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For meeting of March 9, 2017
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March 8, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Attorney

Subject: AO 2016-23 (Socialist Workers Party) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on March 9, 2017.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-23

2

3

4 Michael Krinsky, Esq.

5 Lindsey Frank, Esq.

6 Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.

7 61 Broadway, 18th floor

8 New York, NY 10006-3791

9

DRAFT B

10 Dear Messrs. Krinsky and Frank:

11 We are responding to your advisory opinion request on behalf of the Socialist Workers
12 Party, the Socialist Workers National Campaign Committee, and committees supporting
13 candidates of the Socialist Workers Party (collectively the “SWP” or the “SWP committees”)
14 concerning the renewal of a partial reporting exemption for the SWP. The Commission
15 concludes that the public interest would be served by disclosure of SWP’s contributors and
16 vendors as required by the Federal Election Campaign Act (the “Act”), and that the SWP has not
17 demonstrated a reasonable probability that disclosing its contributors and vendors will subject
18 those persons to threats, harassment, or reprisals. Accordingly, the Commission is not renewing
19 the SWP’s partial reporting exemption.

20 **Background**

21 The facts presented in this advisory opinion are based on your advisory opinion request
22 submissions received on October 31 and November 14, 2016 (“AOR”), and your comment dated
23 February 16, 2017 (“Comment”).

24 *A. Partial Reporting Exemption History*

25 The SWP was first granted a partial reporting exemption in a consent decree, dated
26 January 2, 1979, which resolved *Socialist Workers 1974 Nat’l Campaign Comm. v. FEC*, Civ.
27 No. 74-1338 (D.D.C. 1979). In that case, the SWP had alleged that certain disclosure provisions
28 of the Act deprived the SWP and its supporters of their First Amendment rights because of the

1 likelihood of harassment resulting from mandatory disclosure of contributors and vendors.
2 Additionally, the SWP had alleged that the governmental interest in publicizing identifying
3 information of contributors and payees was diminished because, as a minor party, the possibility
4 of an SWP candidate winning or influencing an election was remote. The consent decree
5 exempted the SWP from the Act's requirements to disclose: (1) the names, addresses,
6 occupations, and principal places of business of contributors to the SWP committees; (2) other
7 political committees or candidates to whom the SWP committees made contributions;
8 (3) lenders, endorsers, or guarantors of loans to the SWP committees; and (4) persons to whom
9 the SWP committees made expenditures. The consent decree, however, required the SWP to file
10 all reports and to maintain all records in accordance with the Act; those records were to include
11 all information normally required to be disclosed.

12 The decree stated that its provisions would extend to the end of 1984. It also expressly
13 permitted the SWP committees to apply for an extension of the provisions. On July 24, 1985, the
14 court approved an updated settlement agreement with a similar reporting exemption, but also
15 required the SWP to file all reports and to maintain all records in accordance with the Act.¹

16 In 1990, the SWP sought an extension of the partial reporting exemption through the
17 advisory opinion process in lieu of obtaining a new consent decree from the court. The
18 Commission granted the same exemption provided by the previous consent decrees. The

¹ In view of the specific provisions of the 1979 amendments to the Act's disclosure provisions, the 1985 agreement also exempted the SWP from reporting the identification of persons providing rebates, refunds, or other offsets to operating expenditures, and persons providing any dividend, interest, or other receipt. See *Stipulation of Settlement*, filed July 24, 1985, in *Socialist Workers 1974 Nat'l Campaign Comm. v. FEC*, Civ. No. 74-1338 (D.D.C.)

1 advisory opinion provided that the exemption would be in effect through December 31, 1996.

2 *See* Advisory Opinion 1990-13 (SWP).²

3 The SWP made similar requests for reporting exemptions in 1996, 2002, 2008, and 2012,
4 and the Commission issued advisory opinions on each occasion that renewed those exemptions.

5 *See* Advisory Opinion 1996-46 (SWP); Advisory Opinion 2003-02 (SWP); Advisory Opinion
6 2009-01 (SWP); Advisory Opinion 2012-38 (SWP).³ The current exemption applies to activity
7 through December 31, 2016.⁴ *See* Advisory Opinion 2012-38 (SWP).

8 *B. Factual Update*

9 The factual basis for the SWP's prior reporting exemptions is set forth in the advisory
10 opinions granting those exemptions. *See* Advisory Opinion 2012-38 (SWP). As discussed
11 below, the SWP's current request presents facts regarding its activities since the reporting
12 exemption was last renewed in 2012.

13 *1. Electoral Success*

14 In the 2016 Presidential election, the SWP's candidate for President achieved general
15 election ballot access in seven states and received approximately 12,000 votes.⁵ The SWP has

² Available at <http://saos.fec.gov/saos/searchao>.

