

November 20, 2013

By Electronic Mail (AO@fec.gov)

Lisa J. Stevenson
Deputy General Counsel, Law
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion 2013-17 Drafts A and B (Agenda Document No. 13-47) (Tea Party Leadership Fund)

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion 2013-17 Drafts A and B (Agenda Document No. 13-47), scheduled to be considered by the Commission at its November 21 meeting. These draft opinions have been produced in response to Advisory Opinion Request (AOR) 2013-17, submitted on behalf of the Tea Party Leadership Fund (TPLF), a nonconnected hybrid political committee. TPLF seeks an advisory opinion that it is exempt from the reporting and disclosure requirements of the Federal Election Campaign Act (FECA) on the ground that it “can establish a reasonable probability that disclosing its contributors and recipients of expenditures would result in threats, harassment, or reprisals from government officials or private parties” AOR 2013-17 at 3.

Draft A concludes that TPLF is entitled to an exemption from FECA’s reporting and disclosure requirements “because it has demonstrated a reasonable probability that compelled disclosure would subject its supporters to threats, harassment, or reprisals.” Draft A at 1. Given the generality of so-called evidence of harassment presented by TPLF, Draft A would also seemingly extend this exemption to all other Tea Party organizations as organizations engaged in activity “indistinguishable in all its material aspects” from TPLF’s activities. *See* 2 U.S.C. § 437f(c)(1)(B).

Draft B concludes that TPLF is not entitled to an exemption from FECA’s reporting and disclosure requirements “because TPLF is not a minor party or organization” and that “even if the Commission were to consider the exhibits that TPLF has provided as evidence of harassment and hostility, the Commission would still conclude that TPLF is not exempt from disclosure requirements.” Draft B at 1 and 11.

For the reasons detailed in the comments we filed on October 18 in response to AOR 2013-17,¹ and the further reasons detailed below, the Campaign Legal Center and Democracy 21 respectfully urge the Commission to reject Draft A and approve Draft B, denying TPLF’s request

¹ Campaign Legal Center and Democracy 21, Comments on AOR 2013-17, Oct. 18, 2013.

for exemption from FECA's reporting and disclosure requirements. The exemption granted in Draft A is not required by the Constitution and would fatally undermine the federal disclosure regime, depriving voters in elections around the nation of information vital to their Election Day decisionmaking.

I. Draft A Omits Half of the Relevant Legal Analysis in Order to Wrongly Conclude that TPLF is Entitled to Exemption.

Although the Supreme Court has long held that disclosure requirements such as those at issue in this AO proceeding “would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed,” *Citizens United v. FEC*, 558 U.S. 310, 370 (2010), the Court has made clear that the constitutional standard for the “threats, harassment, or reprisals” exemption is exceedingly narrow and requires a balancing test. Under the formulation articulated in *Buckley v. Valeo*, the exemption is only available when the “threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied.” 424 U.S. 1, 71 (1976).

Draft A omits entirely the required consideration of the “state interest furthered by disclosure” with respect to a group seeking the “threats, harassment, or reprisals” exemption. In this regard, the legal analysis of Draft A is fatally flawed and should be rejected by the Commission.

Draft B, by contrast, correctly explains that the *Buckley* Court found the generally vital governmental interest in disclosure to be “diminished” only where the “contribution in question is made to a minor party with little chance of winning an election” and where the “interest in deterring the ‘buying’ of elections and the undue influence of large officeholders” is reduced because “it is less likely that the candidate will be victorious.” Draft B at 5 (quoting *Buckley*, 424 U.S. at 70). The Supreme Court again emphasized this important consideration in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, reiterating that the governmental interests in disclosure are “diminished” in the case of minor parties because “the improbability of their winning reduces the dangers of corruption.” 459 U.S. 87, 92 (1982); *see also* Draft B at 6.

The application of this balancing test between evidence of threats, harassment, or reprisals and the governmental interests in disclosure is aptly illustrated in the Commission’s advisory opinion earlier this year extending, once again, the Socialist Workers Party’s (SWP) partial exemption from FECA’s disclosure requirements. In AO 2012-38, the Commission explained:

[T]he Commission must weigh three factors: (1) the history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by governmental authorities, including law enforcement agencies, or by private parties; (2) evidence of continuing violence, harassment, or threats directed at the SWP or its supporters since the prior exemption was granted; and, balanced against the first two factors, (3) the governmental interest in obtaining

identifying information of contributors and recipients of expenditures. The Commission has decided previously that, where the impact of the activities of the SWP and its supporters on Federal elections is minimal because the possibility of an SWP candidate winning an election is remote, the government's interest in obtaining such information is lessened.

AO 2012-38 at 8 (emphasis added) (citing AO 2009-01 (SWP) and *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 422 (2d Cir. 1982)).

