ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION 2018-EC- 002

Issued October 19, 2018

The Arkansas Ethics Commission (the "AEC") received an advisory opinion request from Mr. Bob R. Brooks, Jr. of Little Rock, Arkansas. Therein, Mr. Brooks asked the following questions:

1) *If a non-candidate committee, organized under federal law as a tax-exempt entity pursuant to 26 USC section 501(c)(4) (hereinafter, "committee") runs issue ads in Arkansas:*
   (A) Would that committee's activity constitute a contribution as defined under Ark. Code Ann. § 7-6-201(4) or a nonmoney or in-kind contributions?
   (B) Would that committee's activity be subject to any state contribution prohibitions or limits?
   (C) Would that committee's activity be subject to any state reporting or registration requirements?
   (D) Would those issue ads be "unregulated political speech and not subject to Arkansas campaign finance laws" as outlined by the AEC in Advisory Opinion No. 2006-EC-004 issued on April 21, 2006?

2) *In light of the AEC's ruling in Case No. 2014-CO-054 regarding the fact that coordinated expenditures (those "controlled by or coordinated with the candidate and his campaign" as outlined in McConnell v. Federal Election Commission, 540 U.S. 93 (2003) shall not be deemed to be an in-kind contribution, is it still correct to rely on the fact that "Arkansas' current statutory framework remains silent on this issue" such that non-candidate expenditures made by a 501(c)(4) committee which are coordinated with a state candidate and his campaign remain unregulated in Arkansas?*

3) *If there are other guidelines or policies that you would have state candidates follow or observe in this area, would you please point those out for the record?*

For purposes of the request, Mr. Brooks specifically states that the AEC is to assume that the issue ads run by the committee "could reasonably be interpreted as something other than an appeal to vote for or against a specific candidate." Likewise, the request asks the AEC to assume that the

ads would not constitute express advocacy or its functional equivalency. Keeping those assumptions[1] in mind, the answers to questions 1)(A)-(D) and 2) above are as follows:

1. (A) No, assuming the ads were issue speech paid for by the committee, current Arkansas law does not demand that it automatically be considered a contribution subject to reporting by a candidate.

(B) No, if it is not a contribution, then the current $2,700 per election contribution limit would not be applicable.

(C) Issue speech is not regulated by any laws under the jurisdiction of the Commission, and the Commission is unaware of any state registration and reporting requirements that would be triggered.

(D) There have been no pertinent changes in Arkansas law with respect to issue speech and campaign finance law since 2006-EC-004 was issued.

2. There have been no changes in Arkansas law with respect to coordinated issue speech since Case No. 2014-CO-054 was issued. Coordinated issue speech is not currently regulated in Arkansas. Coordinated express advocacy and/or its functional equivalent remains regulated and is subject to the campaign finance laws under the jurisdiction of the AEC, including but not limited to contribution limits and reporting requirements.

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[1] In the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court found that phrases like "for the purpose of influencing" did not provide a sufficiently precise description of what conduct was regulated and what conduct was not regulated. Consequently, under First Amendment "void for vagueness" jurisprudence, the Court held such language to be unconstitutionally vague.

In *Buckley*, the Court ultimately determined that the phrase "for the purpose of influencing" must be construed to require language of express advocacy. It went on to establish a bright-line test, the so called "magic words" test, specifically requiring the use of "vote for," "elect," "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat", "reject", or similar words.

More recently, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Court recognized a broadened standard for permissibly regulating speech, which includes the "functional equivalent" of express advocacy. Under this standard, it is permissible to regulate speech that does not include the so-called "magic words", provided such speech is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. To conduct this analysis, the Court set forth a two-part test to be applied.

The first part of the test is to examine whether an ad's content is consistent with that of a genuine issue ad: does the ad focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. The second part of the test is to consider whether the ad's content lacks indicia of express advocacy: mentioning an election, candidacy, political party, or challenger or does it take a position on a candidate's character, qualifications, or fitness for office.

The requestor cited Case No. 2014-CO-054, in which the Commission found that the "Miles to Washington" ad did not contain any "magic words". The Commission then went on to apply the functional equivalency test to that particular ad. In doing so, the Commission considered the above-mentioned factors and found that this ad could reasonably be interpreted as something other than an appeal to vote for or against a specific candidate. Accordingly, the Commission found that, under current Supreme Court jurisprudence, the "Miles to Washington" ad was not the functional equivalent of express advocacy, and, therefore, did not constitute a contribution within the meaning of Ark. Code Ann. § 7-6-201(4).