³ Available at <http://saos.fec.gov/saos/searchao>. In AO 1996-46, the Commission modified the renewal of the exemption by requiring each committee entitled to the exemption to assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of \$200 in a calendar year. In this manner, a reviewer (i.e., either the Commission staff or a member of the public) could more easily detect contributions in excess of the Act's limits.

⁴ Advisory Opinion 2012-38 (SWP) specified that no later than 60 days prior to that date, the SWP could submit a new advisory opinion request seeking another renewal of the partial exemption. SWP first submitted a request for an advisory opinion on October 31, 2016, and a complete request was received on November 14, 2016.

⁵ *See* <http://www.thegreenpapers.com/G16/President-Details.phtml?v=c&p=SWP>. The SWP's presidential nominee received in 4,114 votes in 2012. *See Official 2012 Presidential Election Results* (Jan. 17, 2013), <http://www.fec.gov/pubrec/fe2012/2012presgeresults.pdf>.

1 not placed any candidates on the ballot for the U.S. Senate or House of Representatives since
2 2012. AOR015, 189.

3 2. *Financial Activity*

4 Information presented in the request, and in reports filed with the Commission, indicates
5 that a total of 406 persons made contributions to the SWP in 2016, including 86 persons who
6 contributed over \$200. *See* AOR195-197. Reports filed with the Commission indicate that the
7 SWP received contributions totaling \$11,324 prior to the general election in 2012, *see* Socialist
8 Workers Campaign Committee, FEC Form 3X at 3 (Oct. 23, 2012),⁶ \$1277 in 2013, *see* Socialist
9 Workers National Campaign Committee, FEC Form 3X at 3 (Jan. 12, 2014),⁷ and no
10 contributions in 2014 or 2015. *See* Socialist Workers National Campaign Committee, FEC Form
11 3X at 3 (Jan. 19, 2015);⁸ Socialist Workers National Campaign Committee, FEC Form 3X at 3
12 (Jan. 17, 2016).⁹ As of November 28, 2016 (the end of the 2016 post-general election reporting
13 period), the SWP's total contributions for 2016 were \$82,372. *See* Socialist Workers National
14 Campaign Committee, FEC Form 3X (Dec. 7, 2016).¹⁰

15 3. *Harassment*

16 The SWP's current request includes 33 exhibits attesting to 25 incidents of alleged
17 harassment or intimidation or of potential supporters stating that they feared being identified

⁶ <http://docquery.fec.gov/pdf/535/12940401535/12940401535.pdf>.

⁷ <http://docquery.fec.gov/pdf/761/14940022761/14940022761.pdf>.

⁸ <http://docquery.fec.gov/pdf/198/15950046198/15950046198.pdf>.

⁹ <http://docquery.fec.gov/pdf/750/201601179004511750/201601179004511750.pdf>.

¹⁰ <http://docquery.fec.gov/pdf/106/201612079037734106/201612079037734106.pdf>.

1 with the SWP. These allegations generally fall into three categories: (a) statements regarding
2 the fear that potential SWP supporters have of being identified as SWP supporters; (b) statements
3 and materials regarding alleged hostility and harassment from government authorities and law
4 enforcement entities; and (c) statements and materials regarding alleged hostility and harassment
5 from private parties. The requestor states that this compilation of incidents “is not meant to be
6 exhaustive, as acts of intimidation and harassment against the SWP and its supporters are
7 frequent enough that they often go unreported to any central body.”

8 a. Allegations of Historical and Current Government Harassment
9 Causing Fears Among Potential SWP Supporters

10 In its request, the SWP summarizes the history of harassment and disruption by
11 government entities that lasted through the 1970s and that was the subject of lawsuits as late as
12 the 1980s.¹¹ Additionally, the SWP cites (as it did in its 2012 advisory opinion request) certain
13 government guidelines and programs for obtaining and maintaining information on U.S. citizens
14 and residents.¹² The SWP does not indicate that the government has employed any of these
15 guidelines or programs in relation to the SWP, but the SWP asserts that, along with the lengthy

¹¹ Advisory Opinion 1990-13 (SWP) described FBI investigative activities between 1941 and 1976 that included: extensive use of informants to gather information on SWP activities and on the personal lives of SWP members; warrantless electronic surveillance; surreptitious entry of SWP offices; attempts to embarrass SWP candidates and to foment strife within the SWP and between the SWP and others; and frequent interviews of employers and landlords of SWP members. The description of these activities was set out in the Final Report of the Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., Feb. 4, 1980) and *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986); see also Advisory Opinion 2003-02 (SWP) n.8 for a description of FBI activities between 1941 and 1976.

