April 27, 2010

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2010-7 (Yes on FAIR)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2010-7, an advisory opinion request submitted on behalf of Yes on FAIR, a California political committee that seeks the Commission's opinion as to whether "Members of Congress may solicit funds for Yes on FAIR outside the limits and source restrictions prescribed by the Federal Election Campaign Act ("FECA") [*i.e.*, soft money]." AOR 2010-7 at 1.

As recognized by Yes on FAIR, the question of whether federal candidates and officeholders may solicit soft money for state ballot measure committees has been posed to the Commission in at least three advisory opinion requests since the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA")—"each yielding a different outcome." AOR 2010-7 at 3 (citing Ad. Ops. 2003-12 (Flake), 2005-10 (Berman/Doolittle) and 2007-28 (McCarthy/Nunes)). We agree with Yes on FAIR that the "result has been confusion in the law" and that the "time has long since passed" for the Commission to answer this question definitively. AOR 2010-7 at 3. However, we disagree in the strongest possible terms with Yes on FAIR regarding what the definitive answer should be under the controlling law.

We have filed comments with the Commission in all three of the advisory opinion proceedings cited above,[1] and we do so here again, urging the Commission to make clear that FECA, as amended by BCRA, along with existing Commission regulations, require the Commission to advise Yes on FAIR that Members of Congress may <u>not</u> "solicit funds for Yes on FAIR outside the limits and source restrictions" prescribed by FECA. *See* 2 U.S.C. §§ 431(1) (defining "election") and 441i(e)(1) (ban on soft money solicitation by federal candidates in connection with any election). *See also* 11 C.F.R. §§ 300.60 and 300.62.

[1] *See* Comments of the Campaign Legal Center on AOR 2003-12 (Flake) (April 21, 2003); Comments of Common Cause and Democracy 21 on AOR 2003-12 (Flake) (April 21, 2003); Comments of the Campaign Legal Center on AOR 2005-10 (Berman/Doolittle) (July 27, 2005); Comments of the Campaign Legal Center and Democracy 21 on AOR 2007-28 (McCarthy/Nunes) (November 5, 2007).

Despite the requestors' best efforts to complicate the matter—and the Commission's indecisiveness in past advisory opinion proceedings—the appropriate legal analysis is simple. The Commission needs to answer only two straightforward questions:

- Are Members of Congress within the class of persons restricted by the soft money solicitation prohibition of section 441i(e)(1)—*i.e.*, are Members of Congress federal candidates, federal officeholders, or agents of federal candidates or officeholders?

- If so, is the proposed activity covered by the soft money solicitation prohibition of section 441i(e)(1)—*i.e.*, are the funds being solicited or directed in connection with an "election"?

The answer to the first question is yes. Obviously, Members of Congress are federal officeholders and many are likewise federal candidates and thus are clearly subject to the soft money prohibition of section 441i(e)(1).

The answer to the second question is also yes. The activity proposed by Yes on FAIR—to have Members of Congress soliciting funds for an initiative committee whose activities relate to a ballot proposition that will appear on the same ballot that Members of Congress will appear as candidates for federal office—is not only solicitation in connection with "an election," but in connection with an "election for Federal office" where federal candidates are on the ballot and stand to benefit from the soft money expenditures that the initiative committee makes.

Because both questions above should be answered in the affirmative, section 441i(e) prohibits Members of Congress from soliciting soft money for Yes on FAIR.

We strongly urge the Commission to advise Yes on FAIR that solicitation of funds for it by Members of Congress in connection with the November 2010 California general election must comply with FECA amount limitations, source prohibitions and reporting requirements as required by section 441i(e)(1)(A).

1. BCRA's legislative history, purpose and text make clear that Members of Congress are prohibited from soliciting soft money in connection with California's November 2010 election.

FECA, as amended by BCRA, states that federal candidates, officeholders and their agents shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office … unless the funds are subject to the limitations, prohibitions and reporting requirements" of FECA. 2 U.S.C. § 441i(e)(1)(A).[2]

[2] Section 441i(e) also provides that federal candidates and officeholders shall not solicit or spend money in connection with non-federal elections "unless the funds are not in excess of the amounts permitted" by FECA, and "are not from sources prohibited [by FECA] from making contributions in connection with an election for Federal office." 2 U.S.C. § 441i(e)(1)(B); *see also* 11 C.F.R. §§ 300.60 and 300.62. Though we believe this provision is applicable to state ballot measure elections, such as described by this AOR, the Commission need not reach that issue here. *See* n.13, *infra*.

