting Independent Expenditures, and from which no candidate contributions may be made.

NO RISK OF QUID PRO QUO CORRUPTION IN THE USE OF SUCH FUNDS

The only compelling government interest that the Court has found to justify limiting an individual or an entity's right to free speech has been the appearance of, or actual, *quid pro quo* political corruption. *See Citizens United*, 130 S.Ct. at 909. That has been strictly held to mean the exchange of dollars for political favors. *See Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985); *see Citizens United*, 130 S.Ct. at 909. However, by its independent nature, independent expenditures have been held not to constitute a risk of such *quid pro quo* corruption as a matter of law. *See SpeechNow*, 599 F.3d at 694.

CCF seeks to fully exercise its constitutional right to free speech by accepting source-restricted contributions for the purpose of making independent expenditures. Limiting its right to speak freely through such expenditures goes directly against the line of decisions holding that such expenditures, and the contributions that support them, cannot be limited based on the identity of the entity that engages in that activity. *See Citizens United*, 130 S.Ct. at 885. Restricting CCF's right to accept source-restricted contributions through 2 USC § 441i(e)(1), in the absence of a countervailing compelling government interest, would be unconstitutional and would have a chilling effect on CCF and its supporters right to free speech.

While the *McConnell* court held that 2 USC § 441i(e), prohibiting candidates or their authorized political committees from spending funds that are not subject to the limitations of the Act, was constitutional, it did so on the basis that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *McConnell v. Federal Election Commission*, 540 U.S. 93, 182 (2003). In this case, the candidate benefiting from the expenditure will not "receive, direct, transfer or spend" any funds, and will be entirely removed from the use or spending of any funds raised for the purpose of making an independent expenditure. Thus, contributions made to CCF will not be at the behest of that beneficiary candidate, or his authorized committee or agents.

*Quid pro quo* corruption can only exist between the party paying for or making the expenditure, and the party benefiting from that expenditure. The relationship between the political committee and the associated candidate is irrelevant to such analysis. In the case of

CCF, the associated candidate will not be a beneficiary of the Independent Expenditures. Consequently, because the associated candidate does not benefit and is not part of the potentially corrupting activity, and the beneficiary candidate is isolated entirely from any contributions made for the purpose of supporting that candidate, there can be no actual or apparent *quid pro quo* corruption. Additionally, because the funds received and expended for the purpose of conducting Independent Expenditures will be segregated into a non-contribution account pursuant to the Commissions guidance subsequent to *Carey v FEC*, there is no risk of the associated candidate using CCF as way of circumventing the amount and source restrictions of the Act by directing money to his own campaign, since all independent expenditures will be made for the benefit of other candidates.

APPLICATION OF 2 USC § 441i(e)

The BCRA, includes "entit[ies] directly or indirectly established, finance, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding federal office" in its restrictions on contributions found at 441i(e). 2 USC § 441i(e)(1). These entities are defined on the basis of a ten-factor test at 11 CFR § 300.2(c)(2) (i)-(x) as to the candidate associated with that leadership PAC, and may be indicative of limitations on that associated candidate's ability to solicit contributions for the leadership PAC, but not of the PACs freedom to call for the election, or defeat, of any clearly identified Federal candidate or to accept funds for that purpose. Preventing the leadership PAC itself - and those individuals other than the associated candidate who participate in it - from accepting contributions that have repeatedly been found constitutional and the product of lawful activity would violate the rights to free speech and free association of those individuals.

Funds contributed for the purpose of conducting independent expenditures, whether or not to a leadership PAC, are not beyond "the limitations, prohibitions and reporting requirements of the Act." 2 USC § 441i(e)(1)(A). The courts have repeatedly upheld both source restrictions and reporting requirements on any contribution, whether to be used for candidate contributions or independent expenditures. However, the courts have also repeatedly and expressly held that there can be no upper limit on then amount of funds contributed for the purpose of making independent expenditures. The Constitution simply does not permit the government to suppress free speech by restricting the right to make contributions for Independent Expenditures. To flatly prohibit otherwise lawful, constitutionally protected activity because it is beyond the grasp of a federal agency to regulate in one regard – though otherwise regulated within the permissible scope of the government's authority - is a patently absurd outcome. Funds contributed to any non-connected political action committee, including leadership PACs, for use in making Independent Expenditures are subject to those limits that the constitution allows be applied, and are not, therefore, the kind of "non-federal funds" prohibited under § 441i(e). Advisory Opinion 2011-12 DRAFT B (Agenda Document No. 11-37-A) spoke eloquently and directly to this point:

