ALAN WILSON
ATTORNEY GENERAL

June 4, 2019

Ms. Meghan L. Walker, Executive Director
State Ethics Commission
201 Executive Center Drive, Suite 150
Columbia, SC 29210

Dear Ms. Walker:

You have requested an opinion "as to the constitutionality of enforcing certain provisions of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 (the Act) with regard to political parties, as that term is defined in the Act." By way of background, you provide the following information:

> [a]s you may know, in South Carolina Citizens for Life, Inc. v. Krawcheck, 759 F. Supp.2d 708 (D.S.C. 2010), the Act's definition of "committee". . . was declared unconstitutionally overbroad due to its impact on groups engaged primarily in issue advocacy. Citing North Carolina Right to Life. Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008), the court held that the Act's filing and reporting requirements would only be permissible when applied to organizations whose major purpose is the election or opposition of a candidate for elective office.
>
> Following these decisions, the Commission suspended enforcement of a multitude of statutes related to "committees," including, but not limited to, S.C. Code Ann. § 8-13-1308, which requires certain disclosure reports to be filed with the Commission. Similarly, out of an abundance of caution, the Commission suspended enforcement of § 8-13-1308 with regard to political parties' campaign accounts. As indicated by the attached 2015 memorandum, the Commission continued to enforce § 8-13-1308 with regard to political parties' operating accounts. . . . However, given that "political party" is separately defined within the Act and is specifically referenced in § 8-13-1308(G),. . . the Commission now seeks guidance as to whether Krawcheck in fact limits the Commission's ability to enforce the Act's disclosure and filing requirements of political parties' operating and campaign accounts.
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> Therefore, the Commission's question is as follows: Does Krawcheck limit the Commission's ability to enforce the S.C. Code Ann. § 8-13-1308 with regard to a political party, as that term is defined in the Act?

(emphasis added). You further note that "the Act distinguishes, and the Commission has recognized, differences between contributions to a political party's campaign account and donations to a political party's operating account." (citing SECAO 92-240). In the referenced opinion of the State Ethics Commission, it was concluded that "transfers of funds from a national party committee to a State party are not subject to the restrictions contained in Section 8-13-

1322(A). Subsection (A) of § 8-13-1322 provides that "(A) A person may not contribute to a committee and a committee may not accept from a person contributions aggregating more than three thousand five hundred dollars in a calendar year" pursuant to § 8-13-1300(6) a "committee" includes a "party committee."

Your question is difficult with no clear answer, particularly in light of Krawcheck and N.C. Right to Life v. Leake, 535 F.3d 274 (4th Cir. 2008). While disclosure "statutes connected to the nomination or election of a candidate for public office" are "almost without exception upheld," statutes which encompass issue advocacy are far more constitutionally problematical. Malloy, "A New Transparency: How To Ensure Disclosure From 'Mixed-Purpose' Groups After Citizens United," 45 U.S.F.L. Rev. 428, 440 (2011). Here, a political party, although generally thought of as an entity which supports the nomination ore election of its candidates, does much more. A party also engages in issue advocacy. Thus, the answer to your question is unclear. Accordingly, we believe it is best to err on the side of caution, by continuing the Commission's present policy of non-enforcement of § 8-13-1308, and await clarification by the General Assembly.

Law/Analysis

Your question involves provisions contained in the "Ethics, Government Accountability and Campaign Reform Act" of 1991 ("the Act"), codified at S.C. Code Ann. § 8-13-100 et seq. As our Supreme Court has advised, "[t]he Ethics Act is a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service." Ex Parte Harrell v. Attorney General of State, 409 S.C. 60, 64, 760 S.E.2d 808, 810 (2014). Section 8-13-1308(G) of the Act provides as follows:

> [n]otwithstanding any other reporting requirements in this chapter, a political party, legislative caucus committee, and a party committee must file a certified campaign report upon the receipt of anything of value which totals in the aggregate five hundred dollars or more. For purposes of this section, "anything of value" includes contributions received which may be used for the payment of operation expenses of a political party, legislative caucus committee or a party committee. A political party also must comply with the reporting requirements of subsections (E), (C) and (F) of Section 8-13-1308 in the same manner as a candidate or committee.

(emphasis added). In particular, Subsection (F) requires a detailed campaign report, including the "name and address of each person making a contribution of more than one hundred dollars and the amount and date of receipt of each contribution. . . ." [§ 8-13-1308(F)(2)]. Section 8-13-1300(26) of the Act defines a "political party" as an "association, a committee, or an organization which nominates a candidate whose name appears on the election ballot as the candidate of that association, committee, or organization."

. Typically, any statute enacted by the General Assembly is entitled to a strong presumption of constitutionality. As we have consistently advised,

> . . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the Constitution." Joytime Distrib. & Amusement Co. Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Att'y Gen., August 19, 1997.

Notwithstanding this presumption of validity ordinarily afforded to legislation, we note that many courts do not afford the presumption of constitutionality if First Amendment rights are arguably infringed. As one court has observed, "[t]he general presumption of constitutionality accorded legislation is inapplicable where the law infringes on the exercise of First Amendment rights, and the burden of establishing the law's constitutionality is upon the government." Schultz v. City of Cumberland, 536 N.W.2d 192, 194 (Wisc. App. 1995). Op. S.C. Att'y Gen., 2007 WL 4284626 (November 27, 2007).