In other words, when a federal candidate or officeholder raises funds "in connection with" a federal election, BCRA requires that he or she raise only hard money, subject to FECA amount limitations, source prohibitions, and reporting requirements.

BCRA's legislative history makes clear that this prohibition on soft money fundraising by federal candidates and officeholders is the very foundation of BCRA. One of BCRA's principal sponsors explained: "It is a key purpose of [BCRA] to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Even opponents of BCRA understood the intent and effect of BCRA's soft money ban. Senator Hatch (R-UT) explained to his colleagues on the Senate floor: "The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political parties and Federal candidates to solicit or receive any funds not subject to the hard money limitations of the Federal Election Campaign Act." 147 Cong. Rec. S3240 (daily ed. April 2, 2001) (statement of Sen. Hatch).

Congress recognized that the improper influence of soft money on federal officeholders depends not simply on an officeholder's actual receipt of soft money contributions, but on an officeholder's successful solicitation of soft money contributions—regardless of whether or not the officeholder controls the recipient organization.[3] One BCRA sponsor bluntly stated: "[W]e will be taking the solicitation of big money by people in power … out of American politics and with it will go the appearances of favoritism and corruption." 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin) (emphasis added). Senator McCain (R-AZ) likewise emphasized the importance of BCRA's ban on the solicitation of soft money:

> These [BCRA] provisions break no new conceptual grounds in either public policy or constitutional law. … Indeed, statutes like these have been on the books for over 100 years for the same reason that we're prohibiting certain solicitations—to deter the opportunity for corruption to grow and flourish, to maintain the integrity of our political system, and to prevent any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Furthermore, and most importantly with respect to this AOR, Congress understood that BCRA's prohibition on the solicitation of soft money was vital to preventing circumvention of the prohibition on candidate and party receipt of soft money. Senator Snowe (R-ME), another key BCRA co-sponsor, explicitly noted the importance of the solicitation ban to preventing circumvention of BCRA's ban on officeholder and party receipt of soft money:

> Now, some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for

[3] The requestor states that "Yes on FAIR is not directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, any federal candidate or officeholder." AOR 2010-7 at 2.

> electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived "quid pro quo."

148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

BCRA's legislative history, purpose and text confirm that section 441i(e)(1) was intended to eliminate the threat of real and apparent corruption resulting from federal officeholder solicitation of soft money for themselves or for other groups in connection with elections. Nowhere does BCRA's legislative history, purpose, or text suggest that the application of section 441i(e)(1) depends on an officeholder's control of the recipient group or committee, or on the type of the election (*i.e.*, federal or non-federal) for which the funds are solicited.[4]

2. The Supreme Court in *McConnell* upheld BCRA's prohibition on federal officeholder solicitation of soft money for committees over which the officeholder has no control, and regardless of the ends to which the funds are ultimately put.

The Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-84 (2003), upheld against constitutional challenge the section 441i(e)(1) ban on solicitation of soft money by federal candidates and officeholders. The Court began its analysis by examining the BCRA prohibition on direct receipt of soft money by federal candidates and officeholders. The Court noted:

> No party seriously questions the constitutionality of [BCRA's] general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them. Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate, regardless of the ends to which those funds are ultimately put, qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption. By severing the most direct link between the soft-money donor and the federal candidate, [BCRA's] ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.

McConnell, 540 U.S. at 182 (emphasis added).

The Court then went on to examine the constitutionality of the BCRA ban on soft money solicitations by federal candidates and officeholders. The Court upheld the solicitation ban, reasoning:

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[4] Although the type of election (*i.e.*, federal or non-federal) does not affect the application of section 441i(e)(1), the type of election does affect the scope of regulation under section 441i(e)(1). Funds raised in connection with federal elections must comport with FECA amount limitations, source prohibitions, and reporting requirements under section 441i(e)(1)(A), while funds raised in connection with non-federal elections must comport with FECA amount limitations and source prohibitions, but not reporting requirements. *See* 2 U.S.C. §§ 441i(e)(1)(A) and (B).