¹² Specifically, the SWP points to alleged relaxation in FBI guidelines concerning investigations and information-gathering relating to threats to national security; increased federal support for, and involvement in, state and local “fusion centers,” described as “a collaborative effort of 2 or more [f]ederal, [s]tate, local or tribal government agencies that combines resources, expertise, or information with the goal of maximizing the ability of such agencies to detect, prevent, investigate, apprehend and respond to criminal or terrorist activity”; an increase in government surveillance of telephone and electronic communications; and relaxed privacy safeguards. See AOR108, 198, 380, 409.

1 history of governmental harassment and disruption prior to 1990, these more recent
2 developments in government surveillance could cause any person interested in supporting the
3 SWP to reasonably fear that association with the SWP might subject them to government
4 surveillance and harassment. The SWP also describes more recent governmental action towards
5 groups that “engage in activism concerning issues that are also the subject of SWP activity,”
6 AOR033, but the request does not provide any information indicating that the SWP has been the
7 target of such action.

8 The SWP’s request contains eight statements by SWP candidates and campaign workers
9 relating to concerns expressed by potential SWP supporters regarding public identification with
10 the SWP. These include six statements by campaign supporters and workers describing their
11 experiences while campaigning and talking with potential supporters, selling subscriptions to
12 SWP’s publication, the *Militant*, and working to get petition signatures. Individuals expressed
13 fear that getting involved with the SWP, or placing their names and addresses on subscription
14 lists, would result in scrutiny of them by governmental authorities, including immigration
15 authorities, or their being placed on a “government list,” or facing adverse employment action.
16 *See* AOR757-768.

17 b. Interactions with Governmental Authorities

18 In addition to the factual background and generalized allegations of government
19 surveillance discussed above, the SWP raises three specific incidents of alleged governmental
20 and law enforcement harassment and surveillance. In the first such incident, the SWP candidate
21 for Vice President was stopped and his belongings were examined by Australian immigration
22 authorities before he could board a flight to the U.S. He was again stopped and searched by TSA

1 staff upon landing in the U.S. Neither the Australian immigration authorities nor the TSA
2 provided a reason for detaining the candidate, and the information provided does not indicate
3 whether the officials in either the U.S. or Australia knew of his connection to the SWP.
4 AOR728.

5 The other two incidents involved local law enforcement officers. In one of the incidents,
6 a police officer attempted to stop SWP canvassers by asking if they had a permit to campaign,
7 but he let them continue after he learned that they did not need a permit. AOR731. The other
8 incident occurred when residents of two apartment complexes called the police to stop an SWP
9 candidate and volunteer who were collecting ballot signatures. At both complexes, the police
10 affirmed the SWP's right to engage in campaign activity. AOR733.

11 The SWP also describes six instances when prison officials prevented inmates from
12 receiving issues of the *Militant* in one federal and three state prisons. In each instance, prison
13 officials permitted inmates to receive the *Militant* after the *Militant* challenged the officials'
14 decision. AOR594-727.

15 c. Hostility from Private Parties

16 The SWP submitted fourteen exhibits attesting to alleged incidents of harassment, threats,
17 or violence by private individuals or businesses. In one such incident, an SWP city council
18 candidate's home was burglarized, and the only item taken was a smartphone containing political
19 contacts and call records. AOR570. Another incident involved SWP's campaign headquarters
20 in Los Angeles, where the office's front window was shattered after a public event in October
21 2014. See AOR586. In both of these cases, police reports were filed but no arrests were made.
22 See AOR570, 586.

1 Two SWP supporters state that they made contributions to SWP with the understanding
2 that SWP was exempt from certain reporting obligations, and that if SWP were required to report
3 the names of its contributors, they would not contribute to SWP because they believe it would
4 negatively affect their employment. *See* AOR769-772.

5 The remainder of the exhibits describe disruption of SWP workers or candidates while
6 they were distributing SWP literature or attempting to obtain ballot petition signatures. Most of
7 these incidents involved verbal harassment or threats (*see* AOR570, 589, 592, 736-756), and one
8 incident included physical mistreatment of SWP property (*see* AOR589). In approximately half
9 of these cases, SWP alleges that the harassment was specifically because the workers or
10 candidates were associated with the SWP or believed to be associated with communism. *See*
11 AOR570, 589, 736, 738, 744, 746, 751.

12 **Question Presented**

13 *Do the SWP, the Socialist Workers National Campaign Committee, other SWP party*
14 *committees, and authorized committees of candidates of the SWP, qualify for a continuation of*
15 *their previous partial reporting exemption?*

16 **Legal Analysis and Conclusions**

17 No, the SWP committees do not qualify for a continuation of their partial reporting
18 exemption.

19 The Act requires political committees to file with the Commission reports that identify
20 individuals and other persons who make contributions over \$200 during the calendar year or
21 election cycle (depending on the type of committee), or who come within various other
22 disclosure categories. 52 U.S.C. § 30104(b)(3), (5), (6); *see also* 52 U.S.C. § 30101(13). As a