Moreover, while this Office has concluded that the Ethics Commission possesses no authority to determine the constitutionality of a statute, see Op. S.C. Att'y Gen., 2010 WL 3896168 (September 3, 2010), we have also steadfastly adhered to the requirement that the Commission possesses the sole jurisdiction to enforce the Act administratively. As we previously advised, "[t]his Office has consistently recognized the Commission's exclusive jurisdiction regarding any resolution of questions involving interpretation and administrative enforcement of the State Ethics Act." Op. S.C. Att'y Gen., 2013 WL 6924890 (December 23, 2013). Thus, while we may advise as to the constitutional implications of a provision of the Ethics Act, the decision to enforce or not enforce any provision lies with the Commission. As we have advised previously:

> [g]enerally, a public officer may not decline to enforce laws found on the statute books until the courts have declared such enactments unconstitutional . . . [citations omitted]. However, a governmental officer who takes an oath to uphold the United States Constitution may act on the ruling of the Attorney General as to the doubtful constitutionality of a particular statute if the courts have not acted. . . . This is consistent with the federal case law that would permit a governmental official to be held personally liable in a suit for money damages if he violates a person's clearly established constitutional rights. See Harlow v. Fitzgerald, 73 L.Ed.2d 396 [and other cases]. . . .
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> A court may deem such rights to be clearly established based upon the above analysis. This provides further authority for you, as well as any other South Carolina public official to decline to enforce the state statute. O'Shields v. Caldwell, [207 S.C. 194, 219, 35 S.E.2d 184, 194 (1945)].

Op. S.C. Att'y Gen., 2003 WL 21790884 at *4 (June 24, 2003).

With that brief background in mind, we turn to a discussion of the Krawcheck decision by the District Court of South Carolina in 2010.

Krawcheck Decision

The Krawcheck decision is a seminal authority in this matter regarding enforcement of the Ethics Act. In Krawcheck, supra, South Carolina Citizens for Life, Inc. brought suit against the members of the State Ethics Commission, contending that "the term 'committee' found in [the Ethics Act], S.C. Code Ann. § 8-13-1300(6), is facially unconstitutional for overbreadth, (2) the term 'influence' found in S.C. Code Ann. § 8-13-1300(31)(C) is facially unconstitutional for overbreadth and (3) the term 'influence' found in S.C. Code Ann. § 8-13-1300(31)(C) is facially unconstitutional for vagueness." The Court ultimately ruled that the definition "committee," as found in the Act, is facially unconstitutional as a result of overbreadth.

The Krawcheck Court noted, that "[d]esignation as a 'committee' under the South Carolina Ethics Act involves a number of organizational, administrative, reporting and funding requirements." 759 F.Supp.2d at 713-14 (detailing regulatory requirements). Proceeding to discuss the governing First Amendment decisional law in the context of election regulation, Judge Wooten stated:

> [b]oth the federal and state governments have a long history of disclosure requirements in the election context. The earliest federal disclosure law was enacted on June 25, 1910, just over one hundred years prior to the controversy now before this Court. However, the analysis of the South Carolina provisions challenged in this action begins, "as does nearly any analysis of the constitutionality of campaign finance regulation," North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 281 (4th Cir. 2008), with the Supreme Court's landmark decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Buckley"). In Buckley, the Supreme Court addressed several challenges to the Federal Election Campaign Act of 1971 ("FECA"). FECA contained numerous restrictions including limits on expenditures by individuals and groups that were made "relative to a clearly identified candidate," and public disclosure requirements for contributions by individuals, limits on expenditures by individuals and groups that were made "relative to a clearly identified candidate," and public disclosure requirements for contributions and expenditures above certain threshold levels. Buckley, 424 U.S. at 7, 96 S.Ct. 612. In deciding Buckley, the Court "recognized that legislatures have the well established power to regulate elections . . . and that pursuant to that power, they may establish standards that govern the financing of political campaigns." North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) ("Leake") (citing Buckley, 424 U.S. at 13, 26, 96 S.Ct. at 612).
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> The Supreme Court "simultaneously noted, however, that campaign finance restrictions operate in the area of the most fundamental First Amendment activities,

> "and thus threaten to limit ordinary 'political expression.'" Id. (quoting Buckley, 424 U.S. at 14, 96 S.Ct. 612).
>
> Based on these competing concerns, the Supreme Court "recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment Freedoms." Leake at 281. The Court "did so by demarcating a boundary between regulable election-related activities and constitutional protected political speech." Id. In addressing the comprehensive provisions set forth in FECA, the Supreme Court held that "campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular candidate.'" Id. (quoting Buckley, 424 U.S. at 80, 96 S.Ct. 612). As the Fourth Circuit noted, this holding is based on the recognition that "only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable."

759 F.Supp.2d at 714-15.

The District Court's concern in Krawcheck was that the definition of "political committee" in FECA "could be 'interpreted to reach groups engaged purely in issue discussion.'" Id. at 715 (quoting Buckley, 424 U.S. at 79). Thus, according to Krawcheck,

> [t]o prevent the regulations from reaching groups engaged primarily in issue advocacy, the Supreme Court concluded that the definition of political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Buckley, 424 U.S. at 80, 96 S.Ct. 612 (emphasis added). This construction of the term "political committee" as applied to non-candidate organizations has come to be known as the "major purpose" test. Colorado Right to Life Committee, Inc. v. Coffman, 498 F.3d 1137, 1152 (10th Cir. 2007) (citing FEC v. Akins, 524 U.S. 111; 118 S.Ct. 1777, 144 L.Ed.2d 10 (1998).

Id. at 715.

Moreover, in Krawcheck, Judge Wooten further pointed out that the Fourth Circuit had applied the "major purpose" test in Leake. In the view of the Leake Court, it was not sufficient that the statute in question have support of a candidate as one goal, among other purposes:

> [t]he Fourth Circuit went on to note that "[i]f organizations were regulable merely for having the support or opposition of a candidate as 'a major purpose' political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate." Id. at 287-88. The Fourth Circuit concluded that "[t]his would not only contravene both the spirit and the letter of Buckley's 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation." Id.

