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September 8, 2017

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BY ELECTRONIC MAIL

Shawn Woodhead Werth
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Re: Comments on AOR 2017-06 (Stein & Gottlieb)

Dear Ms. Werth:

In the last decade-and-a-half, companies seeking to make it easier for small donors to make online political contributions have come before the Commission to ask whether their proposals comply with federal law. In response, the Commission has developed a set of viewpoint-neutral, objective criteria to guide its decisions. These criteria strike a careful balance between enforcing the ban on corporate contributions and corporate facilitation, on the one hand, and the Commission's interest in ensuring a robust marketplace for small-dollar individual donors. While the Commission has sometimes struggled to find consensus in applying its regulations to new technologies in other spaces, it has admirably applied these criteria in a metronome-like fashion, leading to reasonably consistent results and the steady development of new tools for small donors.

Presented with another one of these proposals (hereinafter, the "App") in AOR 2017-06, the Office of General Counsel prepared two legally sound draft responses. Both Draft A and Draft B hew closely to Commission precedents, rigorously applying the viewpoint-neutral, objective criteria that the Commission has spent years developing. The drafts reach the same conclusion: that the proposed App provides services to donors (rather than political committees) and that it complies with federal law. Draft B explicitly underscores that the basis for this decision is the proposed App's "restriction on candidate participation …." Draft AO, Agenda Document 17-35-B at 7. Draft A does not include this explanation, but reaches the same conclusion applying the same criteria.

The Commission need not, and should not, second-guess itself here. The drafts are well-reasoned, based firmly in the Commission's regulations and precedents, and do not engage in improper viewpoint discrimination. The Commission should approve Draft A or Draft B or some compromise between the two. There should be no material difficulty in finding consensus

between these two drafts.

I. The Commission Should Continue to Rely on Viewpoint-Neutral, Objective Criteria to Adjudge Legality of Contribution Applications

At the August 18, 2017, hearing, several commissioners asked for more time to consider a comment filed by the Campaign Legal Center ("CLC"). The CLC objects to only one feature of the App: that its initial menu of Featured Candidates will only include Democratic candidates.[1] That feature, it claims, violates section 114.2 of the Commission regulations. At the hearing, we pointed out that the CLC had failed to cite any statute, regulation, or Commission precedent in support of this argument. And notably, in its follow-up comment filed one week later, the CLC *still* fails to cite any statute, regulation, or Commission precedent for the proposition that it is illegal to feature certain candidates and exclude others in an otherwise compliant product.

The CLC's inability to marshal legal citations is not due to a lack of trying. The problem is that CLC's argument is antithetical to the Commission's regulations and First Amendment law. Like any government agency regulating speech, the Commission must avoid any regulation or enforcement policy that discriminates based on the viewpoint of the speaker. The Commission has respected this limitation, creating viewpoint-neutral, objective restrictions on the use of corporate resources in support of fundraising for *any* candidate, while eschewing proscriptions that require the Commission to draw lines based on *which* candidates stand to benefit from the corporate service. In demanding that the Commission judge whether corporations are being "too partisan," the CLC is setting a constitutional trap that the Commission should elide.

A. Compliance with the Commission's corporate facilitation and corporate contribution rules does not turn on the party affiliation of the candidates that may stand to benefit from the corporation's services.

Section 114.2 implements the Act's prohibition on corporate contributions and the corporate facilitation of contributions. The regulation effectively prohibits corporations, *except for commercial vendors and similar service providers*, from leveraging their assets to facilitate the making of contributions to candidates *unless those assets are paid for by a permissible source.* Significantly, a corporation's compliance with section 114.2 is entirely unrelated to whether it engages in conduct that benefits only some candidates or whether it engages in conduct that benefits all candidates. The relevant consideration is the nature of the conduct, not the universe of candidates that may benefit from the corporation's services.

