

October 18, 2013

By Electronic Mail

Lisa J. Stevenson
Deputy General Counsel, Law
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2013-17 (Tea Party Leadership Fund)

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request 2013-17. The request, submitted on behalf of the Tea Party Leadership Fund (TPLF), a nonconnected hybrid political committee, seeks an advisory opinion that the TPLF is exempt from the reporting and disclosure requirements of the Federal Election Campaign Act (FECA) on the ground that it “can establish a reasonable probability that disclosing its contributors and recipients of expenditures would result in threats, harassment, or reprisals from government officials or private parties” AOR 2013-17 at 3.

Although the Supreme Court has held that disclosure requirements such as those at issue in this AO proceeding would be unconstitutional if applied to an organization facing a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed, the TPLF has failed to make the requisite showing that it meets this standard. TPLF’s request for exemption from FECA’s disclosure requirements should be denied.

I. History and Scope of the “Threats, Harassment, or Reprisals” Exemption

The Supreme Court has long held that disclosure requirements such as those at issue in this AO proceeding “would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.” *Citizens United v. FEC*, 558 U.S. 310, 370 (2010); *see also Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003); *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

However, as the Court made clear in *Buckley v. Valeo*, the constitutional standard for the “threats, harassment, or reprisals” exemption is exceedingly narrow. Under the formulation articulated in *Buckley*, the exemption is only available when the “threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that

[the challenged disclosure requirements] cannot be constitutionally applied.” 424 U.S. at 71. The *Buckley* Court explained that the narrow exemption from disclosure requirements that the Court described is “necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights[,]” but “acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the ‘free functioning of our national institutions’ is involved.” *Id.* at 66 (emphasis added) (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). “The governmental interests sought to be vindicated by [FECA] disclosure requirements are of this magnitude.” *Id.*

The *Buckley* Court explained that FECA’s disclosure requirements directly serve at least three critically important governmental interests: (1) providing the electorate with information regarding where political campaign money comes from and how it is spent, in order to aid voters in evaluating those who seek federal office, *id.* at 66-67; (2) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to the light of publicity, *id.* at 67; and (3) enabling the gathering of data necessary to detect violations of contribution limits, *id.* at 67-68.

Appellant minor parties in *Buckley* argued they were entitled to exemption from FECA’s disclosure requirements on the ground that disclosure would subject minor party supporters to threats, harassment, or reprisals. However, having recognized the magnitude of the governmental interests advanced by FECA’s disclosure requirements, the Court denied exemption to the minor parties, noting that “no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*.” *Id.* at 71.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court held that the free speech and association protections of the Fourteenth Amendment Due Process Clause prohibited the state of Alabama from compelling the NAACP to disclose its membership list. 357 U.S. at 466. The NAACP had made “an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* at 462. The Court concluded that the state’s purported interest in disclosure of the NAACP’s membership list—determining whether the organization had violated state law by failing to register as a foreign corporation doing business in the state—was insufficient “to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner’s members of their constitutionally protected right of association.” *Id.* at 463-64.

The NAACP’s “uncontroverted showing” of threats, harassment and reprisals related to the well-known climate of extreme violence toward civil rights activists at the height of the Civil Rights Movement in Alabama and elsewhere in the southern United States. The NAACP’s brief filed with the Supreme Court noted:

Threatened and actual loss of employment and other forms of economic reprisals have accompanied legislation intended to punish financially those persons who advocate orderly compliance with the law as well as those who advocate equal

rights for all. Violence and bloodshed have been predicted by high state officials if segregation is ended. Threats and actual acts of violence have been directed against Negroes who seek to assist their constitutional rights as well as against whites who seek compliance with the law. While Negroes have been refused official protection from threats of physical violence, where Negroes have protested against deprivation of their rights, state officials have been quick to curb this “lawless” activity. Other pressures have been exerted on Negroes to maintain “voluntary” segregation. Alabama officials have committed themselves to a course of persecution and intimidation of all who seek to implement desegregation. Negroes who seek to secure their constitutional rights do so at the peril of intimidation, vilification, economic reprisals, and physical harm.

Brief of Petitioner at 15-17, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), 1957 WL 87216 (footnotes omitted).