> [BCRA's] restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell, 540 U.S. at 182 (emphasis added).

The *McConnell* Court thus upheld the soft money solicitation ban for federal candidates and officeholders as a closely drawn, constitutionally permissible means of preventing corruption and circumvention of existing contribution limits, even when the candidate's solicitation is for the benefit of a committee over which the candidate has no control and regardless of the election-related ends to which those funds are ultimately put.

Thus, neither the candidate's control of the recipient committee (or lack thereof), nor the recipient committee's use of the funds, are relevant factors in the application of section 441i(e)(1). The argument by Yes on FAIR that such factors are relevant has been squarely rejected by the Supreme Court and is without merit.

3. Commission regulations reinforce the BCRA provision prohibiting Members of Congress from soliciting soft money in connection with California's November 2010 election.

Commission regulations define "election" to mean the "process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office." 11 C.F.R. § 100.2(a).[5] California's November 2010 election clearly meets this definition. Individuals are seeking election to federal office in California's November 2010 election.

Commission regulations implementing the section 441i(e)(1) soft money ban state that individuals holding federal office shall not:

> [S]olicit, receive, direct, transfer, spend, or disburse funds in connection with an election for Federal office, including funds for any Federal election activity as defined in 11 CFR 100.24, unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act.

11 C.F.R. §§ 300.60 and 300.61 (emphasis added).[6]

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[5] FECA itself defines "election" more broadly to include any "general, special, primary, or runoff election." 2 U.S.C. § 431(1)(a).

[6] In the Commission's Explanation and Justification for sections 300.60 and 300.61, the Commission noted that a commenter in the rulemaking "urged the Commission to construe [section 441i(e)] to prohibit a candidate only from raising non-Federal funds that would eventually benefit the candidate's own campaign." *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft

BCRA and the Commission's regulations in turn define "Federal election activity" ("FEA") to include voter registration activity (*i.e.*, contacting individuals to assist them in registering to vote) within 120 days preceding a federal election, as well as all of the following activities conducted "in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot)":

- voter identification (*i.e.*, acquiring information about potential voters);
- generic campaign activity (*i.e.*, a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified candidate); and
- get-out-the-vote activity (*i.e.*, contacting registered voters to assist them in engaging in the act of voting).

See 2 U.S.C. § 431(20)(A)(ii) (emphasis added); *see also* 11 C.F.R. §§ 100.24 and 100.25.

Contrary to the specific language of the applicable regulation, Yes on FAIR proposes to have Members of Congress raise soft money that will be spent directly in connection with the November 2010 federal elections—to engage and turn out voters in those elections, generally; and most likely to pay for activities that meet the federal law definition of FEA (*e.g.*, voter registration, voter identification and GOTV). Yes on FAIR explicitly states that it "will engage in an extensive campaign to promote the FAIR Act's passage as well as get-out-the-vote programs specifically designed to get the measure's supporters to the polls in November." AOR 2010-7 at 2.

Such GOTV efforts undeniably mobilize voters for candidates. Political scientists have demonstrated empirically that ballot measures increase voter turnout in midterm elections as well as presidential elections—with the effect on turnout even more pronounced in midterm elections.

> Simulating voter turnout in midterm elections, we find … that each additional initiative on the ballot raises state turnout by 1.7%, enough to swing a close candidate election. Stated another way, each initiative appearing on a state's ballot increases turnout by nearly 2% in midterm elections, all else equal. A state with three initiatives on the ballot would be expected to have roughly 5.1% higher voter turnout in midterm elections, holding other differences among the states constant.

Caroline J. Tolbert & Daniel A. Smith, *The Educative Effects of Ballot Initiatives on Voter Turnout*, AM. POL. RESEARCH 33(2), 301 (2005).[7] Tolbert and Smith predict:

Money, Final Rules and Explanation and Justification, 67 Fed. Reg. 49064, 49106 (July 29, 2002). The Commission flatly rejected this suggestion on the ground that it did "not find support in the statutory language for this approach." *Id.*

[7] *Available at* http://www.clas.ufl.edu/users/dasmith/APR%202005.pdf.