For example, a corporation that provides catering services to every single federally-registered

[1] The CLC does not appear to object to any other feature of the App. *See* Comment on Agenda Document Nos. 17-35-A and 17-35-B by the Campaign Legal Center (Aug 17, 201& [hereinafter "CLC First Comment"]; Comment on AOR by Campaign Legal Center (Aug. 23, 2017) [hereinafter "CLC Second Comment"].

candidate, regardless of party, would violate the law if it did not receive advance payment for those catering services. 11 C.F.R. § 114.2(f)(2)(i)(E). In Advisory Opinion 1996-02 (CompuServe), for example, the Commission rejected a proposal by CompuServe to provide free accounts to *all* candidates irrespective of political party because that practice did not constitute the normal and usual charge for the service. On the other hand, a corporation that only provided its customer list to Democrats from swing congressional districts would be in full compliance with the law if it received advance payment from a permissible source for the fair market value of the list. *Id.* § 114.2(f)(2)(i)(C). Likewise, a corporation that distributes a solicitation beyond its restricted class on behalf of a bipartisan group of candidates without charge is in violation of the law; a corporation that distributes the same solicitation to its restricted class solely on behalf of Republican candidates is in full compliance with the law. *Id.* § 114.3(a)(1).

In regulating online contribution services, the Commission has developed viewpoint-neutral, objective criteria to adjudge the permissibility of the product. A product that the Commission deems to be providing fundraising services to contributors complies with the law if the vendor does not propose to enter into any contractual relationship with recipient political committees; processes funds through a merchant account only at the request of a contributor, not at the request of a political committee or of the vendor's own volition; and charges contributors a contribution-processing fee that will cover the vendor's costs and provide it with a reasonable profit. *See* Advisory Opinion 2011-09 (Democracy Engine); Advisory Opinion 2015-08 (Repledge). A product that the Commission deems to be providing fundraising services to political committees complies with the law if it acts as a commercial vendor by rendering services in the ordinary course of business at the usual and normal charge; forwards contributions through candidates through segregated accounts; and employs adequate screening procedures to ensure it is not forwarding illegal contributions. *See* Advisory Opinion 2012-09 (Points for Politics). The party affiliation of the candidates that may benefit from such services has never been a relevant factor – let alone the dispositive one – in the Commission's determination of whether a product complies with the corporate facilitation and corporate contribution rules.

That is not merely a regulatory choice by the Commission; it is a decision strongly influenced by constitutional considerations. The First Amendment strongly disfavors viewpoint discrimination. *See First Nat'l Bank of Boston v. Bellotti,* 98 S.Ct. 1407 (1978) (striking down a state statute that permitted corporations to spend money on certain types of referenda but not others). "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, ___ S. Ct. __, 137 S. Ct. 1744, 2017 WL 2621315(2017) (concurrence of Kennedy, Ginsburg, Kagan, and Sotomayor). Once the government determines that a particular form of speech is permissible, it may not prohibit a subset of that speech based on the viewpoints it espouses. A product that would comply with Commission regulations if it included Democratic

and Republican candidates cannot be barred because it excludes Democratic *or* Republican candidates.

B. The Commission has consistently recognized that the corporations may exclude candidates, so long as the decisions are based on commercially reasonable criteria.

In the world of politics, campaign committees rely heavily on corporate vendors. Many of these vendors – fundraisers, media consultants, pollsters, direct mail specialists, digital ad providers and, yes, even lawyers – only provide services to candidates from a single political party. Regardless of these vendors' own subjective beliefs, this choice is dictated primarily by business considerations. Many candidates do not want to retain vendors that work with "the other side." The same goes for many prospective donors affiliated with one party or the other. Bowing to this reality, the Commission has consistently recognized that corporations can choose to do business with certain candidates and not others, as long as the decision is based on commercially reasonable criteria and the corporation otherwise structures the activity to comply with the law. As Drafts A and B correctly observe:

> The Commission has previously concluded that a commercial vendor, providing services to political committees under 11 C.F.R. § 114.2(f)(1), need not make its services available to committees representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria. *See* Advisory Opinion 2012-28 (CTIA — The Wireless Association) at 3, 8-9 (no contribution to committee where "wireless service providers may decide, due to commercial considerations, to accept proposals from some political committees and not others"); Advisory Opinion 2012-26 (Cooper for Congress *et al.*) at 10 (no contribution to committee where its participation was subject to "objective and commercially reasonable" criteria); Advisory Opinion 2006-34 (Working Assets) at 2-3 (describing requestor's proposed use of "common commercial principles" to determine partner entities' commercial viability).

