July 10, 2013

AOR 2013-09

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

RE: Advisory Opinion Request of Special Operations Speaks PAC and Col. Robert L. Maness

Dear Mr. Herman:

Pursuant to 2 U.S.C. 437f(a)(2), Special Operations Speaks PAC ("SOS"), a non-connected hybrid political action committee, and Colonel Robert L. Maness, a candidate for United States Senate from Louisiana, requests an Advisory Opinion from the Federal Election Commission ("FEC") as to whether SOS may contribute to Col. Maness up to the non-corrupting amount of $5,000[1] under 2 U.S.C. § 441a(a)(4). SOS has already contributed $2,600 to Col. Maness and wishes to contribute an additional $2,400 up to the non-corrupting amount of $5,000, and Col. Maness wishes to accept this contribution. SOS has contributed to only two candidates thus far, and does not intend to contribute to any additional candidates as required by U.S.C. § 441a(a)(4) for multicandidate status, preferring instead to focus on other forms of political advocacy.

This request is made on a candidate's behalf and pertains to an election to be held on November 4, 2014. Accordingly, under the FEC's expedited review procedure, SOS respectfully requests an opinion within 20 days. *See* 11 C.F.R. § 112.4(b).

I. INTRODUCTION

The Federal Election Campaign Act ("the FECA") defines a "multicandidate committee" as a political committee that has been "registered...for a period of not less than 6 months, has received contributions from more than 50 persons [and] made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4). Multicandidate committees may contribute to candidates up to $5,000 per election. 2 U.S.C. § 441a(a)(2)(A). Committees without this favored status may only contribute up to $2,600 per election. *See* 2 U.S.C. § 441a(a)(1)(A).

Congress justified the registration requirements and their corresponding contribution limits as ostensibly necessary to prevent corruption. Specifically, Congress aimed to thwart potential circumvention of the base contribution limits, which were originally $1,000. The Supreme Court reviewed the constitutionality of the contribution limits and registration requirements, holding the requirements served the compelling governmental interest of preventing corruption and, more

[1] *See* 2 U.S.C. 441(a)(2)(A); *see also Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976) (upholding the $5,000 limit on contributions from PACs to candidates).

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specifically, served the permissible purpose of preventing individuals from circumventing base contribution limits. *Buckley v. Valeo,* 424 U.S. 1, 35-36 (1976). But the Court did not specifically address the burden on those organizations without favored multicandidate committee status. *See id.* Unlike many long-established PACs, these newly formed associations frequently engage in spontaneous speech and are substantially less likely to be focused on protecting incumbents. Requiring such impromptu groups to adhere to multiple registration requirements, including the five-candidate requirement, entirely forecloses their desired speech. *See* 2 U.S.C. § 441a(a)(1)(A). And burdening the fundamental rights of just these disfavored groups deprives them of equal protection of the law. *See* U.S. CONST. amend. V.[2]

Shortly after *Buckley*, Congress amended the FECA, enacting additional prophylactic measures to foreclose any possibility of circumvention. These amendments rendered the prior five-candidate requirement entirely unnecessary. The five-candidate requirement is now useless in preventing circumvention of contribution limits—the Court's sole rationale for initially upholding the registration requirements. *See Buckley v. Valeo*, 424 U.S. at 38.

Because no governmental interest now exists to justify burdening SOS's speech and association rights, the five-candidate requirement is unconstitutional both facially and as applied to SOS. The requirement now serves only as a barrier to political speech and particularly burdens comparatively newly-established associations of speakers, who focus on highly specific issues or speak only during particular election periods. More precisely, the five-candidate requirement forces SOS to either engage in unwanted association with candidates with whom it does not wish to associate, or associate to a far lesser extent with those candidates whom it supports—including Col. Maness.

II. BACKGROUND

SOS is a non-connected hybrid political action committee ("PAC") that meets all requirements for multicandidate committee status enumerated in 2 U.S.C. § 441a(a)(4) but one: SOS has not contributed to five candidates. SOS registered with the FEC on July 2, 2012, fulfilling the six-month waiting period requirement. *See* 2 U.S.C. § 441a(a)(4). SOS has thousands of grassroots contributors, easily surpassing the 50 person contributor requirement. *See id.* But SOS has chosen to be highly selective as to which candidates it contributes, opting instead to engage mainly in issue advocacy and political activism. SOS intends to contribute to only one or at most two additional candidates prior to the 2014 election, and wishes to do so at the same non-corrupting level available to corporate and union speakers.