Footnotes to the above passage in the NAACP’s brief cited news articles recounting:

- “Year-long series of bombings and shootings of Negro leaders in bus segregation issue.”
- “In Montgomery, 19 major acts of violence—9 bombings and 10 shootings—were directed against buses, or the homes of Negro leaders.”
- “In Montgomery, Dec., 1956, one Negro woman was hit in both legs by bullet during firing on buses.”
- “In Birmingham, the home of Rev. F. L. Shuttlesworth, a Negro leader of the bus boycott, was bombed.”
- “In Montgomery, four Negro churches were bombed. Also the homes of two ministers, both leaders in bus boycott, one leader white and one Negro. A Negro cab stand was blasted. An attempt was made to bomb home of Rev. M. L. King.”
- “Ku Klux Klan activity, demonstrations, and cross burnings, were reported in Opelika, Montgomery, Mobile, Birmingham, Prattville and other Alabama communities.”
- “In Birmingham, Rev. F. L. Shuttlesworth was physically attacked when he attempted to enroll Negro students in an all-white school.”
- “In Birmingham, two false bombing reports at Phillips High School and student demonstrations at Woodland High School followed reports that Negro students would attempt to enroll at these schools.”
- “In Birmingham, a white steel worker (Lamar Weaver) was attacked on March 6, 1957 by a crowd of white men after he sat beside a Negro couple in a Birmingham railroad station. Weaver, who has made pro-integration speeches, escaped in his car in a storm of heavy stones. He was struck in the face with a suitcase, windows of the car were shattered.”

Id. at nn.12-13 (citations omitted).

Bombings, shootings and other violent attacks—these were the activities that constituted threats and harassment sufficient to warrant an exemption from disclosure in *NAACP v.*

Alabama. It is against this historical backdrop that the Court in *Buckley* made clear that the threats and harassment must create an actual—not speculative—burden on a group’s freedom to associate in order to warrant exemption from disclosure laws. *See Buckley*, 424 U.S. at 69-70. Actual evidence of threats and harassment was absent from the record in *Buckley* and the Court consequently denied minor parties’ request for exemption.

The Supreme Court applied *Buckley*’s “reasonable probability” of “threats, harassment, or reprisals” standard for exemption from disclosure laws in *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 88 (1982), and held: “In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP [*i.e.*, Socialist Workers Party], Ohio’s campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP.” *Id.* at 102. The Court reviewed the evidentiary record compiled in the district court, explaining that the SWP had introduced evidence of incidents including “threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office.” *Brown*, 459 U.S. at 99. The Court continued: “There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership.” *Id.* The Court explained that although the state of Ohio “contend[ed] that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court’s conclusion that ‘private hostility and harassment toward SWP members make it difficult for them to maintain employment.’” *Id.*

Even more troubling, the district court in *Brown* had found that “FBI surveillance of the SWP was ‘massive’ and continued until at least 1976” and that the “FBI also conducted a counterintelligence program against the SWP and the Young Socialist Alliance (YSA), the SWP’s youth organization.” *Id.* “Until at least 1976, the FBI employed various covert techniques to obtain information about the SWP, including information concerning the sources of its funds and the nature of its expenditures.” *Id.* at 99-100. “The District Court specifically found that the FBI had conducted surveillance of the Ohio SWP and had interfered with its activities within the State.” *Id.* at 100. “Government surveillance was not limited to the FBI. The United States Civil Service Commission also gathered information on the SWP, the YSA, and their supporters, and the FBI routinely distributed its reports to Army, Navy and Air Force Intelligence, the United States Secret Service, and the Immigration and Naturalization Service.” *Id.*

The SWP had a total of only sixty members, yet supported its claim for exemption with evidence of pervasive and “ingrained” societal hostility toward its members. *Id.* at 99. In granting an exemption, the Court emphasized the extensive “past history of government harassment,” including “massive” surveillance efforts by the FBI and other government agencies. *Id.* Additionally, the Court found that, despite the fact that SWP’s principal aim was to “achieve social change through the political process” with “its members regularly run[ning] for public office,” the “SWP’s candidates have had little success at the polls.” *Id.* at 88. “In 1980, for example, the Ohio SWP’s candidate for the United States Senate received fewer than 77,000 votes, less than 1.9% of the total vote. Campaign contributions and expenditures in Ohio have averaged about \$15,000 annually since 1974.” *Id.* at 88-89.

The SWP has been partially exempt from FECA disclosure requirements since 1979, as a result of a consent decree to resolve *Socialist Workers 1974 National Campaign Comm. v. FEC*, Civil Action No. 74-1338 (D.D.C. 1979), and the FEC's issuance of multiple advisory opinions extending the exemption. See AO 1990-13; AO 1996-46; AO 2003-02; AO 2009-01; AO 2012-38.