Significantly, in Advisory Opinion 2015-08, the Commission considered the request of Repledge, a for-profit business venture that, like the App, sought to offer contribution-processing services to contributors and charge contributors a commercially reasonable fee for those services. Also like the App, Repledge made a "reasonable commercial decision to limit its universe of candidate recipients." Advisory Opinion 2015-08 (Repledge). Repledge included certain candidates (major party presidential candidates), and excluded other candidates (minor party and independent presidential candidates) from its platform. *Id.* at 6 ("Repledge will process and transmit contributions only to the major party nominees in the 2016 presidential election."). The Commission expressly considered this aspect of Repledge's proposal and determined that it did "not … require a different outcome than in the prior advisory opinions." *Id.* Similarly, in

Advisory Opinion 2015-11 (FYP) the Commission considered the request of a for-profit entity that proposed to offer contribution-processing services to users and charge users a fee for those services. Political committees could apply to FYP to be featured as potential recipients and FYP would apply a set of commercial factors, *including whether the committees shared FYP's users' ideology and values*, to determine whether those committees qualified as potential recipients. *See* Advisory Opinion 2015-11 (FYP) at 3. The Commission agreed that the product complied with the law, though disagreed on the rationale for doing so.

Oddly, CLC cites Repledge for the proposition that "in none of those matters [involving contributor-side services] has the Commission approved a corporation's proposal to process payments to a partisan set of recipients selected by the corporation." CLC Second Comment at 1-2. That is simply incorrect. The Repledge opinion expressly permitted a corporation to process payments to a set of recipients selected based on commercial factors that included their partisan affiliation; the candidate could not appear on the platform unless she or he affiliated with the Republican Party or the Democratic Party. The fact that the platform featured Democratic and Republican candidates – but excluded third party candidates and independents – is not a valid legal basis to distinguish Repledge's proposal from the App. As the author of the CLC comment knows from experience, a Commission policy that allowed corporations to exclude third party candidates on the basis of their partisan affiliation but barred corporations from excluding major party candidates on the basis of theirs would not be upheld by a reviewing court. *See Level the Playing Field v. FEC*, 232 F.Supp.3d 130 (D.D.C. 2017); *see also* 11 C.F.R. § 110.13(c) ("For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate."); *LaBotz v. FEC*, 889 F. Supp.2d 51, 62 (rejecting a Commission dismissal of a complaint as arbitrary and capricious because it ignored evidence that the staging organization selected its candidates based solely on their status as Democratic and Republican nominees).

In short, a corporation may exclude candidates from its platform so long as the decision to do so is based on commercially reasonable criteria. *See* Advisory Opinion 2015-08 ("[a]s long as Repledge transmits funds … on identical terms and without any preferential placement or treatment, Repledge's *reasonable commercial decision to limit its universe of candidate recipients does not render its proposal impermissible.*") (emphasis added). The App easily satisfies the same test. The App's creators have spent time and resources considering how to develop and market the Project so it has the best chance of being financially successful. They have conducted market research into customer attitudes and demands; interviewed potential users of the App to understand the features and functionalities of political apps the public is most likely to use; and studied how different options for developing and marketing the App affect profit-and-loss projections. They have concluded that the App will have the most commercial success if its customers view the App as the premier vehicle to identify and support Democratic candidates running in key districts for the U.S. House and U.S. Senate. Otherwise, the product will be indistinguishable from others in the market and will have limited chance for success. This

is a commercially reasonable decision.