1 general matter, such disclosure “enables the electorate to make informed decisions and give
2 proper weight to different speakers and messages.” *Citizens United v. FEC*, 130 S. Ct. 876, 916
3 (2010). The Supreme Court has held, however, that under certain circumstances the Act’s
4 disclosure requirements are unconstitutional as applied to a minor party because the burden that
5 such disclosure might impose on the party’s exercise of its First Amendment rights outweighs
6 the government’s relatively insubstantial interest in that party’s disclosure. *Buckley v. Valeo*,
7 424 U.S. 1, 71-72 (1976). The Court recognized that “[t]hese movements are less likely to have
8 a sound financial base and thus are more vulnerable to falloffs in contributions. In some
9 instances fears of reprisal may deter contributions to the point where the movement cannot
10 survive.” *Id.* at 71. Similarly, although the disclosure provisions of the Act serve to deter
11 corruption and the appearance of corruption, “the governmental interest in disclosure is
12 diminished when the contribution in question is made to a minor party with little chance of
13 winning an election,” or where “contributions to a minor party . . . are concerned, for it is less
14 likely that the candidate will be victorious.” *Id.* at 67.

15 Because “[m]inor parties must be allowed sufficient flexibility in the proof of injury to
16 assure a fair consideration of their claim” for a reporting exemption, “[t]he evidence offered need
17 show only a reasonable probability that the compelled disclosure of a party’s contributors’ names
18 will subject them to threats, harassment, or reprisals from either Government officials or private
19 parties.” *Id.* at 74. “The proof may include, for example, specific evidence of past or present
20 harassment of members due to their associational ties, or of harassment directed against the
21 organization itself. A pattern of threats or specific manifestations of public hostility may be
22 sufficient.” *Id.*

1 A. *Public Interest in Disclosure to the Public of SWP's Financing*

2 The Commission must first determine whether the SWP continues to maintain its status
3 as a minor party, such that the governmental interest in ensuring that SWP's financing is
4 disclosed to the public is reduced. *See Buckley*, 424 U.S. at 68-74; *ProtectMarriage.com v.*
5 *Bowen*, 830 F. Supp. 2d 914, 930 (E.D. Cal. 2011) (noting that disclosure exception is “not for
6 the majority, but for those groups in which the government has a diminished interest”), *aff'd in*
7 *part and dismissed in part*, 752 F.3d 827 (9th Cir. 2014).

8 Even though the SWP has never prevailed in a partisan general election, its stature has
9 grown significantly in several ways since the Commission last considered the reporting
10 exemption. First, the SWP received more than \$80,000 in contributions during 2016. Not only
11 does this represent a sevenfold increase from the SWP's fundraising during the 2012 election
12 cycle, it also places the SWP in the top half of all active non-candidate committees in terms of
13 fundraising success.¹³ Indeed, the SWP raised more funds than many state committees of more
14 electorally successful parties, such as the Green Party and the Libertarian Party. *See id.*

15 Second, the SWP's candidate for President, Alyson Kennedy, achieved ballot access in
16 seven states that held a combined 70 electoral votes. Ms. Kennedy had the ninth-widest ballot
17 access among the 31 presidential candidates who qualified for the ballot in at least one state.¹⁴
18 Ms. Kennedy received more than 12,000 votes, which ranked 11th out of the 31 presidential

¹³ Data available at http://www.fec.gov/data/CommitteeSummary.do?format=html&election_yr=2016.

¹⁴ *See* <http://www.thegreenpapers.com/G16/President-Details.phtml?v=c&p=SWP>.

1 candidates,¹⁵ and which was nearly triple the 4,100 votes the SWP’s presidential candidate
2 received in 2012.

3 The SWP’s ability to draw this quantity of votes increases the public interest in disclosure
4 of its finances: “[A] minor party sometimes can play a significant role in an election. Even
5 when a minor-party candidate has little or no chance of winning, he may be encouraged by
6 major-party interests in order to divert votes from other major-party contenders.” *Buckley*, 424
7 U.S. at 70; *see, e.g., United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992) (affirming
8 conviction for excessive contribution made to third-party candidate in attempt to benefit
9 Democratic candidate by drawing support away from Republican candidate in close race).¹⁶

10 Finally, while not associated with the SWP specifically, the Commission notes that 2016
11 presidential candidate Senator Bernard Sanders raised over \$231,800,000¹⁷ and received more
12 than 13 million votes (approximately 43% of the total) in the Democratic Party presidential
13 primaries.¹⁸ Senator Sanders is widely known to have adopted the “Socialist” label during his
14 tenure as an elected official.¹⁹ Similarly, there is evidence that voters themselves self-identified

¹⁵ *See id.*

¹⁶ *See also* Carla Marinucci, *GOP Donors Funding Nader/Bush Supporters Give Independent’s Bid a Financial Lift*, S.F. CHRON., July 9, 2004, available at <http://www.sfgate.com/politics/article/GOP-donors-funding-Nader-Bush-supporters-give-2708705.php>.