Several months before the Supreme Court decided *Brown*, the Second Circuit Court of Appeals likewise applied *Buckley*'s "reasonable probability" of "threats, harassment, or reprisals" standard for exemption from disclosure laws in *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 418 (2d Cir. 1982). The Hall-Tyner Election Campaign Committee, the campaign committee of a Communist Party U.S.A. presidential/vice-presidential ticket in the 1976 election, asserted its constitutional right to be exempt from FECA's disclosure requirements. In holding that the Hall-Tyner committee was entitled to an exemption, the Second Circuit noted that "[n]umerous statutes purport to subject members of the Communist Party to both civil disabilities and criminal liability"—*i.e.*, it was illegal under federal and numerous states' laws to simply be a member of the Communist Party. *Id.* at 422. The court also noted the "extensive governmental surveillance and harassment long directed at the Communist Party and its members" by the Federal Bureau of Investigation. *Id.* at 423. The court therefore concluded that this history of threats, harassment and reprisals of the Communist Party was "not justified by the Government's relatively insignificant interest in disclosure" by the Hall-Tyner committee. *Id.* at 423.

More recently, in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd* 540 U.S. 93 (2003), the U.S. District Court for the District of Columbia rejected an argument by the ACLU, Chamber of Commerce, National Association of Manufacturers, and National Rifle Association that, due to their "controversial" nature, the groups were entitled to the "threats, harassment, or reprisals" exemption from FECA's "electioneering communication" disclosure requirements. *Id.* at 242-47. The court explained that "[n]either NAACP nor *Brown* stand for the proposition that disclosure laws that apply to organizations 'whose positions are often controversial and whose members and contributors frequently request assurances of anonymity' are facially unconstitutional." *Id.* at 245. In response to evidence by these groups that donors were fearful of disclosure of their contributions, the court responded: "These fears are the result of conjectures by those expressing them, but unless there is a reasonable probability that these fears will be realized as a result of disclosure, *Buckley* instructs that such worries do not overcome the state's legitimate interest in disclosure." *Id.* at 246 (emphasis added). The court concluded:

Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court.

Id. at 247.

Most recently, the Supreme Court referenced *Buckley*'s "threats, harassment, or reprisals" standard in *Doe v. Reed*, 130 S. Ct. 2811 (2010). In *Doe*, proponents of a referendum to deny certain benefits to same-sex couples claimed that disclosing the referendum petitions would unconstitutionally subject signatories to threats, harassment and reprisals. *Id.* at 2820-21. The Court rejected the plaintiffs' facial challenge to the disclosure of referendum petitions and Justice Scalia observed:

Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. . . . There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Id. at 2836-37 (Scalia, J., concurring).

All of these cases show that the "threats, harassment, or reprisals" exemption is intended to carve out a narrow protected space for viewpoints that would otherwise be forced to retreat from the "marketplace of ideas." The Court made clear in *Buckley* that the right of "group association is protected because it enhances '[e]ffective advocacy.'" 424 U.S. at 65 (quoting *NAACP*, 357 U.S. at 460. A group's ability to demonstrate that threats, harassment, or reprisals are a barrier to effective advocacy is necessarily part of its claim for exemption. Any burden on a group's right to free association must be weighed against the governmental interest in obtaining disclosure from such a group. And the Court has made clear, the test here requires demonstration of actual—not speculative—burden on freedom of association.

The application of this balancing test between evidence of threats, harassment, or reprisals and the governmental interests in disclosure is aptly illustrated in the Commission's advisory opinion earlier this year extending, once again, the SWP's partial exemption from FECA's disclosure requirements. In AO 2012-38, the Commission explained this balancing test as follows:

[T]he Commission must weigh three factors: (1) the history of violence or harassment, or threats of violence or harassment, directed at the SWP or its supporters by governmental authorities, including law enforcement agencies, or by private parties; (2) evidence of continuing violence, harassment, or threats directed at the SWP or its supporters since the prior exemption was granted; and, balanced against the first two factors, (3) the governmental interest in obtaining identifying information of contributors and recipients of expenditures. The Commission has decided previously that, where the impact of the activities of the SWP and its supporters on Federal elections is minimal because the possibility of an SWP candidate winning an election is remote, the government's interest in obtaining such information is lessened.

AO 2012-38 at 8 (emphasis added) (citing AO 2009-01 (SWP) and *Hall-Tyner Election Campaign Comm.*, 678 F.2d at 422).