Since its founding nearly a year ago, several thousand persons have contributed to SOS. But SOS has purposefully contributed to only three federal candidates. Specifically, SOS contributed $2,500 to the

[2] Under the Fourteenth Amendment to the U.S. Constitution, "No State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Equal protection applies to federal legislation through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

recount fund of Mr. Allen West, the former Republican Representative from Florida's Eighteenth Congressional district, and $2,600 to the special primary election campaign of Mr. Larry Grooms, a Republican candidate for the House of Representatives from South Carolina's First Congressional district, for the special primary election held on March 19, 2013. SOS also contributed $2,600 to Col. Maness. SOS now wishes to contribute up to an additional $2,400 to Col. Maness to total the non-corrupting amount of $5,000, and Col. Maness wishes to accept this contribution.

III. DISCUSSION

Contribution limits "operate in an area of the most fundamental First Amendment activities," and "[t]he First Amendment affords the broadest protection to such political expression . . . ." *Buckley*, 424 U.S. at 14. Indeed, the First Amendment "has its fullest and most robust application to the conduct of campaigns for political office." *Id.* at 15 (internal citations omitted). The First Amendment also vigorously 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. Ala. ex. rel. Patterson*, 357 U.S. 449, 461-62 (1958).As perhaps the most important mechanism for individuals to band together for political advocacy, PACs also enjoy robust First Amendment protection. *See Citizens United v. FEC*, 558 U.S. 310, 343 (2010). Without a "sufficiently important" interest, *Buckley* at 25, Congress cannot curtail PAC speech or associational freedoms, nor can it impose classifications to permit the speech of some PACs while unnecessarily burdening other PACs wishing to exercise the same fundamental rights. *See Buckley* at 95-96; *see Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983).

In 1974, Congress defined a multicandidate committee as "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). The 1974 Amendments to the FECA also instituted a $5,000 contribution limit per candidate per election for multicandidate committees, with no aggregate limit on the amount PACs could contribute to all candidates. *Id.* at 1275; § 101(b)(2).

In *Buckley*, the Supreme Court reviewed the requirements for multicandidate committees:

> 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 these requirements existed to prevent individuals from circumventing base contribution limits:

> [T]he registration, contribution, and candidate conditions serve the permissible purpose of *preventing individuals from evading the applicable contribution limitations by labeling themselves committees*.

Id. at 35-36 (emphasis added).

In 1976, as a direct response to *Buckley*, Congress enacted *additional* contribution limits and preventative measures to thwart any possibility of circumvention. The FECA's 1976 Amendments prohibited individuals from contributing more than $5,000 to any individual 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, 99 Stat. 486 (May 11, 1976) ("1976 Amendments"). Further, the 1976 Amendments enacted the "nonproliferation provisions," a prevantative measure specifically aimed at confronting (and precluding) any potential circumvention of base contribution limits. *Id.* All PACs sponsored by the same organization would henceforth be treated as "affiliated" and held to a single contribution limit. *Id.*

In sum, the 1976 Amendments entirely foreclosed any possibility of circumvention by prohibiting contributors from funneling—short of already illegal earmarking—candidate contributions above the base limits Congress had determined pose no cognizable threat of corruption. *See generally* 2 U.S.C. §§ 441a(a)(1) and (2). Accordingly, the five-candidate prerequisite had, by 1977, become an unnecessary "prophyla[ctic]-upon-prophylaxis," *FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007), rendering it useless to preventing corruption through circumvention of the base limits. The requirement now serves only to impermissibly burden the speech of discerning PACs, such as SOS—and operates to preference well-established groups to the detriment of spontaneous, grassroots speakers.[3]

Even if a contribution, as *Buckley* held, "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. *California Medical Association v. FEC* ("*CalMed*"), 453 U.S. 182, 203 (1981). In *CalMed*, the Court held that "contributions to political committees can only be limited if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest." *Id.* at 203 (Blackmun, J., concurring in part and in the judgment). Thus, *CalMed* 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. 2012) (quoting *Buckley*, 424 U.S. at 25).

[3] SOS submits that many of the arguments made in briefs for Appellants and their *amici* in the pending case of *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), *cert. granted*, 133 S. Ct. 1242 (2013) (No. 12-536, 2013 Term), for striking down the aggregate contribution limit are applicable here. But even if the Supreme Court were to uphold those aggregate limits, the five-candidate contribution requirement still fails to pass constitutional muster.

Because the 1976 Amendments foreclosed the possibility of circumventing base contribution limits, no compelling or even valid government interest currently exists to justify forcing a PAC to contribute to five or more candidates, at least some of whom it would not otherwise contribute to, before attaining multicandidate committee status. Accordingly, the five-candidate requirement is broader than necessary to achieve any anti-circumvention interest, to the extent one exists, and unnecessarily abridges associational freedoms. The requirement directly burdens First Amendment freedoms and forces putative speakers to either engage in unwanted association with candidates with whom they do not identify, or associate to a far lesser extent with those candidates they truly support.