The CLC frets that "the requestors' desire to maximize contributions to swing-state Democrats is completely consistent with an intent to further the election of those candidates, and it renders the concept of 'commercially reasonable criteria' (Draft A at 9; Draft B at 10) so expansive as to be meaningless." CLC First Comment at 3. But the CLC misstates the idea underlying the App. The App's purpose is *not* to maximize contributions to swing-state Democrats; it is to maximize profits by driving contributions through the platform. In the view of the App's creators, the most commercially effective means of doing so this election cycle is to limit the platform to Democrats in winnable House and Senate races. Recent experience in Georgia's Sixth Congressional District race shows that the candidates that would generate the most revenue for the App are not always synonymous with the "tipping point" races for a Democratic majority. *See* Carter Sherman, *The Most Expensive House Race in History*, Vice News (June 20, 2017), *available at* https://news.vice.com/story/dems-spent-millions-to-lose-georgia (noting that a race the generated the most small-dollar donations in U.S. House history was no higher than the 70th most important district for retaking a Democratic majority, according to the Chair of the DCCC). The protections of an advisory opinion extend only as far as the facts presented in the request. If the App's creators were to abandon the commercial methodology described here and feature candidates who requested to be featured on the App or featured the candidates the App's creators simply liked the best, the advisory opinion would offer no protections.

C. The CLC's second comment is unpersuasive.

In recognition of the mountain of precedents lined up against its position, the CLC's second set of comments concedes that committee-side products should be permitted to exclude candidates but argues that contributor-side products should not be allowed to make the same commercial decision. This argument is unpersuasive.

First, contrary to the CLC's suggestion, the argument finds no support in the Commission's precedents. In Repledge, the Commission green-lighted a contributor-side product that excluded candidates based on their partisan affiliation. For the reasons set forth in the preceding section, it would be impermissible to distinguish Repledge on the grounds that it excluded third party and independent candidates, rather than Democratic or Republican candidates. Likewise, in FYP, the Commission approved a product that excluded candidates based on ideology. Several commissioners classified FYP as a contributor-side product, while other commissioners said it was both a contributor-side and committee-side product, but in the end a majority of commissioners reached the conclusion that the product was permissible.

Second, a Commission rule that permitted corporations that coordinate with candidates (as with purveyors of committee-side services) to enjoy more leeway to exclude than corporations that operate independently of candidates is at odds with the campaign finance jurisprudence over the

last forty years. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (finding the ceiling on independent expenditures to be an unconstitutional limit on the quantity of political speech); *Fed. Election Comm'n*, 558 U.S. 310 (2010) (permitting corporations to spend unlimited sums on independent expenditures); *Speechnow.org v. Fed. Election Comm'n*, 599 F. 3d 686 (D.C. Cir. 2010) (allowing individuals to contribute unlimited amounts to independent expenditure committees). Corporations that dutifully limit contact with candidate committees may not be regulated more strictly than corporations that invite such contact.

The Commission has, on one occasion, considered the Project's exclusion of candidates as a factor in determining whether it is a contributor-side or committee-side product. In FYP, the Commission split on whether the requestor's process for determining which candidates to feature rendered it a committee-side product. Several commissioners in FYP concluded that the requestor's process for determining which committees to exclude – which included a process whereby committees could apply on FYP's website to be featured and FYP would then apply ideological and other factors to decide which committees' requests it would grant and proceed to work with – rendered that requestor a committee-side product and required that the fees charged to users be treated as contributions to the recipient committees. Unlike the product in FYP, the App provides no way for candidates to apply to be featured. We argued based on the Commission's precedent – and both Drafts A and B agreed – that this and other factors discussed in the request meant the App was a contributor-side product rather than a candidate-side product. We of course agree with both Drafts A and B that because the App will not contract with candidate committees and will not have a similar application-and-decision process as FYP's means that the App is properly treated as a contributor-side product.