> "The Act's amount limitations may not be applied constitutionally to Majority PAC and House Majority PAC. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (*en banc*) ("*SpeechNow*"); *see also EMILY's List v. FEC*, 581 F.3d 1,10 (D.C. Cir. 2009). The Commission decided in Advisory Opinion 2010-11 (Commonsense Ten) that "there is no basis to limit the amount of contributions to [Majority PAC] from individuals, political committees . . . ." *See also* Advisory Opinion 2010-09 (Club for Growth). Because there is no longer an applicable amount limitation for contributions to these independent expenditure-only committees, Federal officeholders, candidates, and officers of national party

committees would not solicit funds contrary to the Act's amount limitations by soliciting unlimited funds for these independent expenditure-only committees. *(footnote below)*"

"The absence of an applicable amount limitation does not compel a determination that the funds at issue here are not Federal funds. First, such a reading would run contrary to other interpretations of the Act in the Commission's regulations. *See generally* 11 CFR 300.36(a) (recognizing that a State, district, or local committee of a political party must use Federal funds when conducting Federal election activity even though the committee may not be a political committee under 11 CFR 100.5 and therefore have no statutory reporting requirements with which to comply); 11 CFR 300.71 (recognizing that certain communications made by State and local candidates "that [refer] to a clearly identified candidate for Federal office" must be paid for with Federal funds despite the absence of any FEC reporting requirements associated with those funds). Moreover, using that absence of a limitation with which to comply to create a prohibition on the solicitation of those funds violates "the common mandate of statutory construction to avoid absurd results." *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993)."

*(footnote)* "Also, the solicitation of contributions for Majority PAC and House Majority PAC by Federal candidates, officeholders, and officers of national party committees poses no risk of circumvention of candidate or national party committee contribution limits. In Advisory Opinion 2010-09 (Club for Growth), the Commission considered the risk of circumvention of candidate contribution limits posed by an independent expenditure-only committee's solicitation of funds earmarked for specific independent expenditures. The Commission found that "there [was] no possibility of circumvention of any contribution limit" because the committee represented that it would not "make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, nor will the committee make any

coordinated communications or coordinate any expenditure . . . . " *Id.* Similarly, Majority PAC and House Majority PAC have also represented that they will make neither direct nor in-kind contributions."

The *EMILY's List* and *Carey* courts have held that non-connected political committees may accept both source-restricted funds for the purpose of conducting Independent Expenditures and simultaneously accept amount- and source-restricted funds to make direct contributions to candidates as long as each set of funds is kept in segregated bank accounts. *See generally EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *Carey v FEC*. These holdings do not operate to distinguish between one form of non-connected political action committee and another. Therefore, leadership PACs should be entitled to the same protections afforded other non-connected committees with respect to the ability to accept source-restricted contributions from any individual, corporation, or union for the purpose of making Independent Expenditures.

## IV. QUESTION PRESENTED

*May a leadership PAC accept source-restricted contributions from any individual, corporation, or union into a separate, segregated non-contribution account for the purpose of conducting Independent Expenditures, in addition to accepting donations subject to the amount and source limitations of 2 USC § 441a(a) for the purpose of making direct contributions to candidates for federal office?*

## V. CONCLUSION

If CCF may accept source-restricted contributions for independent expenditures, two separate accounts will be used to segregate the funds in accordance with the rulings in *Emily's List* and *Carey* and consistent with recent guidance from the commission. The court in *Emily's List* and in *Carey* held that keeping separate accounts for amount- and source-restricted contributions and source-restricted contributions for Independent Expenditures is an appropriate means of ensuring there is no crossover of funds, without forfeiting First Amendment rights. *EMILY's List*, 581 F.3d 12. Therefore, a leadership PAC should be entitled, as is any other non-connected PAC, to accept source-restricted funds for independent expenditures, while keeping those amounts segregated from other funds used in making direct campaign contributions.

Sincerely,

Dan Backer, Esq.
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Constitutional Conservatives Fund PAC

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10/23/2011 03:46 PM

To <DAdkins@fec.gov>
cc <NStipanovic@fec.gov>
bcc
Subject response re: CCF AOR & 11 CFR 300.2(c)

Mr. Adkins & Mr. Stipanovic,

Pursuant to our conversation last week, CCF acknowledges that it is at least indirectly established, controlled, maintained or financed by the associated candidate within the meaning of 11 CFR 300.2(c).

Regards,

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