The Commission based its decision in AO 2012-38 to extend the SWP’s partial exemption from FECA’s disclosure requirements largely on the first and third factors. The Commission emphasized the history of violence, threats, and harassment experienced by the SWP, focusing largely on harassment that occurred many decades ago. The Commission noted, for example: “FBI surveillance of the SWP lasted for 25 years and ended around 1976, nearly 40 years ago. The SWP has provided the Commission with accounts of serious incidents of harassment by private parties over the last several decades, but those have declined over time.” *Id.* at 9 (citations omitted). Evidence of recent threats, harassment, or reprisal of the SWP—the second factor—was quite weak.

The third factor—the governmental interest in obtaining identifying information of contributors and recipients of expenditures—weighed heavily in the Commission’s decision in AO 2012-38 to extend SWP’s partial exemption from FECA’s disclosure requirement. The Commission explained:

The governmental interest in obtaining the names, addresses, and other identifying information of SWP contributors and vendors doing business with the SWP committees in connection with Federal elections remains very low and continues to be outweighed by the reasonable probability of threats, harassment, or reprisals resulting from such disclosure. The SWP has experienced a decline in episodes of harassment of serious magnitude, but has submitted some credible evidence of threats and intimidation. When weighed together with the very small amounts of money raised and the significant past history, the recent evidence of harassment thus satisfies the requirement of demonstrating a reasonable probability of harassment.

Id. at 10.

Commission Chair Weintraub elaborated on this point in a concurring opinion, writing: “In my view, the continuation of the exemption was warranted because of the SWP’s unique history, the very low probability that the SWP’s activities would affect the outcome of a federal election, and the extremely limited amount of information that would fall within the exemption.” Concurring Opinion of Chair Ellen L. Weintraub in Advisory Opinion 2012-38, 1. Chair Weintraub continued:

SWP received only \$1,222 in contributions from 2009 through 2011, and only approximately \$16,087 in 2012. Only 118 people contributed to the committee in 2012, even fewer than the 243 people who contributed in 2008. And despite fielding a presidential candidate in every election since 1948 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever been elected to public office in a partisan election.

For me, SWP’s exceptionally limited activity, balanced against their long history and continued experience of harassment, weighed in favor of granting a further partial exemption. To be sure, in some cases, “a minor party . . . can play a

significant role in an election” by “divert[ing] votes from other major-party contenders.” However, there is no indication that SWP has played such a role in any federal election.

Id. at 1-2.

Supreme Court decisions (and the Commission’s implementation of them) make clear that exemption from FECA’s disclosure requirements is appropriate only in the rarest of circumstances—where there is a real probability of serious threats, harassment, or reprisals and it outweighs the public interest in disclosure because the organization raises relatively insignificant sums for electoral activity and has little chance of winning or affecting an election. Unsurprisingly, exemptions have been difficult to obtain from the Court under this demanding standard. *Compare Brown*, 459 U.S. at 101-02 *with Citizens United*, 558 U.S. at 371 (rejecting a claim for exemption and noting that Citizens United had been disclosing their donors for years without incident); *McConnell*, 540 U.S. at 199 (refusing to exempt parties from disclosure despite their “expressed concerns” of harassment); *Buckley*, 424 U.S. at 69-74 (concluding that the “substantial public interest in disclosure” “outweigh[ed] the harm generally alleged”).

II. TPLF Is Not Eligible For the “Threats, Harassment, or Reprisals” Exemption From FECA Disclosure Requirements

The Tea Party movement has significant public support, has enjoyed success in the electoral arena and is a powerful faction within one political party and in U.S. politics right now. Indeed, the Tea Party movement is widely credited as responsible for this month’s federal government shutdown. The *Washington Post*, for example, recently explained:

The federal shutdown this week represents the culmination of a sustained attack by a group of conservative Republicans on the size and scope of government that has been years in the making.

A core group of House Republicans elected in the tea party wave of 2010 has largely succeeded in its aim of scaling back federal spending, despite fervent opposition from President Obama and the Democratic controlled Senate.

....

Even before the shutdown that began at midnight Monday, the tea party efforts greatly reduced the pace of federal spending. To the dismay of many Democrats and supporters of a robust federal government, the consequences of tea party efforts are likely to remain even when the shutdown ends.

....

“I think the conservatives in the House have had some notable successes,” said Rep. Joe Barton (R-Tex.), a member of the tea party caucus. “You’re never 100 percent successful, but we certainly saved lots and lots of money.”

President Obama’s declining ambitions for domestic spending underscore the success of the tea party movement. When he came to office, he projected that agencies would spend \$1.2 trillion in 2014. But this week, Obama was calling for a bill funding agencies at a level of \$986 billion—an 18 percent decline from his earlier projections.