But even if the Commission were to reject that particular conclusion in Drafts A and B, the App would still be permissible as a committee-side product. As explained in our original request, the App is providing contribution-related services in the normal course of business; is providing services at the normal and usual charge for the marketplace; and is using a segregated merchant account to forward contributions without exercising any influence over which candidates will receive contributions. Thus, if commissioners disagree that the App is properly classified as a contributor-facing product, the appropriate answer is to treat the user-paid *fees* collected by the App as contributions to the recipient committees. It is not to bar the product altogether, as CLC suggests should be done. There is certainly no justifiable basis for the Commission to treat the App any worse than the product that was approved in FYP. *See supra*, at 3 (discussing the Commission's objective, viewpoint-neutral criteria for compliant contributor-side and committee-side service providers).

II. Policy

The Commission need not consider broader policy arguments in rendering its decision. This is not a case of first impression and the Commission's regulations and precedents provide a clear

path to the correct legal conclusion. Nonetheless, we wish to respond to the hypothetical in the CLC's first comment. The CLC warns the Commission that answering "yes" to this opinion will result in a dystopian future where corporate advisers steer millionaires and billionaires to direct six-figure checks to the advisers' candidates of choice. We hate to burst the CLC's bubble, but that dystopian future has already arrived. In plush living rooms and fancy resorts around the country, wealthy donors regularly congregate to decide which candidates to support. These contributors are guided by "donor advisers" (many of whom work for incorporated entities) and "donor tables" (many of which are incorporated) that provide donors with oodles of information about candidates' positions on issues, fundraising numbers, and likelihood of winning. The contributors pay for these services – which make them legally permissible – but they are expensive and an average donor cannot afford them.

The App will provide some semblance of those services – minus the *hors d'oeuvres* and cocktails – for average donors. Because the App will have substantially more customers than an average major donor adviser, it can charge substantially less for these services while still generating a commercially reasonable profit. A small donor community that has been motivated to march, attend town halls, and call their Members of Congress is eager to learn more about the congressional candidates that promise to bring change to Washington D.C. The Commission should not deny small donors the same services that the wealthiest donors already receive.

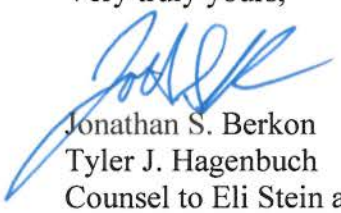
This debate, of course, is not a new one. Whereas the CLC depicts small-donor mobilization via the Internet as a slippery slope to Kochism, others have correctly noted that "the Internet provides a counter-balance to the undue dominance that 'big money' has increasingly wielded over the political process in the past half-century." Comments of the Center for Democracy & Technology on Notice of Proposed Rulemaking 2005-10 The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers at 3 (June 3, 2005), *available at* https://cdt.org/files/speech/political/20050603cdtcomments.pdf. During the fight over the Internet regulation from 2004 through 2006, grassroots activists on the left and the right urged regulatory restraint. The CLC did not.

Had the CLC gotten its way, individuals who wished to expend funds to create a YouTube video advocating for or against a candidate would have been required to file reports with the Commission. Comments of the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics on Notice 2005-10: Internet Communications (supporting the adoption of various rules proposed by Notice of Proposed Rulemaking, Internet Communications, 70 Fed. Reg. 16,967 (Apr. 4, 2005)), *available at* http://www.democracy21.org/uploads/%7B645238F4-73A5-4537-B333-AA8DFD2732C1%7D.PDF. Nonprofit corporations and labor unions would have had to scrub their websites of *any* candidate references – regardless of whether the references pertained to policy matters – in the 90 days preceding an election unless strict firewalls were maintained. A candidate running for U.S. Senate would have been barred from urging a vote for a presidential candidate on her Facebook page, if the Commission determined

that the "value" of that page exceeded $2,000. Cash-strapped state parties would have been required to review every inch of their websites to determine whether a general call to the public to "support Democrats" or "support Republicans" – the very purpose of a state party – had to be treated as a federal election activity. And emails, yes emails, would have been treated nearly identically to television advertisements.

Thankfully, the Commission sided against the CLC and for grassroots activists in 2006. It should do so again today.

Very truly yours,



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