¹⁷ *See* Bernie 2016, FEC Form 3P (Oct. 27, 2016), <http://docquery.fec.gov/pdf/855/201610279036940855/201610279036940855.pdf>.

¹⁸ *See* <http://www.thegreenpapers.com/P16/D>.

¹⁹ *See, e.g.,* John Dillon, *Exactly What Kind Of Socialist Is Bernie Sanders?*, NPR, Aug. 27, 2015 (“[S]ocialist’ is now how Vermont Sen. Bernie Sanders has described himself throughout his career. Sanders has not run from the term, even as he surges in his race for president.”), available at <http://www.npr.org/sections/itsallpolitics/2015/08/27/434872755/exactly-what-kind-of-socialist-is-bernie-sanders>.

1 as Socialists in significant numbers in 2016.²⁰ . The ability of such a candidate to garner
2 substantial electoral support and the numbers of voters identifying as Socialists calls into
3 question the SWP’s qualification for a reporting exemption. *See Doe v. Reed*, 823 F. Supp. 2d
4 1195, 1203-04 (W.D. Wash. 2011) (distinguishing group that “rais[ed] nearly \$30 million,
5 securing 52.3% of the vote,” from disclosure-exempt organizations such as NAACP in 1950s
6 and SWP in 1970s), *appeal dismissed on other grounds*, 697 F.3d 1235 (9th Cir. 2012).

7 The SWP argues in its Comment that “the government has no interest in disclosure based
8 on the SWP’s 2016 vote total and ballot access, [as] this vote total was not nearly enough to
9 change the results in any state.” Comment at 8. Specifically, the SWP states that the votes
10 received by its presidential candidate in 2016 “were nowhere close to changing the results
11 between the two main party contenders in any state” (*id.*), that “the SWP’s 2016 presidential
12 candidate had ‘little chance of winning an election’” (*id.* at 9 (quoting *Buckley v. Valeo*, 424 U.S.
13 at 70)), and that its “contributions remain insignificant compared to the money needed to operate
14 a national presidential campaign” (*id.* at 11). The SWP argues that therefore “there can be no
15 ‘compelling government interest’ in disclosure of the origin of this amount of money.”
16 Comment at 11.

17 The Commission notes that the “compelling government interest” standard (*i.e.*, strict
18 scrutiny) does not apply to disclosure provisions such as those at issue here. *See Citizens United*

²⁰ *See* John McCormick and Arit John, Anti-Wall Street Sentiment Breaks by Party Line in Iowa Poll, BLOOMBERG, Jan. 15, 2016 (43% of Democrats who planned to attend 2016 Iowa caucuses described themselves as Socialists), Available at <https://www.bloomberg.com/politics/articles/2016-01-15/anti-wall-street-sentiment-breaks-by-party-line-in-iowa-poll>; James Pindell, New Globe Poll Shows Rubio Closing in on Trump in N.H., BOSTON GLOBE, Feb. 5, 2016 (31% of likely Democratic voters in New Hampshire called themselves Socialists), available at <https://www.bostonglobe.com/news/politics/2016/02/05/new-poll-shows-rubio-closing-trump/QpALGuCZ2gAivxLtHAaPAI/story.html>.

1 v. *FEC*, 130 S. Ct. 876, 914 (2010). The Commission nonetheless agrees that the SWP is a
2 minor party relative to other political parties that are not currently exempt from the reporting
3 requirements of the Act. However, minor parties are not *per se* exempt from the Act’s disclosure
4 requirements. *See Buckley*, 424 U.S. at 74 (“[A] blanket [reporting] exemption is not
5 required.”). A political party may be exempt from its statutory disclosure obligations only
6 insofar as the demonstrated burden that such disclosure might impose on the party’s exercise of
7 its First Amendment rights outweighs the public interest in that party’s disclosure. *See id.* at 71-
8 72. As the SWP’s fundraising, ballot access, and other electoral activities increase, the public
9 interest in disclosure of the SWP’s contributions and expenditures also increases.

10 Accordingly, considering the SWP’s achievements in fundraising and ballot access, as
11 well as the recent electoral success of a candidate with a party identification materially similar to
12 the party at issue here, the Commission concludes that — although the SWP remains a minor
13 party — the public interest in disclosure of SWP’s financing is significantly greater than it has
14 been at any other time that the Commission considered the SWP’s reporting exemption.

15 *B. Probability of Threats, Harassment, and Reprisals*

16 Next, the Commission must assess the probability that persons associated with the SWP
17 would be subject to threats, harassment, and reprisal if their identities were disclosed. The
18 Commission assesses this probability by examining instances of threats, harassment, and
19 reprisals directed at the SWP or its supporters, both historically and since the most recent
20 reporting exemption was granted.

