October 26, 2015

Via Electronic Submission System

Federal Election Commission
ATTN: Amy L. Rothstein, Assistant General Counsel
999 E Street NW
Washington, DC 20463

Re: Comments on Rulemaking Petition—Contributions From Corporations or Other Organizations to Political Committees (REG 2015-03) (Notice 2015-10)

Dear Ms. Rothstein,

The Pillar of Law Institute is a nonprofit, nonpartisan institution organized under § 501(c)(3) of the Internal Revenue Code and dedicated to defending political free speech and association. It is a program of the Wyoming Liberty Group. The Institute represents plaintiffs and defendants nationwide who are threatened by laws that abridge political First Amendment rights. Pillar will also from time to time provide comments to administrative agencies including the Federal Election Commission with the aim of informing administrative decisions that will prevent the abridgement of free speech. We welcome the opportunity to discuss these comments further at any scheduled hearings.

I. Introduction

Before this Commission is a petition seeking to end "contribution laundering"—an act that does not exist. However quixotic this proposal may be, it has no relevance under the Federal Election Campaign Act ("FECA"). Instead, it would injure civic engagement by ordinary Americans.

The proposal in question rests on two flawed assumptions. First, the primary dedication of this Commission is to protect the rights enumerated in the Constitution, not to enact free-floating concepts of electoral nirvana.[1] Second, making an already cumbersome FECA more complicated by imposing yet more rules only makes the exercise of First Amendment rights further removed from average citizens.[2]

Because the petition in question seeks to cure a harm that does not exist—contribution laundering—and because it impairs, rather than advances, First Amendment political speech and association, it should be summarily denied.

[1] *See, e.g.,* Statement of Reasons ("SOR") of Commissioner Weintraub in MURs 5540, 5545, 5562, 5570 (CBS Broadcasting, Inc.) (FEC Jul. 12, 2005) ("merely investigating" allegations of fairness "would intrude upon [C]onstitutional guarantees of freedom of the press"); SOR by Commissioner Sandstrom in MUR 4620 (The Coalition) (FEC Sept. 6, 2001) ("the Commission must be mindful of constitutional constraints"); Advisory Opinion ("AO") 2003-02 (Socialist Workers Party), Apr. 4, 2003 (exemption to disclosure requirements applied due to constitutional considerations); Shays v. FEC, 337 F.Supp.2d 79, 86–87 (D.D.C. 2004) (instructing the FEC to conduct a more thorough analysis of First Amendment concerns).

[2] *See, e.g.*, Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Institute for Justice, Oct.2007, *available at* http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf; Benjamin Barr & Stephen R. Klein, *Publius was not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 254 (2014).

II. Illusory Reform: Contribution Laundering Does not Exist

Much to the displeasure of the professional campaign finance lobby, the Supreme Court has plainly established that spending money in political campaigns and for political speech is an important right protected by the First Amendment.[3] Some individuals may pamphlet door-to-door, others may post yard signs, but many Americans busy with ordinary life make contributions to support political causes and candidates they believe in. Many reform-oriented commentators sing the harpy's cry of "corruption" whenever money bearing some electoral nexus is mentioned.[4] For them, burning bras, protesting in the streets, or walking across New Hampshire is the stuff real politics is made of. Writing a check to the National Rifle Association, a climate change PAC, or your favored candidate[5] just raises eyebrows. But overwhelmingly for mothers busy with children's trumpet lessons and fathers working double shifts, writing a check to one's favored cause is the most efficient and realistic path to political engagement.

Protecting the ability of Americans of any socioeconomic status to participate in the political process is important. It is especially important when money is flowing from individuals to non-connected, independent expenditure only ("super") PACs, hybrid PACs, or traditional PACs. Whether the group is the NRA Political Victory Fund or Sierra Club PAC, these groups harness the amazing power of association—average Americans amplifying and expanding their voice by pooling their resources into a group sharing common principles.[6] Hindering this sort of civic engagement with more rules, even when done to enhance "disclosure," only removes ordinary Americans from our shared political life.

The proposed reform falls into the same weary traps highlighted above. It purports to be concerned about the import of anonymous speech, but asks for far-reaching forced disclosure of even the most remote political spending. It tilts at electoral windmills by asking this body to end "contribution laundering"—an act that does not exist. It seeks complex rules to determine the "proximate" or "original" source of all political funding; much like identifying the first drop of water in the Potomac River. It misunderstands the Supreme Court's imprimatur given to one-time, event-driven disclosure. And it seeks to otherwise drown ordinary citizens and grassroots groups in an accounting and paperwork nightmare to achieve its dream of ending "contribution laundering."

