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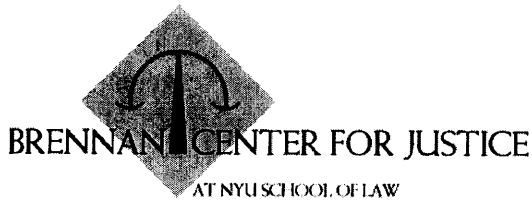

July 27, 2005

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E. Street, NW
Washington, D.C. 20463

Re: Advisory Opinion Request 2005-10

Dear Mr. Norton:

The Brennan Center for Justice at NYU School of Law is pleased to submit these comments in regard to AOR 2005-10. 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 Brennan 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 was part of the legal defense team in *McConnell v. FEC*, 540 U.S. 93 (2003). 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*). The Brennan 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 and state legislatures. In addition, the Brennan Center has published four 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.

The Brennan Center has reviewed the comments submitted in regard to AOR 2005-10 by the Campaign Legal Center. The Brennan Center joins the Campaign Legal Center's analysis of AOR 2005-10 and recommends it to the Commission.

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Because Representative Berman (D-CA) and Representative Doolittle (R-CA) are federal officeholders, and because their proposed solicitation of funds pertains to an "election other than an election for Federal office" the Congressmen are subject to the FECA amount and source limitations set forth in 2 U.S.C. § 441i(e)(1)(B).[1]

The critical question in this AOR is whether the California statewide special election is an election within the scope of section 441i(e)(1)(B). BCRA offers no indication that initiative elections are not included in the category of "any election other than an election for Federal office." Indeed, the Commission's advisory opinion in 2003-12 expressly concluded that state ballot measures constitute elections for purposes of subparagraph (B) of section 441i(e)(1). The Commission's determination was consistent with both BCRA's terms and its overall purpose of preventing the "corruption or the appearance of corruption of federal candidates and officeholders." *McConnell*, 540 U.S. at 182.

For these reasons, and the reasons more extensively detailed in the Campaign Legal Center's comments regarding AOR 2005-10, we hereby urge the Commission to advise Congressmen Berman and Doolittle that they are prohibited by 2 U.S.C. § 441i(e)(1) from soliciting or directing funds in excess of FECA's amount limitations or from sources prohibited by FECA in connection with California's November election.

Respectfully,

/s/ Adam H. Morse
Adam H. Morse
Associate Counsel

/s/ James J. Sample
James J. Sample
Associate Counsel

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[1] In AOR-2005-10, the requestors quote the comments of the Brennan Center in regard to AOR 2003-12, stating that "[t]he 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 AOR." Letter from Adam H. Morse, Assoc. Counsel, Brennan Center for Justice, to Rosemary C. Smith, Esq. (Apr. 21, 2003). The quoted statement in no way stands for the proposition for which the requestors cite it—that "ballot initiative committees and federal officeholders retain a broad zone within which they are free to independently promote ballot issues however they see fit." AOR 2005-10 at 5. On the contrary, the Center's previous statement simply indicated that the precise circumstances applicable here, in AOR 2005-10, were beyond the scope of its comments on AOR 2003-12, because that request involved a committee established by a federal officeholder, Representative Jeff Flake. The Commission's advisory opinion in response to AOR 2003-12 is, however, pertinent to this case insofar as it concluded that state ballot measures constitute elections within section 441i(e)(1)(B).

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