21 As explained above and in prior advisory opinions, there is a long history of threats,
22 harassment, and reprisals against the SWP and its supporters by government agencies and private

1 parties. Courts have detailed “the substantial evidence of both governmental and private hostility
2 toward and harassment of SWP members and supporters,” *Brown v. Socialist Workers ’74*
3 *Campaign Committee (Ohio)*, 459 U.S. 87, 98-99 (1982) (internal quotation marks omitted),
4 such as “massive” FBI surveillance, *id.* at 99. *See also Socialist Workers Party v. Attorney*
5 *General*, 642 F. Supp. 1357 (S.D.N.Y. 1986); *Socialist Workers Party v. Attorney General*, 666
6 F. Supp. 621 (S.D.N.Y. 1987). Similarly, in its prior advisory opinion requests, the SWP has
7 provided the Commission with accounts of serious incidents of harassment by private parties
8 over the last several decades. *See* Advisory Opinion 1990-13 (SWP); Advisory Opinion 1996-46
9 (SWP); Advisory Opinion 2003-02 (SWP); Advisory Opinion 2009-01 (SWP). The Commission
10 once again recognizes the historical pattern of previous actions against the SWP as a factor
11 weighing in favor of renewing the partial reporting exemption, as this history may discourage
12 individuals from getting involved with the SWP for fear of harassment or surveillance by
13 government agencies. *See, e.g.*, Advisory Opinion 2009-01 (SWP); Advisory Opinion 2003-02
14 (SWP).

15 The Commission notes, however, that all of the court cases cited above are 30 or more
16 years old, and as the acts and incidents that they document recede further into the past, their
17 relevance to assessing the probability of the SWP suffering harassment today diminishes. In the
18 advisory opinions as well, the documented instances of harassment have steadily decreased in
19 both quantity and severity. *See* Advisory Opinion 2012-38 (SWP) (quoting Advisory Opinion
20 2009-01 (SWP) (describing alleged incidents of violence and harassment from 2003-2008 as
21 “appear[ing] to be of lesser magnitude than those referenced in court opinions and prior AOs
22 granting the exemption”).

1 It is against this backdrop that the more recent evidence presented by the requestors must
2 be considered. *See Brown*, 459 U.S. at 98 (holding that district court “properly applied the
3 *Buckley* test” in finding that there was “proof of specific incidents of private and government
4 hostility toward the SWP and its members within the four years preceding the trial”); *see also*
5 *FEC v. Hall-Tyner*, 678 F.2d 416, 422 (2d Cir. 1982) (citing government admission that
6 Communist Party seeking reporting exemption remained under “active investigation by the FBI”
7 despite termination of prior surveillance program).

8 For the period during which the most recent reporting exemption was in effect (January
9 1, 2013 through December 31, 2016), the SWP’s primary allegation of government harassment is
10 that the SWP’s 2016 vice presidential candidate was stopped and his belongings examined by
11 Australian immigration authorities before he could board a flight to the U.S. The request states
12 that he was again stopped and searched by TSA staff upon landing in the U.S. Neither the
13 Australian immigration authorities nor the TSA provided a reason for detaining the candidate,
14 and the information submitted does not indicate whether the officials in either country even knew
15 of his connection to the SWP. *See AOR728*. Without additional information regarding the
16 reason for these delays and searches, this incident is difficult to assess. *See Advisory Opinion*
17 *2012-38 (SWP)* (concluding that uncorroborated claim that SWP vice presidential candidate was
18 stopped at Canadian border and questioned by Canadian immigration authorities who had
19 “sizeable dossier” on him was difficult to assess and noting that it was possible that information
20 was gathered by Canadian government); *Advisory Opinion 1996-46 (SWP)* (noting that SWP
21 provided uncorroborated claim that man associated with SWP was on no-fly list and had been

1 questioned by FBI before being permitted to board flight). No other evidence of government
2 surveillance of the SWP is provided in the current request.

3 The SWP does submit evidence regarding government surveillance of certain other
4 domestic advocacy groups. The SWP points to a September 2010 report by the Department of
5 Justice’s Inspector General regarding surveillance of groups such as People for the Ethical
6 Treatment of Animals, Greenpeace, the Catholic Worker Movement, and the Thomas Merton
7 Center, as well as other sources purporting to demonstrate government surveillance of additional
8 groups, including more recent studies and news articles.²¹ But neither the request nor the cited
9 reports suggest that the SWP has been under surveillance or otherwise interfered with by the
10 federal government at any time during the past several years. Surveillance of groups *other* than
11 the SWP provides little support for the probability of future government harassment of the SWP.
12 Although the Court suggested in *Buckley* that “[n]ew parties that have no history upon which to
13 draw may be able to offer evidence of reprisals and threats directed against individuals or
14 organizations holding similar views,” 424 U.S. at 74, the SWP is not a new party that would
15 need to resort to citing the experiences of others for evidence of likely reprisals. Thus, even
16 assuming that the groups described in the cited reports could be construed as ideologically
17 similar to the SWP, the Court’s rationale for considering evidence of threats against groups with
18 similar views is not applicable to the SWP.

