

AOR 2013-06

RECEIVED

2013 JUL -1 PM 1:23

FEC MAIL CENTER

Perkins
Coie

Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960

PHONE: 202.654.6200

FAX: 202.654.6211

www.perkinscoie.com

Marc Erik Elias

PHONE: (202) 434-1609

FAX: (202) 654-9126

EMAIL: MElias@perkinscoie.com

July 1, 2013

BY HAND DELIVERY

Anthony Herman
General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC

RECEIVED
FEDERAL ELECTION
COMMISSION
2013 JUL -1 PM 3:23
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Cc: Chair Weintraub, Vice Chairman McGahn, Commissioner Hunter, Commissioner Petersen, and Commissioner Walther.

Dear Mr. Herman:

As general counsel to the Democratic Senatorial Campaign Committee (the "Committee"), we seek an advisory opinion pursuant to 2 U.S.C. § 437f. The Committee seeks confirmation that, for all purposes under the Federal Election Campaign Act ("FECA") and Federal Election Commission ("Commission") regulations, the term "spouse" and "family" includes same-sex spouses legally married under state law, and that legally married same-sex spouses are fully entitled to all of the same rights and obligations under FECA and Commission regulations as opposite-sex spouses.

In particular, the Committee seeks confirmation:

1. That FECA's contribution limits apply separately to contributions made by each spouse in a legally married same-sex couple, even if only one spouse has income. See 11 C.F.R. § 110.1(i). Accordingly, the Committee seeks confirmation that the Commission's recent Advisory Opinion 2013-02 is expressly overruled.
2. That a Senate candidate who is legally married to a same-sex spouse may utilize "jointly owned assets" as "personal funds" for purposes of 11 C.F.R. § 100.33(c) to the same extent as a Senate candidate who is legally married to an opposite-sex spouse, and that a Senate

LEGAL27128671.3

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DALLAS · DENVER · LOS ANGELES · MADISON · NEW YORK
PALO ALTO · PHOENIX · PORTLAND · SAN DIEGO · SAN FRANCISCO · SEATTLE · SHANGHAI · TAIPEI · WASHINGTON, D.C.

Perkins Coie LLP

candidate who is legally married to a same-sex spouse may obtain a loan on which her or his spouse's signature is required when jointly owned assets are used as collateral or security under 11 C.F.R. § 100.52(b)(4) to the same extent as a Senate candidate who is legally married to an opposite-sex spouse.

3. That the term "families" as used in 11 C.F.R. § 114.1(j) and elsewhere in 11 C.F.R. Part 114 limiting the class of individuals that Committee representatives may appear before pursuant to 11 C.F.R. § 114.2(c)(2) includes a legally married same-sex spouse to the same extent it includes an opposite-sex spouse.

These results are compelled by last week's historic decision by the Supreme Court of the United States. *See United States v. Windsor*, No. 12-307, 2013 WL 3196928 (U.S. June 26, 2013). As the Court correctly concluded, the so-called Defense of Marriage Act ("DOMA"), which limited the definition of "spouse" to opposite-sex couples for purposes of Federal law, "seeks to injure the very class [a state] seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government." *Id.* at *15. Accordingly, the Court found that this section of DOMA was "invalid ... in violation of the Fifth Amendment." *Id.* at *18. Federal law no longer "instructs all Federal officials" that same-sex marriage is "less worthy than the marriages of others," *id.*, and the Commission must rule accordingly.

Given the critical constitutional interests at stake and the ongoing harm to legally married same-sex spouses in the absence of clear Commission guidance, we ask the Commission to expedite this request and issue a response as soon as possible. The Commission has long adhered to an "informal practice of expediting certain highly significant, time-sensitive requests (whether or not relating to an upcoming election). The Commission endeavors to issue advisory opinions within 30 days under this general expedited process." Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32,160, 32,162 (July 7, 2009).

FACTUAL DISCUSSION

The Committee is a national committee of the Democratic Party. As part of its ongoing fundraising program, the Committee solicits contributions from donors in every state across the country. Some of the Committee's donors and prospective donors are same-sex couples legally married under the laws of their state. In some cases, these couples have joint bank accounts; in other cases, they have separate accounts. Just as with same-sex couples, in some cases only one member of the same-sex couple has income. The Committee wishes to solicit and accept contributions from both spouses in these couples, just as it may when soliciting from same-sex couples.

