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April 21, 2003

Rosemary C. Smith, Esq.
Acting Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Comment on AOR 2003-12

Re: Request for Advisory Opinion, AOR 2003-12

Dear Ms. Smith:

The Brennan Center for Justice at NYU School of Law is pleased to submit these comments on the request of the Stop Taxpayer Money for Politicians Committee (the "Committee") for an advisory opinion, AOR 2003-12, completed April 7, 2003. The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's mission is to develop and to implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.

The Center's Democracy Program has been working in the area of campaign finance reform on the federal, state, and local levels since its inception in 1995. The Center is currently part of the legal defense team in *McConnell v. FEC*, which involves 11 consolidated suits against the federal Bipartisan Campaign Reform Act of 2002. Center attorneys have successfully helped to defend numerous challenges to state campaign finance laws throughout the country, including *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), and *May v. Bayless*, 55 P.3d 768 (Ariz. 2002) (*en banc*), *cert. denied*, 155 L. Ed. 2d 314 (2003). The Center also provides legal counsel and legislative drafting assistance to citizens and elected officials interested in promoting campaign finance bills or initiatives and has delivered testimony on campaign finance issues before Congress, state and local legislative bodies, and the Federal Election Commission. In addition, the Center has published three editions of *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws*, which provides comprehensive constitutional analysis of a wide range of campaign finance provisions. The Brennan Center has a strong interest in ensuring that the Federal Election Commission correctly interprets the Bipartisan Campaign Reform Act.

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When a new statute or regulation imposes limitations on campaign financing, political actors seek new ways to continue business as usual. The Bipartisan Campaign Reform Act closed the most significant loopholes that allowed candidates for federal office to use the financial support of corporations, labor unions, and wealthy individuals through soft money contributions and sham issue advocacy. In response, wealthy supporters who either cannot give directly to candidates, because of corporate status, or cannot give as much as they previously did inevitably turn to new mechanisms by which they can continue to funnel money indirectly into campaigns. The tactic whereby candidates establish committees promoting a ballot initiative and then feature themselves prominently in advertising for the initiative is part of the first wave of efforts to circumvent the reforms Congress adopted.

The Bipartisan Campaign Reform Act eliminates the corruption and appearance of corruption that results from candidates soliciting soft money contributions from supporters. It also prevents corporations and labor unions from currying favor with a federal officeholder by running sham issue ads that purportedly urge policy outcomes but actually seek to win votes for an officeholder. These goals would be directly undermined if candidates were permitted to continue raising funds from otherwise prohibited sources and in otherwise prohibited amounts through the simple expediency of linking their efforts to an initiative campaign committee that they established.

Because the Bipartisan Campaign Reform Act unambiguously prohibits initiative campaign committees that were established by candidates for federal office from raising money from sources or in amounts that are not permitted by federal law, the Committee may not accept contributions from corporations or labor unions, or in amounts exceeding the federal limits. The Committee was established by Rep. Jeff Flake. Benjamin L. Ginsberg, Letter to Rosemary C. Smith at 2 (April 7, 2003). As such, regardless of whether Rep. Flake still controls the Committee, it falls squarely in the category of "an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office." 2 U.S.C. § 323(e)(1). The Committee has stated that it intends to participate in voter registration, get-out-the-vote, and voter identification activities in connection with an election where federal officeholders will be elected. Benjamin L. Ginsberg, Letter to Rosemary C. Smith at 3-4, (March 21, 2003). These activities are within the definition of federal election activity at 2 U.S.C. § 431(20). Consequently, the Committee is not permitted to "solicit, receive, direct, transfer, or spend funds . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 323(e)(1)(A). Even if the Committee refrained from engaging in any federal election activity, it would not be permitted to "solicit, receive, direct, transfer, or spend funds . . . unless the funds—(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of [2 U.S.C. § 441a(a)]; and (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office." 2 U.S.C. § 323(e)(1)(B). Neither of these restrictions depends in any way upon whether the Committee is

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a § 501(c)(4) tax-exempt organization or a § 527 political committee. Because the Committee is itself an individual described in 2 U.S.C. § 323(e)(1), it may not take advantage of the exceptions in 2 U.S.C. § 323(e)(4) that permit federal candidates and their agents to raise money on behalf of nonprofit organizations. Even if it were permitted to solicit funds under this section, it would be unable to spend those funds, because the restrictions on the activities of individuals described in 2 U.S.C. § 323(e)(1) apply to expenditures of funds, whereas the exception in subsection (e)(4) only covers solicitations.

Rep. Flake and the Committee seek to raise money "outside of the Federal limit and source restrictions." Benjamin L. Ginsberg, Letter to the Federal Election Commission at 2 (March 3, 2003). To allow them to do so would open a gaping loophole in the federal campaign finance law. All a candidate would need to do to avoid source and amount limits would be to set up a separate committee ostensibly to influence an initiative campaign, but which would from day one stress the candidate's campaign themes, and then run adds that say "Oppose New Taxes: Vote for Rep. John Smith's Initiative 2." Such an initiative committee, even if the candidate did not control it after establishing it, could manifestly be used to circumvent federal campaign rules.

The limitations on the ability of a federal candidate to raise funds for or otherwise support a completely independent ballot initiative committee is beyond the scope of this AOR. Because Rep. Flake established and at least initially controlled the Committee, it cannot receive any funds that are not subject to federal source and amount limitations. The Commission should give effect to the plain language of the Bipartisan Campaign Reform Act.

Respectfully,

Adam H. Morse
Associate Counsel

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