Compelling SOS and all other similarly situated PACs to contribute to five or more federal candidates before it may contribute the full, non-corrupting amount of $5,000 does nothing to prevent corruption. Congress determined a $5,000 limit is not corrupting, and the Supreme Court upheld this limit in *Buckley*. Thus, the FEC has no constitutional basis to enforce this otherwise unconstitutional law.

Accordingly, SOS contends that the five-candidate requirement is unconstitutional both facially and as applied to SOS. The Supreme Court has struck down statutes infringing on First Amendment rights not only on their face, but also as applied. *See FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449 (2007) (holding that prohibiting certain political advertisements was unconstitutional as applied to Wisconsin Right to Life). As described *supra*, SOS meets all other statutory requirements to operate as a multi-candidate PAC but has simply chosen to contribute to less than five candidates. Though SOS has received contributions from thousands of individual contributors, these contributions averaged approximately $50. This fact confirms that SOS did not serve as a conduit for individuals wishing to contribute through SOS in order to evade direct contribution limits—unless the FEC suggests thousands of individuals would band together and unlawfully label themselves as a political committee merely to elude contribution limits. Such a suggestion is even more untenable as SOS may easily (and lawfully) spend *unlimited* amounts on independent expenditures through its *Carey* account. The fact SOS chooses to target its contributions to those few candidates it supports should not diminish its speech, or that of other similarly situated speakers, relative to the speech of other less discerning political committees.

Not only does the five-candidate requirement impermissibly infringe upon the First Amendment rights of SOS and all similarly discerning PACs, but the requirement also deprives these same political speakers of equal protection of the law, in violation of the Fifth Amendment. Though the Fourteenth Amendment proscribes only state action, equal protection applies just as forcefully to federal legislation through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Further, "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

Because some classification inures in every law, most statutory classifications must simply bear a rational relation to a legitimate governmental purpose. *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). But "[s]tatutes are subjected to a higher level of scrutiny if they interfere with

the exercise of a fundamental right, such as freedom of speech . . . " *Regan*, 461 U.S. at 547; *see also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Thus, "exacting scrutiny" applies to laws restricting the core First Amendment right of political expression. *Buckley* at 95-96.

The FEC can present no valid reason—much less a constitutionally satisfactory "substantially important interest," *Buckley* at 95-96—to interfere with the First Amendment rights of PACs who opt to contribute to four or fewer candidates. Indeed, the FEC has no legitimate purpose to justify arbitrarily favoring the speech of some PACs while specifically preventing other PACs from exercising the same freedoms. Thus, even under lesser scrutiny, the five-candidate requirement unconstitutionally deprives SOS, and all PACs similarly situated, of equal protection of the law. So long as the requirement is enforced, it will unfairly burden—and indeed, entirely restrain—the political speech of this class of speakers. And in practical application, the requirement operates to elevate the speech of entrenched organizations to the detriment of grassroots outsiders who remain equally willing, but unable, to speak.

The five-candidate requirement will continue to restrict SOS's First Amendment rights, because SOS contributes selectively. But SOS's only alternative is to contribute to candidates whom it does not support simply to obtain the same speech rights as multicandidate committees. The FEC's continued enforcement of this provision therefore imposes an indefensible unconstitutional dilemma: SOS is forced to either contribute to candidates whom it does not support, or be forever deprived of fully associating with those select few candidates in whom it truly believes.

IV. QUESTIONS PRESENTED

1. Though Special Operations Speaks has not contributed to five candidates under 2 U.S.C § 441a(a)(4), may Special Operations Speaks contributes to Colonel Robert L. Maness, or another federal candidate of its choosing, in an amount up to $5,000 per election?

2. May Colonel Robert L. Maness accepts contributions in an amount up to $5,000 per election from Special Operations Speaks before Special Operations Speaks fulfills the five-candidate requirement under 2 U.S.C § 441a(a)(4)?

V. CONCLUSION

The 1976 Amendments foreclosed any possibility of circumventing base contribution limits. There is no longer a compelling or valid anti-corruption interest to justify forcing a PAC to contribute to five candidates—some of whom it does not support or desire to support—before it may contribute to candidates in the full non-corrupting amount of $5,000 available to other speakers. *See* 2 U.S.C § 441a(a)(4). Accordingly, the FEC should refrain from enforcing this unconstitutional statutory provision against SOS. Because SOS has fulfilled the 50 contributor requirement and waited the

required six months, SOS should now be entitled to contribute to federal candidates, including Col. Maness, in the non-corrupting amount of up to $5,000 per election period.

Sincerely,

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