> . . . The Court stated that "the entire aim of Buckley's 'the major purpose' test was to ensure that all entities subjected to the burdens of political committee designation was engaged primarily in regulable, election-related speech" and that "[b]y diluting Buckley's test and regulating entities that have the opposition or support of political candidates as merely 'a major purpose,' North Carolina runs the risk of burdening a substantial amount of constitutionally protected political speech." Id. at 289. The Fourth Circuit concluded that "[a] single organization can have multiple 'major purposes,' and imposing political committee burdens on a multi-faceted organization may mean that North Carolina is regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a relatively small amount of election-related speech." Id. The Court finds that the Leake analysis dictates the decision in this case.

Id. at 716.

Krawcheck then concluded that "[t]he record indicates that the South Carolina definition of committee contains constitutional infirmities similar to those addressed by the Fourth Circuit in Leake." In the Court's view:

> [t]he South Carolina Ethics Act provides that committee restrictions apply to any group that makes an expenditure in excess of five hundred dollars on "any communication not more than forty-five days before an election, which promotes or supports a candidate, regardless of whether the communication expressly a vote for or against a candidate." South Carolina Code Ann. § 8-13-1300(6), 1300(31)(c). Thus, an entity that spends several million dollars annually on issue advocacy or community outreach can be required to register as a committee under South Carolina law if the group decides to spend five hundred and one dollars on a campaign related communication. Without the incorporation of the "major purpose" test into the statute, this result is inconsistent with both Buckley and Leake.

Id. (emphasis added).

Following a discussion of a number of decisions in other jurisdictions, Judge Wooten concluded that "[l]ike the legislation in the above-cited cases, the South Carolina Ethics Act imposes numerous burdens on entities that qualify as committees under S.C. Code Ann. § 8-13-1302(6) without reference to the entity's major purpose." The Court further observed that there was an exception to the contributions limit of $3500, but even such exception did not sufficiently protect First Amendment interests:

> [t]he Ethics Committee has limited the reach of this provision in recent Advisory Opinions, determining that any funds donated for the purpose of allowing a committee to distribute communications pursuant to § 8-13-1300(31)(c) which promote or supports a candidate or attacks or opposes a candidate within forty-five days of any election – such as voter guides – do not qualify as "contributions." House Legislative Ethics Committee Opinion 2006-3 (Doc. # 16). Because these funds do not qualify as "contributions" under the Ethics Act, funds donated for this

> purpose would not be subject to the $3500 limit on contributions. House Legislative Ethics Committee Opinion 2006-3 (Doc. # 16). Funds used for this purpose are also not subject to the disclosure requirements applicable to funds which qualify as "contributions" under the Ethics Act. State Ethics Commission Advisory Opinion AO 2006-004 (Doc. # 16). However, these subsequent limitations on the contribution limits set forth in Section 8-13-1322 do not eliminate the threat that the contribution limits will suppress a committee's ability to speak. As a whole, the provisions of the Ethics Act place significant burdens on groups that qualify as committees without meaningful consideration of the group's major purpose, thereby threatening to chill significant First Amendment rights.

Id. at 718-19 (emphasis added).

The Court in Krawcheck explained that the Legislature was the authority to produce a constitutional definition of "committee" rather than the judiciary. In the Court's view, "limiting the application of S.C. Code Ann. § 8-13-1300(6) only to groups that have the major purpose of influencing the outcome of the election would be tantamount to rewriting the statute. This is particularly true in this instance, where the 'committee' definition invalidated herein is a component of a comprehensive legislative scheme that involves detailed regulations governing all entities that are encompassed by the statutory definition." Id. at 720. A legislative "fix," however, was possible according to the Court:

> [a]s the Fourth Circuit highlighted in Leake, since state legislatures may further goals of allowing transparency and preventing corruption in the election process without placing extensive committee burdens on all groups that engage in election-related speech. In addressing North Carolina's previous statutory scheme, the Fourth Circuit recognized that "North Carolina is surely right to think that organizations – particularly large organizations – can have a substantial impact on the electoral process even if influencing elections is merely one of their many 'major purposes.' Leake at 290. However, the Fourth Circuit added that "[w]hen faced with such organizations, however, North Carolina does not have to impose the substantial burdens of political committee designation to achieve its goal of preventing corruption." Id. The Fourth Circuit noted that "[i]nstead North Carolina could impose one-time reporting requirements as it already does on certain individual expenditures and contributions by non-political committee organizations." Id. The Fourth Circuit concluded that "[i]n doing so, North Carolina would produce the same benefits of transparency and accountability while only imposing regulatory burdens on communications that are 'unambiguously campaign-related.'" Id. (citing Buckley, 424 U.S. at 80, 96 S.Ct. 612).

Id. at 719 (emphasis added). The Court further explained as to how the legislature might remedy the constitutional flaw in the definition of "committee":

> [i]ndeed, federal law provides for one-time disclosures similar to those alluded to by the Fourth Circuit in Leake. Federal election provisions require that every person that makes a disbursement in excess of $10,000 for the direct costs of providing and

> airing an electioneering communication shall file a one-time report disclosing the identification and principal place of business of the person making the disbursement, and the names of individuals contributing $1,000 or more towards the costs of disbursement. 2 U.S.C. § 434(f). The Supreme Court recently cited these provisions with favor in Citizens United v. Federal Election Commission, 558 U.S. 310, 130 S.Ct. 876, 913-917, 175 L.Ed.2d 753 (2010), rejecting an as-applied challenge to the application of these provisions. In addressing South Carolina's current statutory scheme at the hearing on this matter, counsel for the plaintiff summarized:
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> > [t]he fact that they don't have one time reports is simply their problem. They should have adopted a statute like federal law that requires a one time report. And they can't substitute now, well, we don't have one time reports, so therefore, we can make everybody become a P.A.C. [political action committee]. No. That's unconstitutional, and if this Court strikes that down, then they can adopt a constitutional statute that requires the one time report. Summ. J. Tr. at p. 68: 5-12.
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> This Court concludes that the committee provisions of the South Carolina Ethics Act simply sweep too far. The committee definition, set forth at S.C. Code Ann. § 8-13-1300(6) is in direct conflict with the Fourth Circuit's decision in Leake, and therefore requires invalidation by this Court.