III. Restricting "Contribution Laundering" Would Penalize Commonplace Acts of Association

True to their names, "Make Your Own Laws PAC, Inc." and "Make Your Laws Advocacy" seek to make their own legal terms bearing little resemblance to their commonplace usage. The laundering of funds is traditionally understood as being part of the criminal offense of money laundering. This is a

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[3] McCutcheon v. FEC, 134 S.Ct. 1434, 1440–41 (2014).

[4] *See, e.g.*, Fred Wertheimer, *How Chief Justice Roberts and Four Supreme Court Colleagues Gave the Nation a System of Legalized Bribery*, DEMOCRACY 21, Oct. 6, 2015, http://www.democracy21.org/money-in-politics/press-releases-money-in-politics/how-chief-justice-roberts-and-four-supreme-court-colleagues-gave-the-nation-a-system-of-legalized-bribery/.

[5] Many Americans did just this when Senator Ted Cruz announced his 2016 presidential candidacy. Senator Cruz raised nearly $4 million in the eight days after this announcement. Nearly all of that $4 million came from donations of $100 or less. Derek Willis, *In a Short Time, Ted Cruz Has Raised Big Money From Small Donors*, N.Y. TIMES – THE UPSHOT, Apr. 2, 2015, http://www nytimes.com/2015/04/03/upshot/what-ted-cruzs-early-fund-raising-means-and-doesnt.html?_r=0

[6] It is axiomatic that the vibrant right of association acts as a precursor to the American model of a free society. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, *available at* http://classiques.uqac.ca/classiques/De_tocqueville_alexis/democracy_in_america_historical_critical_ed/democracy_in_america_vol_2.pdf (Chapter 4, "Of Political Association in the United States.")

specific legal term of art. Commonly understood, money laundering occurs when one party engages in criminal activity and then obscures the source of that funding by disguising its original source.[7] Money laundering is often done through fictitious or duplicative transactions to cover the source of the original illegal transaction.

Petitioners' request to "prohibit contribution laundering" fundamentally misunderstands the law. Contributions, unless they are of a prohibited variety—those involving excessive amounts or foreign nationals, for example—do not constitute criminal or illegal acts. Because these contributions are legal in the first place, any subsequent use of them does not constitute "laundering." There is no predicate criminal offense from which to launder. Thus, there is no "laundering" to stop.

Even though nothing nefarious is afoot, reformers still sometimes push headlong with religious zeal to transmute legal contributions into illegal money laundering. These inventions have been soundly defeated. Take for example the near decade long litigation involving former Majority Leader Tom DeLay.[8] There, the State of Texas persecuted DeLay under a theory of money laundering because he used three transfers of contributions to comply with the state's complicated campaign finance law. After nearly ten years and the crippling of a man's political life, DeLay was fully acquitted.

Petitioners' request begins with the wrong assumptions about contributions and reaches necessarily flawed results. Making contributions to fund political speech, the operation of a PAC, or to support a candidate running for public office are important ways people associate and express themselves. They are not, by themselves, illegal corrupting transactions. Consider the following hypothetical.

Mrs. Jones, a citizen concerned about climate change and her children's future, is excited about a new campaign by the local Berkeley PTA to engage on the issue. In addition to friends, families, and neighbors, she contributes $50 to the PTA to help promote a better understanding of climate change by the American public. After studying the issue, the PTA decides contributing funds to a Super PAC that is advertising the issue and discussing its relevance among candidates is the best way to spend the aggregate $12,000 it raised. Understanding that Americans pay most attention to stray political issues during electoral cycles, the PTA donates for maximum efficiency and audience reception and less so because it might have electoral impact.

Out of the $12,000 the PTA raised, $2,500 came from a neighborhood group association—the Berkeley Climate Cops, another $3,000 came from a small batch of local mom and pop corporations through a business association, some $4,500 came from individual donations, and $2,000 came from other non-profits concerned about the cause and inspired by the PTA's action.