The third factor—the governmental interest in obtaining identifying information of contributors and recipients of expenditures—weighed heavily in the Commission's decision in AO 2012-38 to extend SWP's partial exemption from FECA's disclosure requirement. The Commission explained: "As evidenced by the low vote totals for SWP candidates, the lack of success in ballot access, and the small total amounts of contributions to SWP committees, the Commission concludes that the SWP continues to be a minor party that is out of the mainstream." AO 2012-38 at 8. For this reason, the Commission concluded that "[t]he governmental interest in obtaining the names, addresses, and other identifying information of SWP contributors and vendors doing business with the SWP committees in connection with Federal elections remains very low and continues to be outweighed by the reasonable probability of threats, harassment, or reprisals resulting from such disclosure." *Id.* at 10.

By contrast, the governmental interest in obtaining disclosure information from TPLF is very high and clearly outweighs the meager evidence of threats, harassment, or reprisals presented by TPLF. As detailed in our October 18 comments, the Tea Party movement's electoral success, fundraising success and sheer political power in Congress creates a compelling public and governmental interest in disclosure by TPLF and other Tea Party organizations.² Indeed, according to a public opinion poll conducted by the Pew Research Center in early October, "[a]bout four-in-ten (41%) Republicans and Republican leaners agree with the Tea Party movement, while 45% say they have no opinion either way and an additional 2% volunteer that they haven't heard of the movement."³

Draft B notes that the "significant electoral success" and "robust financial activity" of TPLF distinguishes the organization from the Socialist Workers Party and other organizations that courts have held to be exempt from disclosure requirements. Draft B at 8-9. Draft B correctly concludes: "In light of the electoral success of TPLF's supported candidates, coupled with TPLF's extensive financial activity, . . . TPLF is not a minor party or organization . . . [and] is not exempt from the disclosure requirements of the Act and Commission regulations." Draft B at 10-11.

The Campaign Legal Center and Democracy 21 urge the Commission to reject Draft A, to recognize the compelling public and governmental interest in disclosure by TPLF and other Tea Party organizations, and to approve Draft B denying the "threats, harassment, or reprisals" exemption to TPLF.

² See Campaign Legal Center and Democracy 21, Comments on AOR 2013-17 at 13-15.

³ Pew Research Center for the People & the Press, *Tea Party's Image Turns More Negative*, Oct. 16, 2013, <http://www.people-press.org/2013/10/16/tea-partys-image-turns-more-negative/>.

II. The Public and Governmental Interests in Disclosure By TPLF and Other Tea Party Group Vastly Outweighs the So-Called Evidence of Threats, Harassment, or Reprisals Presented By TPLF.

Only where the reasonable probability of threats, harassment, or reprisals outweighs the vital governmental interest in disclosure is an organization entitled to exemption from the disclosure requirements. *See Buckley*, 424 U.S. at 71. As detailed in our October 18 comments, TPLF’s 1,400-plus pages of exhibits fail to demonstrate the “severe hostility and harassment” that TPLF claims the Tea Party and its supporters have suffered.⁴ Ironically, the vast majority of instances of purported “harassment” described in TPLF’s exhibits entail no more than the exercise of First Amendment rights—something the Tea Party claims to support. It is also worth noting that, though TPLF has disclosed millions of dollars of contributions, it does not allege a single instance of threats, harassment, or reprisals directed at one of its donors.

As Justice Scalia observed in *Doe v. Reed*: “There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” 130 S. Ct. 2811, 2836-37 (2010) (Scalia, J., concurring). Existing laws against threats and intimidation are more than sufficient to deal with any harassment Tea Party supporters may experience in the future.

Draft B correctly recognizes that the “instances of threats and harassment and the concerns about harassment expressed by TPLF’s supporters . . . are proportionately far fewer in relation to the number of such supporters than was the evidence of firings, workplace intimidation, threats, harassment, and police hostility directed against supporters of the [SWP].” Draft B at 11. “Moreover, any evidence of threats, harassment, and reprisals directed against the Tea Party movement in general would need to be weighed against the Tea Party’s broad electoral success and financial support, as noted above.” *Id.* Draft B correctly concludes that the “evidence presented here does not outweigh the stronger governmental interest in disclosure of TPLF’s significant financial activity supporting many successful candidates and sitting members of Congress.” *Id.*

III. Conclusion

For all of the above-stated reasons and those set forth in our October 18 comments, the Campaign Legal Center and Democracy 21 respectfully urge the Commission to reject Draft A and approve Draft B, denying TPLF’s request for the “threats, harassment, or reprisals” exemption from FECA’s reporting and disclosure laws. The Constitution does not require such an exemption and granting exemption to TPLF will fundamentally undermine FECA’s disclosure regime and deprive voters of vital information regarding the financing of one of our nation’s most powerful and well-financed political factions.

We appreciate the opportunity to submit these comments.

⁴ See Campaign Legal Center and Democracy 21, Comments on AOR 2013-17 at 9-13.

Sincerely,

/s/ J. Gerald Hebert

/s/ Fred Wertheimer

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Fred Wertheimer
Democracy 21

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW—Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street NE
Washington, DC 20002

Counsel to the Campaign Legal Center

Copy to: Each Commissioner
 Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
 Mr. Adav Noti, Acting Associate General Counsel, Policy
 Ms. Amy L. Rothstein, Assistant General Counsel
 Mr. Robert M. Knop, Assistant General Counsel