Id. at 719-20.

State Ethics Commission Response To Krawcheck

Your letter indicates that as a result of the Krawcheck decision,

> . . . the Commission suspended enforcement of a multitude of statutes related to committees "including, but not limited to, S.C. Code Ann. § 8-13-1308, which requires certain disclosure reports to be filed with the Commission. Similarly, out of an abundance of caution, the Commission suspended enforcement of § 8-13-1308 with regard to political parties' campaign accounts. As indicated by the attached memorandum, the Commission continued to enforce § 8-13-1308 with regard to political parties' operating accounts. . . .

(emphasis added). The Commission, in distinguishing between a political party's campaign account and its operating account, apparently relied upon an earlier opinion, SECA092-340 (November 18, 1992). As we understand it, a party's "operating account" is designed to pay for the party's day to day operations, such as electricity, salaries, etc. as well as other expenses. In our view, no constitutional issue is raised by requiring a political party to disclose contributions to its operating account.

We turn now to § 8-13-1308's regulation of political parties with respect to the party's campaign account. As we have noted in a previous opinion, "[a]lthough this provision (§ 8-13-1308(G)) requires political parties to report contributions, it does not appear to restrict

expenditures made by political parties." Op. S.C. Att'y Gen., 2007 WL 3317618 (October 31, 2007). Thus, the question is whether the First Amendment renders it unconstitutional the limitations on the State's requirement of disclosure through § 8-13-1308 with respect to a political party's campaign account.

It is important to recognize that Krawcheck dealt with the definition of "political committee" and did not address the separate issue of political parties. Nevertheless, we emphasize that political parties possess First Amendment rights of political expression and free speech, just as others do. As Judge Childs explained in Greenville County Repub. Party Exec. Comm. v. South Carolina, 824 F.Supp.2d 655, 663-64 (D.S.C. 2011),

> "The freedom to join together in furtherance of common political beliefs" is clearly protected by the First Amendment of the Constitution. Cal. Democratic Party v. Jones, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.E.2d 502 (2000) (citing Tashjan, 479 U.S. at 214-15, 107 S.Ct. 544). Encompassed within the right to freedom of association is the power of an organization to identify the people who constitute the organization, as well as the right to limit the organization to people who share in the common interest and purpose of the organization. Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82. A corollary of the right to associate is the right not to associate. Jones, 530 U.S. at 574, 120 S.Ct. 2402. Political parties' associational rights are of paramount importance in the process of selecting its candidates for elective office. Indeed, it is the nomination process that "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in the winning it over to the party's views." Jones 530 U.S. at 575, 120 S.Ct. 2402. Accordingly, courts are careful to observe the protections afforded by the First Amendment to political parties in choosing their standard bearers. Id.

Moreover, in Colorado Republican Federal Campaign Committee v. Fed. Election Comm., 518 U.S. 604 (1996) (Colorado I), the Court held that expenditures by political parties, made independently, without coordination with a particular candidate, are protected by the First Amendment. The Court stated the following:

> [b]eginning with Buckley, the Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." NCPAC, supra at 497, 105 S.Ct. at 1469. This difference has been grounded in the observation that restrictions on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communications." Buckley, supra at 20-21, 96 S.Ct. at 635, because the symbolic communicative value of a contribution bears little relation to its size, 424 U.S at 21, 96 S.Ct. at 635-636, and because such limits leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." Id. at 28, 96 S.Ct. at 639. At

> the same time, reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors." Id. at 26-27, 96 S.Ct. at 638-639..
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> In contrast, the Court has said that restrictions of independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech." Id., at 19, 96 S.Ct. at 635. And the same time, the Court has concluded that limitations on independent expenditures are less directly related to preventing corruption, since "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure of the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Id. at 47, 96 S.Ct., at 648.

518 U.S. at 615 (emphasis added). The Court in Colorado I further stated:

> [a] party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2). The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress were it to conclude that the potential for evasion of the individual contribution limits was serious matters, might decide to change the statute's limitations on contributions to political parties. Cf. California Medical Assn., 453 U.S. at 197-199, 101 S.Ct. at 2722-2723 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on contributions to PAC's). But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitations on expenditures. Buckley, 424 U.S. at 44, 96 S.Ct. at 646-647. See also id. at 46-47, 51, 96 S.Ct. at 647-648, 650; NCPAC, supra at 498, 105 S.Ct. at 1469. Contributors seeking to avoid the effect of the $1000 contribution limit indirectly by donations to the national party could spend the same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See Buckley, supra at 44-48, 96 S.Ct. at 646-649 (risk of corruption by individuals independent expenditures is insufficient to justify limits on such spending). If anything an independent expenditure made possible by at $20,000 donation, but controlled and directed by a party rather than the donor would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See Buckley, supra, at 45-46, 96 S.Ct. at 647-648; NCPAC, supra at 498, 105 S.Ct. at 1469. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

518 U.S. at 616-618 (emphasis added). Thus, the Court has recognized that so-called "independent expenditures" by a political party – made without coordination with a candidate – are protected by the First Amendment.

The focus of your question is the disclosure requirements of § 8-13-1308. As noted, this provision requires a political party to "file a certified campaign report upon the receipt of anything of value which totals in the aggregate five hundred dollars or more." The term "anything of value" is to include "contributions received which may be used for the payment of operation expenses of a political party. . . ." In addition, "[a] political party must also comply with the reporting requirements of subsections (B), (C), and (F) of Section 8-13-1308 in the same manner as a candidate or committee." Thus, as noted above, it is our understanding that, based upon the Krawcheck decision, out of an abundance of caution, the SEC has required a political party to disclose only contributions to its operating account.