> As initiative elections gain use and in importance, they may play a growing role in presidential and midterm elections. As we have witnessed in California and several other states during the past decade, ballot measure proponents and opponents likely will continue to fuse their campaigns with the presidential, U.S. Senate, and gubernatorial candidates and vice versa.

Id. at 304.

The spending of Yes on FAIR is likely to have significant impact on voter turnout in California's November 2010 election for Members of Congress.[8]

The Commission's regulations already acknowledge this point: they carve out an exception from the definition of FEA for ballot initiative campaigns that are not held on the date of a federal election. Under the Commission's FEA regulation, the phrase "in connection with an election in which a candidate for Federal office appears on the ballot does not include any activity or communication that is in connection with a non-Federal election that is held on a date separate from a date of any Federal election and that refers exclusively to" non-federal candidates, ballot initiatives, or the date, polling hours and locations of the non-federal elections. 11 C.F.R. § 100.24(a)(1)(iii)(A) (emphasis added). This provision makes clear that when a candidate for federal office appears on the same ballot, on the same day, as a state ballot initiative, activity meeting the definition of FEA falls within the scope of the federal candidate soft money ban at 11 C.F.R. §§ 300.60 and 300.61, which explicitly cross references this regulatory definition of FEA.

The Commission should be clear as to what is at stake in this AOR. Requestors seek permission to have Members of Congress solicit soft money funds for the ballot committee to spend on activities that—according to empirical studies as well as common sense—will shape the electoral environment in which the federal candidates themselves are running for office: Yes on FAIR will motivate voters, they will seek to register voters, and they will turn out voters to the polls, all of whom will then vote in the federal candidates' elections as well.

If the Commission mistakenly reads section 441i(e) so narrowly as to permit the solicitation of soft money here by Members of Congress in a federal election year for a federal ballot, it will be authorizing massive and illegal circumvention of BCRA by federal candidates and officeholders, and in effect reconstituting the soft money system that Congress enacted legislation to ban.

In short, Yes on FAIR proposes that Members of Congress engage in precisely the type of scheme to circumvent BCRA's soft money ban that Congress considered, addressed and foreclosed. Senator Snowe (R-ME) explained that BCRA's soft money ban could not be circumvented through the simple expedient of routing money through "independent groups for electioneering purposes," and that BCRA "would prohibit members from directing money to

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[8] *See also* Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, AM. POL. REV. 29, 643 (2001) ("states with frequent usage of citizen initiatives have higher voter turnout … than noninitiative states in both presidential elections and midterm elections"), *available at* http://www.clas.ufl.edu/users/dasmith/apr.pdf.

these groups to affect elections." 148 Cong. Rec. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (emphasis added).

The Commission's regulations could not be clearer, nor could BCRA. The soft money solicitation prohibition of section 441i(e)(1)(A) applies to the fundraising activities of any federal officeholder in connection with any election for federal office, including "Federal election activities." Neither the text of the regulations, nor the Commission's Explanation and Justification for the regulations, suggest that the phrase "an election for Federal office" does not include elections in which candidates for federal office will be on the ballot simply because there will also be state ballot measures on the same ballot.

Here, the November 2010 general election will have federal candidates on the ballot. The election thus is plainly "an election for Federal office." For that reason, Commission regulations at sections 100.2(a), 100.24, 100.25, 300.60 and 300.61 explicitly prohibit "Members of Congress [from] solicit[ing] funds for Yes on FAIR outside the limits and source restrictions prescribed by" FECA." AOR 2010-7 at 1.

4. The Commission's Advisory Opinion 2005-10 (Berman/Doolittle) pertained to an election with no federal candidates on the ballot and thus is inapplicable here.

The central issue in this AOR is whether federal candidates can raise soft money for a ballot committee that will spend that money on activities—such as get-out-the-vote drives—that are directed to the ballot in a federal election year on which those candidates appear. In this light, the only significant question presented by this AOR is whether funds solicited by federal candidates to support an initiative that will appear on the same ballot as those federal candidates constitutes funds solicited and directed "in connection with an election for Federal office" within the meaning of section 441i(e)(1)(A).