Pause to consider how Petitioners' proposed reform would damage ordinary political engagement. Under current law, the PTA would make its donation to the Super PAC and the Super PAC would be required to disclose it as originating from the PTA. But under the proposed reform, the PTA now faces a sizeable challenge. It must somehow decide the "original" or "proximate" source of each contribution funding its aggregate contribution. To do so, it must reach out to the Berkeley Climate Cops and ask that it turn over each member's contribution, amount, and personal details about each contributor. Assuming 50 people gave $50, it has some work to do. It must also contact each mom and pop business and ask for their original identification. If 30 corporations gave $100 each, there is more paperwork building up. If those 30 corporations have multiple ownership interests, it gets even more interesting. The PTA must also sort out each and every individual contribution making up the $4,500 and be prepared to identify them individually. Assuming 180 people gave $25 each, the PTA better have a small army of sleuths on staff

[7] *See, e.g.*, 18 U.S.C. § 1956.
[8] DeLay v. State, 443 S.W.3d 909 (Tex. Crim. App. 2014).

for compliance purposes. Let's not forget the need to determine the "proximate source" of the $2,000 given by five non-profit corporations here as well.[9]

Some may believe that climate change advocates are dangerous, corrupting individuals and imposing the draconian requirement on a PTA to track down over 300 contributors and provide every minute detail of information is in the public interest. But outside professional reform lobby hallways, this would be laughable.

Most people celebrate the fact that different groups of Americans actually care about a political issue—whether it be gun control, climate change, or Benghazi—and want to engage the public. When a political neophyte musters up the courage to speak out, contribute, or be politically active they should not be buried in paperwork. That people cared about climate change is a source of celebration, not scorn. The surest way to end civic engagement and further injure political participation by average Americans would be to bury them in absurd, far-reaching paperwork of the type imagined by Petitioners.

IV. Paging Mrs. Palsgraf: It is Impracticable to Disclose the Proximate Cause of All Election Spending

Petitioners ask that any "non-individual contributions that may ultimately be spent on political expenditures (whether independent or not) must come from an FEC-reported separate segregated fund or Carey account, and that all regulatory requirements extend to both direct and indirect contributions/expenditures."[10] In other places in their request, they ask that all "proximate" or "original" contributors be disclosed.

Like the theory of proximate cause in torts, limiting principles must restrict legal standards.[11] These make the application of rules sensible, predictable, and compliance, feasible. We might imagine an America with boundless defamation laws, but no one would speak.[12] We could envision never-ending liability for torts, but nothing would be produced.[13] Instead, sensible rules require sensible limits. In the area of political free speech and association those limits can be found in the First Amendment and its supporting case law.

It is clear that when government issues complicated and intricate speech rules, many "persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[14] Petitioners' proposed rule would enact disclosure without sense by requiring disclosure for "the original source of all election-related contributions and expenditures, traceable through all intermediary entities to

[9] Notably, each of the five non-profit corporations giving to the PTA must also root out and decide the "proximate" or "original" source of contributions funding the climate change advertising. Reform of this variety knows no limiting principle and insists on disclosure however far-reaching, however intrusive, however absurd it may be. For illustration of this trend, please see "If You Give a Moose a Muffin," https://www.youtube.com/watch?v=tOPFVSiB5uQ ("When he's finished eating the muffin, he'll want another, and another, and another").

[10] Petition at 3.

[11] *See* Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

[12] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[13] *See, e.g.*, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 686 (1977).

[14] Citizens United v. FEC, 558 U.S. 310, 335–36 (2010) (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

a natural person, regardless of the amounts or entities involved."[15] This only begs the question—what are "election-related contributions and expenditures"? Even the FEC cannot answer this question.[16]

Petitioners' proposal would establish a tidal wave of senseless disclosure. To be meaningful, disclosure law must be limited in how far back it reaches, just like proximate cause limits tort liability. A system of tort law that penalized a homeowner who knocked over a can of paint thinner, which dripped into a public street, which combusted when a resident threw a cigarette down, causing a nearby hospital's power source to explode, causing injury to patients would be absurd. A system of campaign finance that required disclosure and regulatory compliance for $25 donations to the local gun group, which were contributed to the national NRA Victory Fund, which were then donated to a Super PAC to discuss Second Amendment rights would be equally absurd. Congress and the courts have balanced important First Amendment interests with the government's duty to stem corruption of the electoral process.[17] Imposing rules that target spending "regardless of the amounts or entities involved" does not make our American democracy cleaner by pointing out that my neighbor's grandmother spent $25 to support stem cell medical treatment liberalization. It will, however, keep many people out of important national debates.

Disclosure does not come in a one-size-fits-all variety. Many forms of disclosure work significant harms against speakers, especially political amateurs, and enact regulatory barriers to political entry.[18] Limited disclosure makes sense, offers valuable information to the electorate, and those Americans dissatisfied by quasi-anonymous speech may elect to discount its import. It is just that simple. But imposing regulatory hurdles and complex contribution tracking schemes are sure-fire ways to drive individuals out of politics.