The Supreme Court addressed the issue of disclosure of contributions to a political party in Buckley v. Valeo, supra, noting that in certain instances, the requirement of disclosure may contravene constitutional rights as applied. In Buckley, the Court stated:

> [u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure in itself can seriously infringe on privacy of association and belief guaranteed by the First Amendment. E.g. Gibson v. Florida Legislative Comm., 372 U.S. 538, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1153, 2 L.Ed. 1488 (1958).
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> We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. . . . We also have insisted that there be a "relevant correlation" . . . or "substantial relation" . . . between the governmental interest and the information required to be disclosed. See Pollard v. Roberts, 283 F.Supp. 248, 257 (E.D. Ark.) (three-judge court) aff'd, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (per curiam). This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct requiring disclosure. NAACP v. Alabama, supra, 357 U.S. at 461, 78 S.Ct. at 1171. Cf. Kusper v. Pontikes, 414 U.S. at 57-58, 98 S.Ct. at 307-308.
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> As we have seen, group association is protected because it enhances "(e)ffective advocacy." NAACP v. Alabama, supra, 357 U.S. at 460, 78 S.Ct. at 1170. The right to join together, "for the advancement of beliefs and ideas," ibid, is diluted if it does

> not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optionally "effective." Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "(f)inancial transactions can reveal much about a person's Activities, associations, and beliefs." California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (Powell, J. concurring). Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably. In Bates, for example, we applied the principles of NAACP v. Alabama and reversed convictions for failure to comply with a city ordinance that required the disclosure of "dues, assessments, and contributions paid, by when and when paid." 361 U.S. at 518, 80 S.Ct. at 414. See also United States v. Rumley, 345 U.S. 41, 73 S.Ct. 543, 97 L.ED. 770 (1953) (setting aside a contempt conviction of an organization official who refused to disclose names of those who made bulk purchases of books sold by the organization).

424 U.S. at 64-66 (emphasis added).

On the other hand, Buckley also recognized that the government possesses a strong interest "to be vindicated by" disclosure requirements in the context of support or opposition to a candidate. According to the Court, disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is to be spent by the candidate.'" Id. at 66. Second, the Court noted that disclosure requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Id. at 67. Third, disclosure requirements "are an essential means of gathering the data necessary to detect violation of the contribution limitations. . . ." Id. at 68.

As stated earlier, applying the lesser "exacting scrutiny" standard, "the Supreme Court has upheld a wide range of disclosure laws pertaining to campaign-related speech, including disclosure requirements applicable to candidates, political party and independent political committees." Malloy, supra at 441. Buckley, as discussed, was one such instance. Moreover, "[i]n Citizens United, [558 U.S. 310 (2010)] the Court by an 8-1 margin again upheld the EC ["Electioneering Communications"] disclosure requirements both facially and as-applied in certain commercial advertisements promoting a campaign-related film." Malloy, supra at 442. Thus, disclosure requirements "serve substantial governmental interests."

It is also noteworthy that § 8-13-1300(26)'s definition of "political party" is virtually the same as that reviewed in Buckley. Whether such governmental interests enunciated in Buckley are sufficient to overcome the important First Amendment interests present, requires determining the extent of "the burden that they place on individual rights." Id. In most instances, noted the Court, disclosure is likely "to be the least restrictive means of curbing the evils of campaign ignorance and corruption."

As stated, Buckley's analysis has been maintained by the Supreme Court in its more recent cases. In Citizens United, 558 U.S. at 366-367, the Court quoted Buckley extensively with respect to the disclosure provisions "as applied to Hillary and the three advertisements for the movie." Again, as in Buckley, the Citizens United Court noted that ". . . disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' Buckley, 424 U.S. at 64, 96 S.Ct. 612, and 'do not prevent anyone from speaking,' McConnell, [540 U.S.] supra at 201, 124 S.Ct. 519. . . ." 558 U.S. at 366. In Citizens United, the Court reiterated that although the disclosure requirements "were facially upheld, the Court [in Buckley] acknowledged that as-applied challenges would be available if a group could show a 'reasonable probability' that disclosure of its contributers' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties. '" 558 U.S. at 367 (quoting McConnell, 540 U.S. at 198) (quoting Buckley, 424 U.S. at 74). See also McCutcheon v. Fed. Elect. Comm., 558 U.S. 310, 323 (2014) ["disclosure of contributions minimizes the potential for abuse of the campaign finance system."].

On the other hand, the Court has, on several occasions, determined that disclosure does in fact infringe upon constitutional rights. In McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995), for example, the Court held that punishment of a pamphleteer for distributing anonymous leaflets opposing a proposed school tax levy violated the First Amendment. Ohio's statute "applie[d] only to unsigned documents designed to influence voters in an election." 514 U.S. at 344. Quoting Buckley, supra, the Court in McIntyre stated that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] untethered interchange of ideas for the brining about of political and social changes desired by the people.'" 514 U.S., at 346 (quoting Buckley, 424 U.S. at 14).

Moreover, the McIntyre Court noted that "[o]f course, core political speech need not center on a candidate for office. The principles enunciated in Buckley extend equally to issue-based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills." 514 U.S. at 347. In the Court's view, the handbill restriction imposed a restriction on speech even "more intrusive then the Buckley requirement. . ." [resting] "on different and less powerful state interests." According to the Court, "[t]he Federal Election Campaign Act of 1971, at issue in Buckley, regulates only candidate elections, not referenda or other issue-based ballot measures. . . ." Id. at 366. Thus, "Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies the prohibition of all uses of that speech." Id. at 357.

Even though McIntyre distinguished the campaign disclosure requirements addressed in Buckley, it is important to note that Justice Thomas maintains the view that McIntyre overruled Buckley's holding with respect to the validity of disclosure requirements. In McConnell, Justice Thomas, in concurrence, and dissent, stated:

> . . . this Court has explicitly recognized that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in

> requiring disclosure as a condition of entry," and thus "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." (citing McIntyre, 514 U.S. at 342).