....

“Finally, Democrats accepted much of the sequester. We’ve made some progress,” said Rep. Tim Huelskamp (R-Kan.), a leading tea party lawmaker.

Zachary A. Goldfarb, *Tea Party Lawmakers See the Culmination of Years of Effort in Shutdown*, WASH. POST, Oct. 2, 2013.

Simply put, the Tea Party movement is nothing like the vulnerable or marginalized organizations that warrant exemption from political disclosure laws—*e.g.*, the NAACP in mid-1950s Alabama and the 60-member SWP. Not surprisingly, given its mainstream character, the TPLF has failed to show in its AOR sufficient evidence of threats, harassment, or reprisals to warrant an exemption from FECA’s disclosure requirements. Additionally, the Tea Party movement’s political power, together with its demonstrably vast fundraising and spending capacity, confirm the compelling public and governmental interest in continued disclosure by the TPLF and other Tea Party movement organizations.

A. TPLF Has Not Demonstrated a Reasonable Probability of Threats, Harassment, or Reprisals.

TPLF claims that the “TEA Party and its supporters have faced sustained harassment and severe hostility from government officials and private actors” and that it “proffers more than adequate evidence to fulfill its modest evidentiary burden and easily establishes a reasonable probability that compelling TPLF to disclose its contributors will result in continued threats, harassment or reprisals from government officials or private parties.” AOR 2013-17 at 10 (footnote omitted). Yet in more than 1,400 pages of exhibits, the TPLF fails to make the requisite showing of a reasonable probability that disclosure will result in threats, harassment, or reprisals.

Specifically, TPLF alleges: “[T]he TEA Party and its supporters have repeatedly faced severe hostility and harassment: the attached exhibits reveal at least 111 instances of harassment over only four years, from 2009 to the present” *Id.* at 8 (footnote omitted). TPLF continues: “This number far outpaces the 45 instances of harassment over a four-year period that the FEC most recently found sufficient to exempt SWP from compelled disclosure.” *Id.* TPLF details these “111 instances of harassment” in a footnote as follows:

IRS records establish that 96 applications for tax-exempt status were set aside for extra scrutiny because the organizations had “tea party,” “patriots,” or “9/12” in their names. Ex. A-1(ww). Taken together with Appendix F, which reveals 15

instances of targeted harassment by individuals, the exhibits show 111 separate instances of harassment. *See* App. F. Including derogatory statements by government officials, the exhibits establish 295 total instances of harassment. *See* Apps. B-D. And this number does not include surveillance by the FBI and other government agencies, the impact of which is impossible to quantify, nor does it include acts of harassment by the news media. Taking either number into account, TPLF has presented far more substantial evidence of harassment than that which the FEC and the courts have found sufficient to permit exemption from disclosure.

Id. at 8 n.4.

Notwithstanding TPLF's claim to the contrary, its request and 1,400-plus pages of exhibits fail to demonstrate the "severe hostility and harassment" that TPLF claims the Tea Party and its supporters have suffered. *Id.* at 8. Instead, TPLF attempts to portray as harassment:

- government agency scrutiny of paperwork voluntarily submitted by Tea Party organizations for tax exempt status (Appendix A);
- criticism from political opponents (Appendices B, C, D);
- unfavorable coverage in the media (Appendix E);
- unfavorable public opinion polls, unflattering video games and criticism by private citizens (Appendix F); and
- a handful of claims by donors and would-be donors about their fear of government (Appendix G).

Ironically, the vast majority of instances of purported "harassment" described in TPLF's 1,400-plus pages of exhibits entail no more than the exercise of First Amendment rights—something the Tea Party claims to support. It is also worth noting that, though TPLF has disclosed millions of dollars of contributions, it does not allege a single instance of threats, harassment, or reprisals directed at one of its donors. We discuss TPLF's "evidence" in more detail below.

1. Purported Government Surveillance and Scrutiny

TPLF claims that "government officials have singled out the Tea Party for surveillance and exposed supporters to unwarranted scrutiny . . ." AOR 2013-17 at 9. Of the 111 exhibits regarding "instances of harassment" TPLF submitted, 96 pertain to Internal Revenue Service (IRS) scrutiny of applications for tax-exempt status submitted by Tea Party organizations. *Id.* at 8 n.4.