V. Separate, Segregated Accounts Clear the Way for Freedom, not Regulation

Petitioners attempt to characterize *Carey v. FEC* as a model for proposed regulation here. In Petitioners' view, since *Carey* approved the use of separate, segregated accounts for hybrid PACs these accounts must also be applicable here to support far-reaching disclosure. By misunderstanding the nature of the liberties protected by the First Amendment, Petitioners reach their errant conclusions.

The First Amendment presupposes that free speech "is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[19] Thus, the correct presumption about First Amendment liberties is that they are preferred to snooping regulation and that they have their "fullest and most urgent application to speech uttered during a campaign for political office."[20]

The thrust of *Carey v. FEC* was the question of whether a small, grassroots political group could operate as a hybrid PAC or whether it would have to functionally clone itself if it wanted to make small

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[15] 80 Fed. Reg. 45115 (proposed July 29, 2015).
[16] *See* AO 2012-11 (Free Speech), May 8, 2012, http://saos fec.gov/aodocs/AO%202012-11.pdf .
[17] *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 23 (1976) (FECA construed narrowly otherwise it would "preclude[] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association") (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)); McConnell v. FEC, 540 U.S. 93, 102 (2003) (the "narrowing construction adopted in *Buckley* limited the Act's disclosure requirement to communications expressly advocating the election or defeat of particular candidates").
[18] *See, e.g.,* Galassini v. Town of Fountain Hills, 2013 WL 5445483 (D. Ariz. Sept. 30, 2013).

[19] *Citizens United*, 558 U.S. at 339.
[20] *Id.* (*quoting* Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 223 (1989)); *see also* FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 475 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor").

contributions to political candidates in addition to making independent expenditures.[21] Because the small group would suffer real financial injury by having to duplicate its manpower and organizational structure just to engage in protected First Amendment activity, the District Court granted relief and rejected the FEC's argument.

The *Carey* framework is a framework for freedom, not laying the foundation for snooping, bullying, or enemy lists—the true face of "disclosure." Because the *Carey* plaintiffs wanted to engage in both limited contributions and robust expenditures, it agreed that a minimal restriction on its freedom—the creation of a separate, segregated account—would cure any government concern about corruption in its operations.[22] The FEC would have demanded that the plaintiffs cease their activities or functionally clone themselves to do so—a much more burdensome approach. In winning, the *Carey* plaintiffs demonstrated that minimally intrusive, light-handed approaches to preventing corruption are preferred to censorship or undue burdens.

Giving contributions freely and without complicated regulatory schemes is an important right under the First Amendment.[23] Were Petitioners' proposal pointed in the direction of deregulation—the liberalization of First Amendment freedoms—then it would be proper to address any need to balance a countervailing government concern about corruption. But Petitioners' proposal seeks to make civic engagement, the giving of contributions to causes, voices, and, yes, electoral issues people care about, much more burdensome. Demanding that all contributions that might fund some activity that is "election-related" come out of a *Carey* type account only ensures that additional burdens block people from effectively speaking and associating.

Carey v. FEC approved the use of separate segregated accounts to maximize First Amendment freedom while ensuring any government interest in corruption was addressed. Petitioners here seek to impose additional restrictions on the rights of free speech and association without any analysis of the breathing room necessary for these freedoms to exist. The proposed reform here points in the wrong direction—more cumbersome, intricate reporting and compliance schemes without any valid government interest supporting them.

VI. Conclusion

In a post-*Citizens United* world, disclosure increasingly means disclosure without meaningful boundaries. There is little doubt that scores of accountants, lawyers, and speech bureaucrats would be thrilled to devise numerous schemes to track every last political cent spent by every American. We might learn that that a neighbor spent $10 to help tackle pollution in Maryland or that one's brother spent $50 toward improving Ron Paul's Campaign for Liberty. This would take a bevy of forms, professional snooping, and enforcement mechanisms heretofore never imagined. By insisting on disclosure everywhere at all times, we would sacrifice that American ideal of self-government and the chance to be heard. Politics is not just for professionals; it is the birthright of every American. Correct reform maximizes First Amendment freedoms while protecting against corruption in specific, limited ways. Because the petition in question fails to meet these criteria, it should be summarily denied.

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[21] 791 F.Supp.2d 121 (D.D.C. 2011).
[22] *Id.* at 132–33.
[23] *McCutcheon,* 134 S.Ct. at 1440–41.

Respectfully submitted,

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