Yes on FAIR acknowledges: "On one occasion, the full Commission permitted Members to solicit funds outside federal limits and source restrictions on behalf of a ballot measure committee, albeit when the Members themselves were not also on the ballot." AOR 2010-7 at 4 (citing Ad. Op. 2005-10 (Berman/Doolittle)). Yet Yes on FAIR goes on to rely heavily on Berman/Doolittle. But there is a fundamental difference between the Berman/Doolittle opinion and this AOR: in Berman/Doolittle, the solicitation by federal officeholders was directed to a ballot initiative in a non-federal, off-year election where no federal candidates were on the ballot, while here the solicitation is to be directed to an initiative taking place in a federal election year where multiple federal candidates are on the same ballot. The Commission's prior ruling in the context of a ballot campaign taking place in a non-federal election year has no bearing on the very different situation of ballot committee activities directed to a ballot that includes federal candidates.

There is an additional reason that the Berman/Doolittle opinion is of little precedential value here: there is no controlling rationale for the opinion because none of the several opinions in the case commanded a four-vote majority among Commissioners.

Berman/Doolittle distinguished (but did not expressly overrule) an earlier advisory opinion, Ad. Op. 2003-12 (Flake). In the Flake opinion, the Commission held that a federal officeholder's activities with regard to a ballot committee would be "in connection with" a non-federal election, within the meaning of section 441i(e)(1)(B). The Commission did not rely on the fact that the ballot initiative campaign was to take place in a federal election year (2004), but rather said that the ballot campaign was itself a non-federal election, within the scope of section 441i(e)(1)(B). The Commission said section 441i(e)(1)(B) "is not limited to elections for a political office, and that the activities of [the ballot committee] … are in connection with an election other than an election for federal office."

In Berman/Doolittle, by contrast, the Commission held that Members of Congress could raise soft money for ballot committees active in the 2005 California elections, a non-federal election year.

Yes on FAIR's reliance here on the Berman/Doolittle opinion is misplaced, and based on an erroneous reading of that opinion. Although the Commission there approved a request that federal officeholders be permitted to solicit funds for a ballot initiative in an off-year (*i.e.*, non-federal) election, there was no majority reasoning in support of that conclusion. The "bare bones" Advisory Opinion itself stated only, "The Commission concludes that the restrictions on Federal candidates and officeholders in 2 U.S.C. 441i(e)(1)(A) and (B) do not apply to the fundraising activities of Representatives Berman and Doolittle in the circumstances you describe." Ad. Op. 2005-10.

Commissioner Smith voted for this opinion without explanation. Commissioners Toner and Mason supported the result and filed a concurring opinion stating that "ballot initiatives and referenda are not elections for office as a matter of law under Section 441i(e) and, therefore, the statute's soft-money fundraising restrictions do not apply to ballot measure activities."[9]

But Commissioners Weintraub and McDonald supported the advisory opinion result on different, and far narrower, grounds.[10] They noted a crucial difference between the Berman/Doolittle request and the Commission's earlier Flake advisory opinion: that with regard to Berman/Doolittle, "[n]either the requestors, nor any other federal candidate, will appear on the November 2005 ballot." Concurring Statement at 3. By contrast, Rep. Flake was to appear on the November 2004 ballot at issue in Ad. Op. 2003-12. Commissioners Weintraub and McDonald reiterated that the result in the Berman/Doolittle opinion "is fairly narrow in scope" and limited "to those circumstances where … no federal candidate appears on the same ballot…." *Id.* at 5.

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[9] Concurring Opinion in Advisory Opinion 2005-10 of Vice Chairman Michael E. Toner and Commissioner David M. Mason, at 1. These two Commissioners noted, however, "[a]t the very least, Section 441i(e)'s fundraising restrictions do not apply to referenda and initiatives where, as here, no federal candidate appears on the ballot along with the referendum or initiative…." *Id.* at 2. This leaves open the possibility that they would agree that in the situation presented by the AOR here—where a federal candidate does appear on the ballot—section 441i(e) would apply.

[10] Advisory Opinion 2005-10, Concurring Statement of Commissioner Ellen L. Weintraub, Commissioner Danny Lee McDonald (Sept. 2, 2005).