TPLF's submission details the revelation in May 2013 that the IRS, in its review of applications voluntarily submitted by organizations seeking recognition as tax-exempt under Section 501(c)(4) of the Internal Revenue Code, screened for organizations with names including words such as "tea party" and "patriots" and applied extra scrutiny to applications by such groups. This IRS practice came to light in a Treasury Inspector General Report and led to a firestorm of criticism of the IRS. *See* Treasury Inspector General for Tax Administration,

Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, May 14, 2013, AOR 2013-17, Ex. A-1(a).

Based on this report, the Campaign Legal Center and Democracy 21 publicly criticized the IRS for the agency's "improper targeting of conservative groups." See Campaign Legal Center Press Release, *Reform Groups Call on Congress to Deal with Two IRS Scandals: Wrongful Targeting of Groups & Failure to Prevent Abuse of 501(c)(4) Status*, May 22, 2013 (announcing a letter to every member of the House and Senate sent jointly by the Campaign Legal Center, Democracy 21, Americans for Campaign Reform, Citizens for Responsibility and Ethics in Washington, Common Cause, Demos, Public Citizen and Sunlight Foundation).¹

However, IRS documents released in June revealed that the agency also used key words related to liberal politics, such as "progressive," "blue" and "medical marijuana," to screen for organizations that would likewise be subject to extra scrutiny in the application process. See Josh Hicks, *IRS BOLOs: What's the problem?*, WASH. POST, July 3, 2013.² This suggests that the IRS' use of key words to screen applications was not motivated by political ideology or animus toward the Tea Party but, instead, was an attempt by the agency to streamline the processing of a flood of applications for tax-exempt status submitted in the wake of the *Citizens United* decision, which permitted such nonprofit corporations to make independent expenditures in federal elections. See *Citizens United v. FEC*, 558 U.S. 310 (2010). Section 501(c)(4) status is not available to organizations with the primary activity of intervening in candidate elections. It was and is the IRS' statutory responsibility, in the process of reviewing applications for Section 501(c)(4) status, to identify groups with the primary activity of intervening in candidate elections and reject their applications. The agency botched the job, but not in any way that would qualify these groups for exemption from FECA's disclosure requirements.

Regardless of the motivations within the IRS for applying heightened scrutiny to certain applications for Section 501(c)(4) tax-exempt status, such scrutiny does not amount to "threats, harassment, or reprisals" that warrants exemption from FECA's disclosure requirements. Importantly, federal tax law does not require organizations operating under Section 501(c)(4) to submit an application for recognition of tax-exempt status. Doing so is completely voluntary—meaning the organizations that were subject to additional scrutiny were under no legal obligation to cooperate with the IRS. They could have simply ignored the IRS and/or withdrawn their applications for recognition of Section 501(c)(4) status, while continuing to operate as tax-exempt entities.

Additionally, the "scrutiny" amounted to requests by the IRS for more information about the organizations' activities (*e.g.*, copies of emails and other documents) and delays in the processing of the voluntarily-submitted applications. The notion that such scrutiny is on par with

¹ Available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=2137:may-22-2013-reform-groups-call-on-congress-to-deal-with-two-irs-scandals-wrongful-targeting-of-groups-a-failure-to-prevent-abuse-of-501c4-status&catid=63:legal-center-press-releases&Itemid=61.

² Available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/03/irs-bolos-whats-the-problem/>.

the government-perpetrated violence towards the NAACP in 1950s Alabama and the FBI's 25-year surveillance of the SWP is untenable.

TPLF's additional claims of government harassment and surveillance of the Tea Party are equally baseless. For example, TPLF includes as Exhibit A-2(a) a Department of Homeland Security report as evidence of government surveillance and harassment of the Tea Party—yet the document makes no mention of the Tea Party. Instead, the report advises law enforcement agencies to be on the lookout for “rightwing extremist activity, specifically the white supremacist and militia movements,” noting some parallels between the political and economic climate of the United States at the time of the report (2009) and the national climate in the 1990s at the time of the Oklahoma City bombing and other acts of domestic terrorism. Thus, TPLF fails to make clear why the document is relevant to the Tea Party movement and how the report constitutes threats, harassment, or reprisals against the Tea Party movement.

TPLF has failed to submit evidence of threats, harassment, or reprisals by government agencies sufficient to warrant exemption from FECA's disclosure requirements.