540 U.S. at 276. Justice Thomas thus stated that ". . . the only reading of McIntyre that remains consistent with the principles it contains is that it overturned Buckley to the extent that Buckley upheld a disclosure requirement solely based on the governmental interest in providing information to the voters." Id. at 277. Furthermore, in John Doe No. 1 v. Reed, 561 U.S. 186, 238-239 (Thomas J., dissenting), Justice Thomas reiterated his position concerning McIntyre. In a case upholding a statute as applied to the disclosure requirements of referendum petitions, he explained:

> [i]n McIntyre . . . the Court held that an Ohio law prohibiting anonymous political pamphleteering violated the First Amendment. One of the interests Ohio had invoked to justify that law was identical to Washington's here: the "interest in providing the electorate with relevant information." Id., at 348, 115 S.Ct. 1511. The Court called that interest "plainly insufficient to support the constitutionality of [Ohio's] disclosure requirement." Id. at 349, 115 S.Ct. 1511. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Id. at 348, 115 S.Ct. 1511. "Don't underestimate the common man," we advised. Id. at 348, n. 11, 115 S.Ct. 1511 (internal quotation marks omitted).

A majority of the Court has not adopted the position of Justice Thomas.

Two other decisions are also instructive with respect to your question. In Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark. 1968) (three judge court), affd., 393 U.S. 14 (1968), an earlier decision, cited with approval in Buckley, a prosecuting attorney subpoenaed information concerning the identity of individual contributors and the amounts of their contributions to a political party. Such subpoenas, however, were enjoined. The Court concluded that there had been no showing that this information sought was reasonably relevant to the prosecution's investigation of alleged vote buying, or that the public interest, if any, was served by such disclosure. Nor was the information sought sufficiently compelling to outweigh the constitutionally protected interests of the political party. With respect to the First Amendment issues raised by the subpoena, the Court cited Gibson v. Fla. Leg. Invest. Comm., 372 U.S. 539 (1963), Bates v. City of Little Rock, 361 U.S. 516 (1960) and NAACP v. Ala., 357 U.S. 449 (1958), among other decisions, as instructive to the question. Based upon these cases, the Court stated:

> [t]he rationale of those decisions is that the First and Fourteenth Amendments protect the rights of people to associate together to advocate and promote legitimate, albeit controversial, political, social, or economic action; that when the objective of the group or the group itself is unpopular at a given time or place, revelation of the identities of those who have joined themselves together or have affiliated with the group may provoke reprisals from those opposed to the group or its objectives; and

> that the occurrence or apprehension of such reprisals tends to discourage the exercise of the rights which the Constitution protects. In such circumstances, disclosure of the identities of members of the group can be compelled only by showing that there is a rational connection between such disclosure and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling.

283 F.Supp. at 256-57.

Also instructive is the Supreme Court decision in Brown v. Socialist Workers '74 Campaign, 459 U.S. 87 (1982). There, the question was "whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law . . . can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties." The Court concluded that such information from the party, including reporting the names and addresses of contributors and recipients of campaign disbursements, was constitutionally protected from disclosure. In that regard, the Court noted:

> [t]he Ohio statute requires every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Court held that the First Amendment prohibits the government from compelling disclosures by a minor political party that can show a "reasonable probability" that the compelled disclosures will subject those identified to "threats, harassment or reprisals." Id. at 74, 96 S.Ct. at 661. Employing this test, a three-judge District Court for the Southern District of Ohio held that the Ohio statute is unconstitutional as applied to the Socialist Workers Party. We affirm.

459 U.S. at 88 (emphasis added).

Brown set forth the requirements which had been stated in Buckley, as follows:

> "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." Id. at 74, 96 S.Ct. at 661.
>
> The Court's acknowledged that "unduly strict requirements of proof could impose a heavy burden" on minor parties. Ibid.

> "The proof may include, for example, specific evidence of past and present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals against individuals, or organizations holding similar views."
>
> Ibid.

Id. at 93-94. In the Court's opinion in Brown, therefore,

> . . . [c]ompelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and therefore reduce "the free circulation of ideas both within and without the political arena." [citations omitted]. We hold, therefore, that the test announced in Buckley for safeguarding the First Amendment interests of minor parties and their members and supporters applies not only to the compelled disclosure of campaign contributors but also to the compelled disclosure of campaign disbursements.

Id. at 98.

As noted above, Section 8-13-1300(26) defines a "political party" as "an association, a committee, or an organization which nominates a candidate whose name appears on the election ballot as the candidate of that association, committee, or organization." This is the same definition of "political party" reviewed in Buckley, which upheld the disclosure requirement there. A 1993 opinion of the Ethics Commission concluded that "the Ethics Reform Act does not require a political party to disclose contributions specifically solicited for non-campaign related expenses [operation expenses, i.e. rent, telephone bills or payroll], provided such funds are maintained in an account separate from the campaign account and are not used to influence the outcome of elective offices or ballot measures." SECAO 093-059 (January 20, 1993). See also SECAO 92-240 ["the Act distinguishes, and the Commission has recognized, differences between contributions to a political party's campaign account and donations to a political party's operating account."].

Minor political parties are included within the definition of "political party" found in § 8-13-1300(26). Typically, minor parties nominate their candidates for placement on the ballot by convention. Our courts have been vigilant in protecting the constitutional rights of minority parties in South Carolina, including First Amendment protections. See e.g. Toporek v. S.C. State Election Comm., 362 F.Supp. 613, 620 (D.S.C. 1973) where Judge Blatt on behalf of a three-judge court held that

> [w]hile this court is most reluctant to declare a state act unconstitutional for the reasons heretofore set forth we hold that those provisions of Section 23-264, as amended, of the South Carolina Code of Laws, which establish filing dates for candidates nominated other than by party primary method, are unconstitutional in

> that they are in violation of the equal protection clause of the Fourteenth Amendment, and, as these provisions unnecessarily burden the right of the citizenry to vote and seek office, because they violate the right to peaceably assemble and petition the government for redress of grievances as guaranteed by the First Amendment.

