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ADVISORY OPINION 2022-003

Any Advisory Opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the Advisory Opinion is required. See KRS 121.135(4).

August 25, 2022

VIA EMAIL (ANNAWHITES@AOL.COM)
AND FIRST CLASS U.S. MAIL

Hon. Anna Stewart Whites
Attorney at Law
327 Logan Street
Frankfort, KY 40601

In re: Request for Advisory Opinion: Publication of Responses to Candidate Questionnaires

Dear Ms. Whites:

This Advisory Opinion is sent in response to your August 1, 2022, request on behalf of the ACLU of Kentucky ("ACLU"), which you state is not registered in the Commonwealth as a 501(c)(4) entity (a social welfare group under the Internal Revenue Code) or any type of political action committee (the equivalent of a permanent committee for Kentucky campaign finance law). Your request states that the ACLU is preparing to send a questionnaire to judicial candidates across the Commonwealth that would include questions about the candidate's prior experience and opinions on various issues that could be before the judiciary currently or come before it in the future. You state:

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The responses to the questionnaire, if any, would be shared with the public by the ACLU in various ways, including but not limited to in print, on social media or on an ACLU website. The responses would be published as provided, without additional editorializing, comments by the ACLU or additional information not publicly available. The publication of the responses would not include any recommendation to vote for, or against, any candidate or political party.

You ask whether if the Kentucky Registry of Election Finance (“the Registry”) would consider the sending of the questionnaire or the publication of the responses activities subject to Registry regulation. Your request was posted on the Registry’s website for ten days for public comment, as required by KRS 121.135(5)(a), but no comments were received.

Only if the questionnaires could be categorized as contributions or independent expenditures to support or oppose candidates would they be subject to campaign finance law. If, in conducting and publishing the questionnaires, the ACLU was found to be making a contribution to candidates, the activity would be prohibited by KRS 121.025. If the organization was found to be making an independent expenditure, it would be subject to the reporting requirements of KRS 121.150(1). However, based on the facts given, the ACLU would not be engaging in an activity the Registry regulates in circulating the questionnaire or publishing the responses.

The Kentucky Court of Appeals previously held that similar judicial polls were not subject to the Registry’s regulatory authority in *Kentucky Registry of Election Finance v. Louisville Bar Association*, Ky.App., 579 S.W.2d 622 (1978). In that case, the Court of Appeals found that the trial court was not clearly erroneous when it determined that the poll was not a contribution from the Louisville Bar Association to any candidate and that the polls were meant only to “inform the electorate of the qualifications of judicial candidates, in an objective manner without preferential declaration or endorsement of any such candidate.” *Id.* at 625. The Court made this determination despite conceding that “publication of a poll of any kind could provide at least some indirect help to the leader or winner.”

Further, if the survey is presented in a way that does not “expressly advocate[] the election or defeat of a clearly identified candidate or slate of candidates” it also cannot be categorized as an independent expenditure under the definition in KRS 121.015(12). The Registry’s regulatory authority over political communications is limited pursuant to *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the United States Supreme Court construed the expenditure limitations and disclosure and reporting requirements under federal law “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Id.* at 80. The Court identified examples of certain “magic words” that are essential in determining whether a communication is considered to be express advocacy, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject.” *Id.* at 44, fn 52. Communications which do not constitute express advocacy, as defined by this test, are considered constitutionally protected First Amendment speech and may not be subject to government regulation. This is based on the fact that “the government may not regulate a broader class of speech than is necessary to achieve its

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significant interest.” *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004). While the United States Congress responded to *Buckley* and its conflicting federal court progeny by more broadly defining the term “electioneering communication” in the Bipartisan Campaign Reform Act of 2002, the Kentucky General Assembly has not amended KRS Chapter 121 to replace the requirement for express advocacy.

Note that this Advisory Opinion is in agreement with AO 2002-007 which held that another similar poll, described as one that “may include questionnaires and interviews of local candidates” by a coalition interested in local issues. In that Advisory Opinion, the Registry found no distinction between reporting the responses to the coalition’s members or to the public at large the results of the poll. In neither instance, nor in this one, would the law require the organization to report such activity to the Registry, provided that the information is presented without comment or endorsement.

Please keep in mind that this Advisory Opinion is based on the specific facts set forth in your written request, does not cover past conduct, and only may be applied to cover the conduct in the transaction you describe. If you have any questions concerning this Advisory Opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,



LESLIE M. SAUNDERS
General Counsel

Cc: Registry Members
John R. Steffen, Executive Director