19 The SWP also submits evidence regarding a few incidents of police officers being called
20 by residents when SWP workers were canvassing at apartment complexes. In each incident, the
21 officers affirmed that the workers had the right to be engaging in campaign activity. These

²¹ See, e.g., AOR108, 198, 380.

1 cannot be considered instances of government harassment; to the contrary, they demonstrate a
2 willingness of law enforcement officials to protect the SWP’s lawful activity against frivolous
3 complaints. *See Doe v. Reed*, 697 F.3d 1235, 1249 (9th Cir. 2012) (Smith, J., concurring)
4 (evidence of retaliation not persuasive when it showed “satisfactory aid from law enforcement,”
5 which stood “in stark contrast to the behavior of police in *Brown v. Socialist Workers ’74*
6 *Campaign Committee*, where there was . . . police harassment of a party candidate”) (citations
7 omitted).

8 Regarding threats, harassment, and reprisals by non-government actors, the SWP submits
9 evidence of fewer and less serious incidents than it has in the past. For example, the SWP
10 presents evidence that two people stated that they were afraid that associating with the SWP
11 would impact their employment. AOR768, 771. While the Commission does not trivialize such
12 fears, the Commission notes that two references to hypothetical adverse employment actions pale
13 in comparison to the evidence that was before the Supreme Court in *Brown* regarding the
14 employment consequences for SWP members in the 1970s. *See, e.g., Brown*, 459 U.S. at 99
15 (“[I]n the 12-month period before trial, 22 SWP members . . . were fired because of their party
16 membership.”). Similarly, in its previous advisory opinion requests, the SWP has provided the
17 Commission with accounts of serious and widespread physical incidents, including a brick
18 wrapped in incendiary material thrown through the window of a local SWP headquarters, a shot
19 fired through the window of an SWP bookstore and campaign headquarters of an SWP mayoral
20 candidate, and widespread vandalism to SWP property. *See Advisory Opinion 2009-01 (SWP)*
21 *at 7; Advisory Opinion 2003-02 (SWP) at 7; Advisory Opinion 1996-46 (SWP) at 5.* In this
22 request, SWP submits two alleged physical incidents: The theft from an SWP city council

1 candidate's home of a smartphone containing political contacts and call records, *see* AOR570,
2 and the breaking of the front window of the SWP's campaign headquarters in Los Angeles. *See*
3 AOR586. In both cases, police reports were filed but no arrests were made. *See* AOR570, 586,
4 589.

5 Many of the SWP's alleged incidents merely involve private parties expressing heated
6 disagreement with the SWP's positions. Such episodes are "typical of any controversial
7 campaign," and "do not necessarily rise to the level of 'harassment' or 'reprisals.'" *ProtectMarriage.com*,
8 830 F. Supp. 2d at 934. And because there is no evidence that SWP
9 workers called the local police for assistance during these encounters, the Commission is unable
10 to find that they demonstrate that the SWP "lacks adequate recourse to pursue means short of
11 non-disclosure" to protect against any unlawful interference with its campaigning.
12 *ProtectMarriage.com*, 830 F. Supp. 2d at 932.

13 In its Comment, the SWP argues that the government's interest in disclosure is
14 outweighed by the burden such disclosure would impose on the First Amendment rights of SWP
15 and its supporters. In support of this argument, the SWP asserts that there is "an increasingly
16 pervasive and reasonable fear among potential SWP supporters that their support for, or
17 association with, the SWP will subject them to threats, violence or harassment" (Comment at 17)
18 and an "extensive record of potential SWP supporters who refuse to support or contribute to the
19 SWP, because of this fear" (*id.* at 18).

20 The evidence presented in the SWP's request does not show "increasing[]" harassment of
21 the SWP's supporters. To the contrary, as described above, the evidence demonstrates that
22 harassment of the SWP's supporters has steadily decreased over the years since its disclosure

1 exemption was first granted. The SWP’s Comment itself reflects this decrease: The Comment
2 cites many historical examples of severe harassment of the SWP’s supporters (*see* Comment at
3 14-18; *see also supra* pp.13-14 (acknowledging history of harassment)), but its discussion of
4 contemporary events consists exclusively of (1) actions by corrections officers that were
5 reversed, (2) allegations regarding entities unrelated to the SWP, and (3) speculation regarding
6 ambiguous events (*see* Comment at 19-21; *see also supra* pp. 15-17 (addressing these
7 instances)). The Commission reiterates that it takes seriously, and is weighing in its analysis, the
8 longstanding historical harassment of the SWP. But the Commission must also weigh the more
9 recent evidence, which does not indicate a reasonable probability that serious harassment and
10 reprisals are likely to be inflicted on SWP supporters.²²

11 In light of the increasingly distant history of government surveillance and harassment of
12 the SWP, the lack of more recent indications of such surveillance and harassment, and the
13 substantial decline in private harassment of the SWP through the time periods considered in
14 Advisory Opinion 2009-01 (SWP) and Advisory Opinion 2012-38 (SWP), the factual record
15 before the Commission provides relatively little support for the SWP’s current request for a
16 prospective partial reporting exemption.