As discussed above, Krawcheck, in relying upon the Fourth Circuit in Leake, makes it clear that the Supreme Court has "'recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment Freedoms.'" 759 F.Supp.2d at 714-15, quoting Leake, 525 F.3d at 281. Thus, "'only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable. '" Id.

In this instance, the requirement of disclosure by a political party, pursuant to § 8-13-1308, possesses a number of constitutional pitfalls. While disclosure of contributions to a party's "operational account" presents no constitutional issue, the campaign accounts' disclosures may well be different. As noted, where the party expends funds to support or oppose a particular candidate, disclosure is generally upheld. However, as Buckley readily acknowledges, ". . . public disclosure of contributions to . . . political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against" the State's interest in preventing corruption. Buckley, 424 U.S. at 68.

The problem arises because, in some instances, contributions may be made to a political party, and the political party may use such contributions for purposes such as issue advocacy. issue advocacy. See McConnell v. Fed. Elect. Comm., 251 F.Supp.2d 176, 837 (D.C. D.C. 2003) [contributions to state and local political parties may include other purposes including "funding administrative and overhead costs, voter registration or generic get-out-the-vote activities or supporting ballot measures or issue advocacy. . . ."]. This is one instance in which blanket disclosure requirement placed upon a political party may be constitutionally problematical. Where the party may use its campaign account for issue advocacy, Krawcheck and Leake come into play.

Thus, we now proceed to your question regarding Krawcheck. In Leake, the case upon which Krawcheck heavily relied, the Fourth Circuit explained that Buckley's use of the phrase "the major purpose" of supporting or opposing a candidate for purposes of campaign regulation was highly significant in any First Amendment analysis. According to the Fourth Circuit,

> [i]f organizations were regulable merely for having the support of opposition of a candidate as "a major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of Buckley's

> "unambiguously campaign related" test, but it would also subject a large quantity of ordinary political speech to regulations. See e.g. [424 U.S.] . . . at 80, 86 S.Ct. 612.

524 F.3d at 287-88. Citing cases such as Fed. Elec. Comm. v. Mass. Citizens For Life, Inc., 479 U.S. 238 (1986), McConnell, 540 U.S. at 170, n. 64 and others, the Court in Leake concluded:

> [t]hus, we are convinced that the Court in Buckley did indeed mean exactly what it said when it held that an entity must have "the major purpose" of supporting or opposing a candidate to be designated a political committee. Narrowly construing the definition of political committee in that way ensures that the burden of political committee designation only fall on entities whose primary or only activity are within the 'core" of Congress's power to regulate elections. Buckley, 424 U.S. at 79, 96 S.Ct. 612. Permitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple "major purposes" threatens the regulation of too much ordinary political speech to be constitutional.

Id. at 288-89.

With respect to a political party, the Supreme Court, in Colorado Republican Fed. Campaign Comm., supra, (Colorado I), has stated that ". . . one of the main purposes of a political party is to support its candidates in elections." 518 U.S. at 634 (emphasis added). Moreover, in Wash. State Repub. Pty. v. Wash. State Pub. Disclosure Comm., 4 P.3d 808 (Wash. 2000), the Washington Supreme Court addressed the question of the nature of a political party's purchase of advertising attacking an incumbent political candidate's stand on criminal law issues. The Washington Republican Party spent thousands of dollars on advertising on so-called "Tell Gary Locke" television ads critical of a gubernatorial candidate's crime record.

In the Washington Supreme Court's view, Buckley "drew a distinction between contributions and expenditures based upon a 'fundamental constitutional difference between money spent to advertise one's own views independently of the candidate's campaign and money contributed to the candidate to be spent on his [or her] campaign.'" 4 P.3d at 815 (quoting Fed. Elec. Comm'n v. Nat. Conservative Pol. Action Committee, 470 U.S. 480, 497 (1985). The Court summarized Buckley's conclusions this way:

> . . . the Court in Buckley approved financial limitations on contributions to candidates, but held unconstitutional the limitations on expenditures by individuals and groups whose expenditures were not coordinated with candidates. Importantly, the Court also distinguished between express advocacy of candidates for election and issue advocacy, rejecting FECA's burdens on First Amendment freedoms where issue advocacy is concerned.

Id. at 817.

In the Court's view, "Buckley intended to protect issue advocacy which discusses and debates issues in the context of an election." Id. at 821. According to the Court, "[w]hen a political party makes expenditures for issue advocacy the threat of corruption posed by direct contributions to the candidate is absent. By the same token, use of contributions for issue advocacy does not circumvent constitutional limitations on contributions to candidates." Id. at 825-26. Quoting Colorado Republican, supra, (Colorado I), the Court recognized that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." Id. at 826. Moreover, "the ability to join together for the purposes of issue advocacy through a political party is an important aspect of political speech, especially given the role which political parties can play. . . ." Id. at 278.

Scholarly commentary following the Citizens United decision notes that disclosure with respect to "issue advocacy" is constitutionally problematical. As one commentator has noted,

> . . . the Supreme Court has almost without exception upheld disclosure statutes connected to campaign-related spending or spending that relates to the nomination or election of a candidate for public office. The Court, however, has on occasion turned a more skeptical eye to disclosure connected to political "issue advocacy" or advocacy on political issues that is not related to candidate election. To be sure, the line between campaign-related speech has sometimes proven difficult to draw. . . .

Malloy, supra at 440-41 (emphasis added). Moreover,

> . . . [t]he application of disclosure requirements to mixed-purpose groups (i.e. those groups that engage in both electoral and issue advocacy) straddles the divide between campaign-related advocacy and issue advocacy in the Supreme Court's First Amendment jurisprudence. The Supreme Court has not provide and definitive guidance on the question of how much disclosure can be required from mixed-purpose groups whose major purposes does not relate to candidate elections.