Commissioners Weintraub and McDonald took pains to distinguish the scenario presented by the Berman/Doolittle advisory opinion from that which was presented by the Flake opinion—opining that where a federal candidate proposes to raise "soft money to influence voting on a day on which that candidate is himself on the ballot," the fundraising and spending then is "'in connection with an election for *Federal* office,' that is, the candidate's own election." *Id.* at 2 (emphasis in original). That reasoning here would result in the application of section 441i(e)(1)(A) to the activities proposed by Yes on FAIR.

Chairman Thomas dissented at length from the Berman/Doolittle advisory opinion, and would have held that section 441i(e) applies to solicitations for ballot committees by federal officeholders in an off-year election.[11]

Thus, the bare-bones Berman/Doolittle advisory opinion itself provides no analysis in support of its result, nor were there four votes in support of any one analysis.[12]

The Berman/Doolittle advisory opinion accordingly does not provide precedent for the AOR now before the Commission: the broad grounds for the holding in the Toner-Mason concurrence commanded only two votes, and the narrow grounds for the holding in the Weintraub-McDonald concurrence is based on an analysis that is distinguishable here in a key element. The Berman/Doolittle advisory opinion thus does not establish Commission precedent for allowing federal candidates and officeholders to raise soft money for a ballot initiative committee in a year when those federal candidates do appear on the same ballot as the ballot proposition, the situation presented here.[13]

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[11] Dissenting Opinion of Chairman Scott E. Thomas, Advisory Opinion 2005-10 (Sept. 6, 2005). Although the vote on remanding the matter back to the General Counsel for drafting a "bare bones" advisory opinion was unanimous, Chairman Thomas makes clear in his separate dissenting statement that he viewed this "as simply a procedural vote" and it "should not be viewed as an endorsement of the eventual result produced by that redraft." He said, "I disagree with that result." Thomas Dissent at 1 n.1.

[12] For this reason, we agree with the comment made by Chairman Thomas that the Berman/Doolittle advisory opinion fails to establish any precedent:

> Because the Act "clearly requires that for any *official* Commission decision there must be at least a 4-2 majority," a position adopted by less than four Commissioners is not "binding legal precedent or authority for future cases," *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (emphasis in original), and thus is not a statement of Commission policy. Indeed, given the failure of four Commissioners to agree on any reasoning in Advisory Opinion 2005-10, the significance of this Advisory Opinion is greatly limited. Clearly, it cannot be said that this opinion supersedes Advisory Opinion 2003-12 or other opinions construing the statutory solicitation regulations.

Thomas Dissent at 4.

[13] In the event the Commission incorrectly finds that the activity proposed by Yes on FAIR for Members of Congress is not in connection with an election for federal office, the Commission should, in the alternative, find that the proposed activity is in connection with an "election other than an election for

Conclusion

According to the facts presented in AOR 2010-7, Yes on FAIR wishes to have Members of Congress solicit soft money contributions in connection with an election in which they are on the ballot, *i.e.*, a federal election—activity which is at the core of what is prohibited by section 441i(e)(1)(A).

To be clear, the fundraising activities of state ballot measure committees are not at issue in this AOR. At issue are the fundraising activities of federal candidates and officeholders with regard to an election in which those federal candidates are on the ballot.

Congress and the Supreme Court have both recognized that soft money contributions made as the result of solicitations by federal officeholders threaten real and apparent corruption of such officeholders. BCRA's legislative history, purpose and text, as well as this Commission's regulations, make clear that federal candidates and officeholders are prohibited from soliciting soft money contributions in connection with elections in which they are on the ballot—*i.e.*, federal elections.

For the above stated reasons, we urge the Commission to advise Yes on FAIR that Members of Congress are prohibited by 2 U.S.C. § 441i(e)(1)(A) from soliciting or directing funds in connection with California's November 2010 election unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer	*/s/ Paul S. Ryan*
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Federal office" and thus prohibited under 2 U.S.C. § 441i(e)(1)(B). This is the holding of Ad. Op. 2003-12 (Flake), where the Commission correctly concluded that the "scope of section 441i(e)(1)(B) is not limited to elections for a political office, and that the [ballot measure] activities of STMP as described in [its] request … are in connection with an election other than an election for Federal office." Ad. Op. 2003-12 at 6. We agree with the argument presented by Chairman Thomas in support of this position in his dissent in the Berman/Doolittle advisory opinion. Thomas Dissent in Ad. Op. 2005-10 at 2-6.

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