Additionally, as part of its goal of electing a Democratic majority to the U.S. Senate, the Committee recruits and advises candidates about how to best finance their campaigns. The

Committee expects in the future to recruit candidates who are legally married to a same-sex spouse and who have joint assets at their disposal for use to finance a campaign.

Finally, as part of its ongoing outreach and fundraising programs, Committee representatives will from time to time appear before the restricted classes of unions, qualified membership organizations, and other corporations pursuant to 11 C.F.R. § 114.3(c)(2). The Committee wishes to communicate with and solicit contributions from the same-sex and opposite-sex spouses of these organizations' members, executive and administrative employees, and stockholders, as applicable.

LEGAL ANALYSIS

I. DOMA is Unconstitutional

Last week, in *United States v. Windsor*, the Supreme Court of the United States struck down as unconstitutional a provision of DOMA that defined "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "a person of the opposite sex who is a husband or a wife." No. 12-307, 2013 WL 3196928 at *18 (U.S. June 26, 2013). The *Windsor* Court found that DOMA violated the Fifth Amendment because it sought to injure the very class of citizens that certain states have sought to protect when they recognized same-sex marriage. "By doing so [DOMA] violates basic due process and equal protection principles applicable to the Federal Government." *Id.* at *15.

In finding that "the principal purpose and the necessary effect" of DOMA was to demean couples in same-sex marriages, the court stated that

[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.

Id. at *18. The court further observed that "DOMA instructs all federal officials ... that [same-sex] marriage is less worthy than the marriages of others." *Id.*

The Court's decision invalidates Advisory Opinion 2013-02. In February, relying on the dictates of DOMA, the Commission declined a request to allow the Dan Winslow for U.S. Senate Committee and other committees to apply 11 C.F.R. § 110.1(i) to contributions received from lawfully married same-sex spouses. Advisory Opinion 2013-02. At that time, the Commission stated that "[i]f DOMA is held to be unconstitutional by the Supreme Court ... the Commission will, upon request, revisit this issue." *Id.* It must now do so.

II. The Commission Must Look to State Law to Define “Spouse”

The term “spouse” is not defined in FECA or Commission regulations. In similar circumstances, the Commission has relied on state law to supply the meaning of terms not explicitly defined in FECA or its rules. *See* 11 C.F.R. § 114.7(d) (“The question of whether a professional organization is a corporation is determined by the law of the State in which the professional organization exists.”); *id.* § 100.33(a) (incorporating state law to determine which assets are a candidate’s “personal funds”); Advisory Opinion 2008-05 (explaining that FECA legislative history instructs the Commission to look to state law to define the terms “corporation” and “partnership” not defined in the Act or Commission regulations); Advisory Opinion 1989-02 (explaining that the Commission has long looked to state law to determine whether an alleged debt exists).

In Advisory Opinion 2013-2, the Commission deviated from this precedent. It did so solely because of DOMA. *See* Advisory Opinion 2013-2 (“The Commission is, however, precluded from looking to the law of a state that permits same-sex marriage to define or interpret the word ‘spouse’ as used in 11 C.F.R. 110.1(i), for such an interpretation is precisely what Congress intended to foreclose in Section 3 of DOMA.”) Now that DOMA has been invalidated, the Commission must look to state law to provide the meaning of the term “spouse” *See Windsor*, No. 12-307, 2013 WL 3196928 at *14. (“By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States.”)

Failing to do so would violate the Equal Protection Clause, just as DOMA itself did. In passing DOMA, Congress made an “unusual deviation from the usual tradition of recognizing and accepting state definition of marriage.” *Id.* at *15. The court found this deviation as strong evidence that limiting the definition of “spouse” to opposite-sex couples has the purpose and effect to “impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.” *Id.* A law with the purpose and effect of “disapproval of [a] class” “cannot survive.” *Id.* Just as the Constitution bars Congress from improperly limiting the definition of “spouse” to opposite-sex couples, the Commission is likewise without authority to do so.