Id. at 445. Malloy noted that opponents of disclosure requirements have "seized upon the major purpose test, arguing that because comprehensive disclosure requirements are comparable to imposing PAC status, the requirements are unconstitutional as applied to mixed-purpose groups." Id. at 447. Malloy cited the Fourth Circuit Leake case, as a decision which opened the door to declaring unconstitutional disclosure statutes which impinged upon issue advocacy. Malloy attempted to distinguish the situation in Leake from one in which only disclosure was regulated:

> [b]y contrast, the Fourth Circuit in North Carolina Right to Life, Inc. v. Leake ("NCRTL"). . . and the Tenth Circuit in New Mexico Youth Organized v. Herrera ("NMYO"). . . and Colorado Right to Life Committee, Inc. v. Coffman ("CRTL"),. . . have declared unconstitutional state statutes that imposed political committee status on non-major purpose groups. In 2008, in North Carolina Right to Life v. Leake, for instance, the Fourth Circuit struck down a North Carolina law that defined a

> "political committee" as a group that had influencing elections as "a major purpose," not "the major purpose.". . . However, in many of these cases the state statutes under review extended beyond basic disclosure requirements and imposed additional substantive requirements on "political committees." For example, in evaluating North Carolina's definition of "political committee," the Fourth Circuit specifically noted that "political committees" were not only subject to disclosure requirements under North Carolina law, but also "face[d] limits on the amount of donations they can receive in any one election cycle from any individual or entity." . . . Similarly, "political committee" status as provided by the Colorado statute under review by the Tenth Circuit in CRTL entailed not only disclosure, but also strict contribution requirements. . . Therefore, to some extent, the decisions of the Fourth and Tenth Circuits enforcing the major purpose test involved state statutes that extended beyond basic disclosure requirements and imposed substantive contribution restrictions on political committees. . . Thus, there is a strong argument that even comprehensive PAC-style disclosure-only laws pass First Amendment muster.

Id. at 448-49.

Moreover, just as significantly, § 8-13-1300(26)'s definition of "political party" includes minor parties. Thus, as in the Brown decision, the statute leaves the door open for a constitutional challenge to requiring disclosure by those minor parties if the party or contributors are subject to harassment and/or retaliation. A court may, as in Brown, rule that the definition, as employed in § 8-13-1308(G) is unconstitutional as applied. See Brown, supra.

Conclusion

In our opinion, the decision of the SEC to suspend enforcement of § 8-13-1308 because of First Amendment concerns, as expressed in Krawcheck and Leake, was a prudent one. There are indeed credible First Amendment issues raised by enforcement of § 8-13-1308. We recognize, of course, that a primary purpose of a political party is electing candidates. However, ". . . it would ignore reality to think that the party role is adequately described by speaking generally of electing candidates." Fed. Elec. Comm. v. Colorado Repub. Fed. Campaign Comm., 533 U.S. 431, 450-51 (2001) (Colorado II). Certainly after Krawcheck and Leake, enforcement of § 8-13-1308 will likely result in a court challenge. We thus advise that any clarification or modification of the statute should not come from the Commission, but from the General Assembly.

Krawcheck makes it clear that the Supreme Court (particularly in Buckley v. Valeo) "recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards First Amendment Freedoms." According to Krawcheck, relying upon the Fourth Circuit decision in Leake, a statutory definition which does not have as the main purpose ". . . the nomination or election of a candidate" punishes First Amendment protected speech. Leake affirms that Buckley meant what it said in requiring "the main purpose" test.

Thus, in our view, a court could well conclude that § 8-13-1308, as guided by § 8-13-1300(26)'s definition of "political party," infringes upon First Amendment speech. For one thing, contributions to a political party's campaign account (as opposed to its operational account, which raises no First Amendment issues) may be used for issue advocacy as opposed to the nomination or election of a candidate. As Justice Kennedy wrote in Colorado I, '[p]olitical parties have a unique role in serving the principle of open, robust debate on public issues; they exist to advance the members' shared political beliefs." Justice Kennedy continued: "A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." McConnell v. Fed. Elec. Comm., 251 F.Supp.2d at 766-67 (quoting Colorado I, 518 U.S. at 628 (Kennedy, J., concurring in the judgment and dissenting in part).

As noted above, in Colorado I, the Supreme Court also recognized that "one of the main purposes of a political party is to support its candidates in election." (emphasis added). While clearly a party's campaign account is most often used for the nomination or election of a candidate, that is only one "main purpose" for its use. Such account also may be used for issue advocacy. McConnell, 251 F.Supp.2d at 759-60. Both Leake and Krawcheck indicate that where the election of or defeat of a candidate is not "the main purpose," but instead influencing elections are "a major purpose," a statute may well violate the First Amendment. Thus, even though the definition of "political party" in § 8-13-1300(26) is virtually identical to that upheld in Buckley, clearly First Amendment issues continue to be present in any enforcement of § 8-13-1308 as the statute is written.

In addition, there is no doubt that the definition of "political party" in § 8-13-1300(26) encompasses minor parties. That being the case, if a minor political party or its members demonstrate harassment and/or retaliation against them, Buckley and Brown, supra dictate that a court may well deem § 8-13-1308(G) to be unconstitutional as applied.

Thus, the prudent approach is the one which the Commission has chosen: to enforce § 8-13-1308 with respect to a political party's operating account, but not its campaign account. Such action by the Commission is supported by Krawcheck, Leake, Buckley and Brown. As Judge Wooten clearly stated in Krawcheck, the constitutional problems which the SEC has identified are for the General Assembly, not the Commission, to address.

Sincerely,

Robert D. Cook
Solicitor General