3. The request asks what other guidelines or policies should be observed or followed. Subsequent to the Supreme Court's decision in *Buckley*, it has been recognized that expenditures by a noncandidate in a federal campaign that are "controlled by or coordinated with the candidate and his campaign" may be treated as indirect contributions subject to federal law's source and amounts limitations. *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). However, as has been noted previously by the AEC, Arkansas law does not provide that that coordinated expenditures shall be deemed to be an in-kind contribution. While the United States Congress has spelled out this concept, the current statutory framework in Arkansas remains silent on the issue.

The AEC has found previously that an ad paid for by an entity organized at the Federal level that does not meet the definitions of any of the committees under the jurisdiction of the AEC, even if coordinated with a campaign, did not constitute a "contribution" under Arkansas law because the ad did not contain express advocacy or its functional equivalent as defined under the law.

It is also noted that coordinated issue advocacy can be regulated constitutionally. Case history, including the most recent *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), has affirmed that disclosure requirements need not be limited to express advocacy. It appears, however, that only express advocacy and its functional equivalent is currently regulated in Arkansas.

In contrast with the federal system where there is an explicit rule, there is no definitive law or rule in Arkansas stating that coordinated issue speech will be automatically be treated as a contribution. While it is clear that coordination will keep an expenditure from being an independent expenditure, coordination does not automatically make every expenditure a contribution within the meaning of Ark. Code Ann. § 7-6-201(4). As previously noted, coordinated speech which falls short of express advocacy is not currently regulated, and is currently permissible, under Arkansas law.

The request asks if the outcome of Case No. 2014-CO-054 can be relied upon and what other guidelines or policies should be followed. Because coordinated issue ads are not currently regulated as contributions under Arkansas law, the $2,700 campaign contribution limit would not apply and such expenditures would not be required to be disclosed by a candidate on a C&E report as contributions. In the event the ads were, in fact, contributions, expenditures over the current $2,700 per election contribution limit would be deemed excessive contributions, in violation of Ark. Code Ann. §7-6-203(a)(1)(A).

Likewise, since the issuance of Advisory Opinion 2006-EC-004 and the conclusion of Case No. 2014-CO-054, Issue 3 was passed by the voters in the general election held on November 4, 2014, and became Amendment 94 to the Constitution of the State of Arkansas of 1874. During the 90th General Assembly, the Arkansas Legislature passed SB 967, which became Act 1280 of 2015. Amongst other changes, this legislation limited from whom a candidate could accept contributions. A candidate can only accept contributions from (i) An individual; (ii) A political party that meets the definition of a political party under § 7-1-101; (iii) A political party that meets the requirements of § 7-7-205; (iv) A county political party committee; (v) A legislative caucus committee; or (vi) An approved political action committee. If the committee were not one of those permissible contributors, and the ads were not deemed to be issue speech, then the ads could also be found to be a contribution from a prohibited contributor, which would be a violation of Ark. Code Ann. §7-6-203 (a)(1)(B).

Similarly, if the ads were deemed to not be issue speech, then the committee could also be found to be a prohibited political action committee if they were coordinated (in violation of Ark. Code Ann. §7-6-215), or in violation of the independent expenditure laws if they were not coordinated (in violation of Ark. Code Ann. §7-6-220 and/or 7-6-227).

A federal statute, 52 U.S.C. 30104(f)(3), defines "Electioneering communication" to mean any broadcast, cable, or satellite communication that:

1. Refers to a clearly identified candidate for Federal office;
2. Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
3. Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

Arkansas does not have an analogous law. Electioneering communications, including who is making them, how the money was raised to pay for them, and how much was spent on them, need not be reported to the State of Arkansas or disclosed to the public under Arkansas law.

In summary, Arkansas law does not currently regulate coordinated issue advocacy as a contribution. Arkansas law with regard to coordinated issue speech has not been amended by the Arkansas legislature since 2006; therefore, it is still the case that Arkansas law does not currently regulate coordinated issue speech as a contribution. Likewise, as of the date of this Advisory Opinion, electioneering communications that contain issue speech are not regulated under Arkansas law.

This advisory opinion is limited to the specific set of facts or activity set forth in the request. The AEC emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law.

This advisory opinion is issued by the Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

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