III. Legally Married Same-Sex Spouses Enjoy the Same Rights and Obligations as Legally Married Opposite-Sex Spouses under FECA and Commission Regulations

Because the Commission must look to state law to supply the meaning of the term “spouse,” same-sex spouses who are legally married under state law enjoy the same rights and obligations under FECA and Commission regulations as opposite-sex spouses.

Specifically, this means that any time the word “spouse” is used in FECA or Commission regulations, it must be read to include both persons validly married under state law to an

opposite-sex partner *and* persons validly married under state law to a same-sex partner. Consequently, FECA's contribution limits apply separately to contributions made by each spouse in a legally married same-sex couple, even if only one spouse has income. See 11 C.F.R. § 110.1(i) ("The limitations on contributions of this section shall apply separately to contributions made by *each spouse*, even if *only one spouse* has income.") (emphasis added). Thus, the Committee may solicit and accept contributions from same-sex spouses in the same way that it may solicit and accept contributions from opposite-sex spouses.

Likewise, a candidate who is legally married under state law to a same-sex spouse may utilize "jointly owned assets" as "personal funds" to the same extent as a candidate who is legally married under state law to an opposite-sex spouse. See *id.* § 100.33(c) (defining "personal funds" to include "[a]mounts derived from a portion of assets that are owned jointly by the candidate *and the candidate's spouse* as follows ...") (emphasis added). And a candidate who is legally married under state law to a same-sex spouse may obtain a loan on which her or his spouse's signature is required when jointly owned assets are used as collateral or security to the same extent as a candidate who is legally married under state law to an opposite-sex spouse. See *id.* § 100.52(b)(4) ("A candidate may obtain a loan on which *his or her spouse's* signature is required when jointly owned assets are used as collateral or security for the loan. *The spouse* shall not be considered a contributor to the candidate's campaign if the value of the candidate's share of the property used as collateral equals or exceeds the amount of the loan that is used for the candidate's campaign.") (emphasis added). Thus, the Committee may advise and recruit candidates who are in same-sex marriages in the same manner that the Committee may advise and recruit candidates who are in opposite-sex marriages.

For the same reasons, the Commission should recognize that, for purposes of 11 C.F.R. Part 114, the term "family" includes a same-sex spouse to whom a person is legally married under state law. The term "family" plainly includes a person's "spouse." See 11 C.F.R. § 100.93(g)(4) (defining term "immediate family" to include one's "husband" and "wife"); § 113.1(g)(7) (defining term "member of the candidate's family" to include the candidate's "spouse"). And as we demonstrate above, the Court's decision in *Windsor* compels the Commission to recognize that the term "spouse" includes both persons married under state law to an opposite-sex partner *and* persons married under state law to a same-sex partner.

Because the term "family" includes a same-sex spouse to whom a person is legally married under state law, the "restricted class" of a union or membership organization includes the same-sex spouses of its members and executive and administrative personnel, as well as the opposite-sex spouses of those individuals. Likewise, the "restricted class" of a corporation includes the same-sex spouses of its stockholders and executive and administrative personnel. The Committee may communicate with and solicit these same-sex spouses to the same extent that it may communicate with and solicit opposite-sex spouses under Part 114 of the regulations.

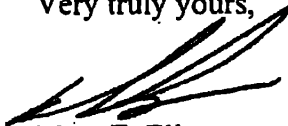
Anthony Herman
July 1, 2013
Page 6

IV. Conclusion

For too long, same-sex married couples have been denied the full panoply of speech and association rights afforded to opposite-sex married couples under FECA and Commission regulations. With its historic decision, the Court invalidated the basis on which the Commission previously justified the abridgement of these rights. The Commission is now compelled to find that same-sex spouses who are legally married under state law enjoy the same rights and obligations under FECA and Commission regulations as opposite-sex spouses. It should do so swiftly and without delay.

We appreciate the Commission's prompt consideration of this request.

Very truly yours,



Marc E. Elias
Andrew H. Werbrock
Jonathan S. Berkon
Tyler J. Hagenbuch
General Counsel to Democratic Senatorial Campaign Committee