2. Purported Harassment by the Obama Administration and Congress

TPLF submits as additional “evidence” of government threats, harassment, or reprisals several hundred pages of news articles about President Obama and his administration, as well as Members of the House and Senate, criticizing the policy preferences and the activities of the Tea Party movement. *See* AOR 2013-17, Appendices B, C and D. This purported “evidence” of harassment does not even warrant serious analysis: it amounts to little more than partisan criticism from the Tea Party's electoral opposition. As Justice Scalia stated in *Doe v. Reed*, “harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance.” 130 S. Ct. at 2837 (Scalia, J., concurring). Requiring the Tea Party and its supporters “to stand up in public for their political acts [and political contributions will] foster[] civic courage, without which democracy is doomed.” *Id.*

3. Purported Harassment by the Media

TPLF claims that “[m]uch like government officials, the media has perpetrated falsehoods about TEA Party beliefs, exacerbating the potential for additional harassment.” AOR 2013-17 at 11; Appendix E. As is the case with the purported harassment by the Obama Administration and Members of Congress, this “evidence” does not warrant serious analysis. Criticism of political views does not constitute threats, harassment, or reprisals.

4. Purported Harassment by Private Actors

Finally, TPLF claims that Tea Party supporters have “faced harassment, threats, and even violence” from private individuals. AOR 2013-17 at 10; Appendix F. Among the “evidence” of harassment directed at the Tea Party by private actors are news stories about public opinion polls documenting “negative views” held about the Tea Party. *See* Ex. F-1, F-2, F-3; F-4. Also included in Appendix F as “evidence” of private actor harassment of the Tea Party are news

accounts of several individuals expressing negative opinions about the Tea Party. *See* Ex. F-5, F-6, F-7, F-8. None of this is evidence of threats, harassment or reprisals.

Deeper into Appendix F are stories about two separate violent confrontations experienced by two Tea Party supporters. Exhibit F-9 is a story that was posted on a website called Infowars about an incident in which “[u]nion thugs viciously attacked a patriot” outside of a political forum held by Representative Russ Carnahan. The story does not indicate that the “patriot” was/is a Tea Party supporter, but did note that the St. Louis Tea Party was present and “was also demonstrating against Democrats attempting to force Obamacare through Congress.” Exhibit F-9 further indicates that the “union thugs” were found not guilty in a prosecution related to the altercation.

Exhibit F-10 is a news report about “[a]nti-immigration rallies . . . taking a violent turn” in Florida. The story notes “two tea party rallies [that] erupted into brawls between protestors and counter-demonstrators.” In one incident, “pro-amnesty activists brutally beat two immigration protesters” and in the other, “a scuffle broke out . . . between tea partiers and a group of neo-Nazis”

These two stories about violent confrontations allegedly involving Tea Party supporters are the closest TPLF comes to presenting any evidence of threats, harassment, or reprisals. If such instances were widespread they might warrant examination and consideration to determine, for example, whether Tea Party supporters were instigators or innocent victims. Further, it is unclear from the articles whether police involvement was requested, and if so, whether arrests or prosecutions were made. However, even if these incidents indeed occurred in the manner TPLF alleges, a small number of isolated incidents in a political movement likely comprised of at least several million people does not warrant exemption from FECA’s disclosure laws.

The private actor harassment and violence directed at the NAACP in 1950s Alabama, and the 60-member SWP, was of a qualitatively different and much greater magnitude. As detailed above, NAACP supporters were the victims of dozens of bombings and violent attacks and were largely denied police protection. And in *Brown*, there was “evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership.” 459 U.S. at 99.

Despite more than 1,400 pages of “evidence,” TPLF has failed to establish a reasonable probability that disclosing its contributors and recipients of expenditures would result in threats, harassment, or reprisals from government officials or private parties. Indeed, most of the allegations, even if corroborated as accurate, would not constitute “harassment” under *Buckley* and other relevant precedents.

B. The Tea Party Movement’s Electoral Success, Fundraising Success and Sheer Political Power in Congress Creates a Compelling Public and Governmental Interest in Disclosure by TPLF and Other Tea Party Organizations.

As the federal government teetered on the brink of its first-ever debt default in mid-October, Senate Democrats and some Senate Republicans, together with the President, were in

agreement on a path forward to avert debt default. Tea Party members of the House of Representatives, however, had for weeks been demanding political concessions in exchange for their votes to raise the debt ceiling and reopen government. *Politico* reported President Obama's position:

What [President Obama] will not do, what he has firmly made clear again and again is give the tea party its ideological agenda in exchange for Congress opening the government or Congress raising the debt ceiling so that the United States doesn't default[.] . . . That has been his position all along.