²² Contrary to the Comment’s suggestion that the Commission’s analysis consists of a “mechanical numbers game” (Comment at 19), the Commission takes careful note of the *nature* of the anti-SWP harassment, both historically and contemporarily. Indeed, it is this nature, more than any quantitative weighing, that leads the Commission to conclude that the likelihood of serious threats, harassment, and reprisal against the SWP’s supporters has significantly decreased. *See, e.g., supra* p. 18 (distinguishing historical record of SWP supporters being fired from current employment-related assertions).

1 C. *Balancing the Public Interest in Disclosure Against the Probability of Threats,*
2 *Harassment, and Reprisals*

3 The SWP has been subject in the past to serious and widespread threats, harassment, and
4 reprisals from both government and private parties. As described above, however, the
5 probability of adverse action against the SWP is significantly lower than it was at any previous
6 time the Commission has considered this issue, and the public interest in disclosure of SWP's
7 financing is greater.²³ The SWP's ability to raise more than \$80,000 during 2016 (which, as
8 stated, represents a sevenfold increase from its fundraising during the 2012 election cycle),
9 together with SWP's success in obtaining ballot access and the votes cast for SWP- and
10 Socialist-affiliated candidates, appears to show that the SWP is able to raise funds and
11 disseminate its message in spite of isolated instances of harassment. The Commission therefore
12 cannot conclude that the SWP's "financial backing is so tenuous as to render [it] susceptible to a
13 . . . speculative fall-off in contributions" if the SWP's contributors are disclosed.

14 *ProtectMarriage.com*, 830 F. Supp. 2d at 929.

15 Viewing the SWP's circumstances and evidence as a whole — including the historical
16 persecution of the group, the relative paucity of recent episodes of serious harassment, and the
17 SWP's increasing level of electoral and financial success — the Commission concludes that the
18 reduced probability of meaningful threats, harassment, and reprisals against the SWP is no
19 longer sufficient to outweigh the public interest in disclosure of the SWP's activity. *See Doe v.*

²³ Indeed, some of the SWP's evidence demonstrates that the alleged hostility is not meaningfully hindering the SWP's activities. For example, the SWP submits a news article quoting an SWP mayoral candidate in Omaha, Nebraska, who stated that the SWP was able to collect "more than two times the required number [1,000] of signatures" to gain ballot access. AOR570. "[The SWP] got a great political response" and "sold hundreds of copies of the *Militant*" and sold several subscriptions to that periodical as well while gathering signatures. *Id.*

1 *Reed*, 697 F.3d at 1248 (Smith, J., concurring) (plaintiffs did not demonstrate infringement of
2 associational rights or “‘the particularized showing required by Supreme Court precedent’ that
3 disclosure . . . is reasonably likely to result in . . . retaliation”) (quoting *Family PAC v.*
4 *McKenna*, 685 F.3d 800, 808 (9th Cir. 2012)); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d
5 1997, 1216 (E.D. Cal. 2009) (plaintiffs did not demonstrate that they had “suffered animosity
6 rising to the level hypothesized in *Buckley* and existing in *Brown*”).

7 The Commission thus concludes that the SWP no longer qualifies for the partial
8 disclosure exemption. Given the long duration of SWP’s partial reporting exemption, however,
9 the SWP’s contributors and payees between December 31, 2016, and the date of this opinion
10 may have reasonably expected that disclosure would not occur for this interim period. The
11 Commission thus extends the partial reporting exemption through March 31, 2017, which is the
12 end of the period for the SWP’s first required report that will follow this opinion. Accordingly,
13 the SWP must begin disclosing all information required by the Act and Commission regulations
14 for receipts and disbursements received or made after that date.

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transaction or activity set forth in your request. *See*
17 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
18 assumptions presented, and such facts or assumptions are material to a conclusion presented in
19 this advisory opinion, then the requestors may not rely on that conclusion as support for their
20 proposed activity. Any person involved in any specific transaction or activity which is
21 indistinguishable in all its material aspects from the transaction or activity with respect to which
22 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

1 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
4 on the Commission's website.

5 On behalf of the Commission,
6
7

8 Steven T. Walther
9 Chairman
10