Jonathan Allen & Carrie Budoff Brown, *No Plan B As Deadline Approaches*, POLITICO, Oct. 16, 2013.³

The same *Politico* story explained that a leading Tea Party movement organization, FreedomWorks, was “urging conservatives to keep the fight going”—making it uncertain whether Republican Speaker of the House John Boehner would “call a vote even if a Senate deal is dropped on his doorstep.” *Id.*

Another *Politico* article explained that on October 15, FreedomWorks, together with Heritage Action for America, “urged lawmakers to vote ‘no’” on a House bill Speaker Boehner supported to avert the debt ceiling crisis and reopen government, explaining:

The organizations' stances are closely watched by conservatives and could directly affect whether House Speaker John Boehner can get 217 Republicans to support his legislation—in fact, shortly after the groups' announced their opposition, the House Rules Committee said it had delayed a meeting on the bill, which was scheduled for a Tuesday night vote.

Burgess Everett, *Heritage Action, FreedomWorks Oppose House Bill*, POLITICO, Oct. 15, 2013.⁴

A political organization with congressional representatives that is capable of bringing the federal government to a standstill, keeping it there for weeks, and threatening the nation's first ever debt default—*i.e.*, the Tea Party—is not the type of vulnerable minority for which the Supreme Court articulated the “threats, harassment, or reprisals” exemption from political disclosure laws.

The Tea Party movement is a strong political faction within one political party and has raised and spent tens of millions of dollars to help elect and reelect more than fifty Members Congress. According to one news report following the November 2012 election: “Of the 55 members of the Tea Party caucus who ran for House seats on Nov. 6, at least 51 will return for

³ Available at <http://www.politico.com/story/2013/10/no-plan-b-as-deadline-approaches-government-shutdown-debt-ceiling-98378.html>.

⁴ Available at <http://www.politico.com/story/2013/10/heritage-action-freedomworks-oppose-house-bill-98356.html>.

the 113th Congress starting in January.” Roxana Tiron & James Rowley, *Tea Party Holds Most Seats While Alienating Voters*, BLOOMBERG.COM, Nov. 8, 2012.⁵

According to FEC records, TPLF (FEC Committee ID #: C00520825) has spent more than \$2.3 million to influence federal elections between its creation in May 2012 and June 30, 2013. Other Tea Party political committees have spent even more. For example, according to FEC records, FreedomWorks for America (FEC Committee ID #: C00499020), spent more than \$22 million to influence the 2012 federal elections.

Given TPLF’s reliance on its so-called “evidence” of threats, harassment, or reprisals related to “other TEA Party groups,” AOR 2013-17 at 9 n.5, there can be no doubt that if the Commission determines that TPLF is eligible for the exemption it seeks, FreedomWorks for America and other Tea Party organizations will soon claim their own exemptions. Granting disclosure exemptions to Tea Party organizations will deprive voters of vital information regarding the financing of one of our nation’s most powerful and well-financed political factions.

By contrast, the NAACP in 1950s Alabama could only dream of one day holding political institutional power as it fought for the right of its members to merely vote in elections. And the SWP provides an even more striking contrast to the Tea Party. The SWP, throughout its history, has been wholly irrelevant in the electoral arena. As the Commission explained earlier this year: “Despite proffering a presidential candidate in every election since 1948 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever been elected to public office in a partisan election.” AO 2012-38 at 2 (emphasis added). It is for this reason that the Commission concluded: “The governmental interest in obtaining the names, addresses, and other identifying information of SWP contributors and vendors doing business with the SWP committees in connection with Federal elections remains very low and continues to be outweighed by the reasonable probability of threats, harassment, or reprisals resulting from such disclosure.” *Id.* at 10.

Applying the “threats, harassment, or reprisals” exemption balancing test to TPLF’s request, the Commission must conclude that the public and governmental interest in obtaining disclosure of political fundraising and spending information for TPLF and other Tea Party movement organizations—which will undoubtedly continue to raise and spend immense sums of money and successfully elect representatives to public office—clearly outweighs the flimsy “evidence” of past or continuing threats, harassment, or reprisals directed at TPLF, its supporters and other Tea Party groups presented by TPLF in AOR 2013-17.

III. Conclusion

For all of the above-stated reasons, the Campaign Legal Center and Democracy 21 respectfully urge the Commission to reject TPLF’s request for the “threats, harassment, or reprisals” exemption from federal campaign finance disclosure laws. The requested exemption is not required by the Constitution and would fatally undermine the federal disclosure regime,

⁵ Available at <http://www.bloomberg.com/news/2012-11-08/tea-party-freshmen-to-become-sophomores-by-keeping-house-seats.html>.

depriving voters in elections around the nation of information vital to their Election Day decisionmaking.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

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