SMITH

FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO:	**Commissioners** **Staff Director** **General Counsel**
FROM:	**Office of the Commission Secretary**
DATE:	**June 28, 2004**
SUBJECT:	**Statement of Reasons MUR 5146 by Commissioner David M. Mason and, Commissioner Michael E. Toner**

The attached document is being circulated for a 48-hour review prior to public release. Absent objection, the Office of General Counsel will include this statement in the public record file in this case.

cc: Vincent Convery

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5146
Michigan Democratic State Central Committee	)	
And Alan Helmkamp, as Treasurer	)	
	)	

STATEMENT OF REASONS
COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER

I. Background

In this matter the Commission considered a complaint alleging that the Michigan Democratic State Central Committee ("MDSCC") and Alan Helmkamp, as Treasurer of the Committee (collectively "Respondents"): (1) violated the disclaimer requirement for express advocacy communications of the Federal Election Campaign Act of 1971 as amended ("FECA" or "Act") at 2 U.S.C. § 441d(a); (2) violated the Fund Act provisions of 26 U.S.C. § 9012(f); and (3) violated 2 U.S.C. §441b's ban on corporate and labor organizations using general treasury funds to make a contribution or expenditure in connection with a federal election, when they placed an advertisement in several Michigan newspapers on November 1, 2000 (the "Advertisement").[1]

On November 4, 2003, the Commission decided by a vote of 5-1 to find reason to believe that MDSCC and Alan Helmkam violated 2 U.S.C. § 441d(a), and find reason to believe that Respondents violated 2 U.S.C. 434(b)(4)(H)(iii).[2]

Following this vote, Commissioner Mason moved to serve interrogatories and request for production of documents on the MDSCC and Alan Helmkamp, as recommended in the Office of General Counsel ("OGC") Report dated September 12, 2003. The motion failed to carry on a vote of 2-4, with Commissioners Mason and Toner voting affirmatively and Commissioners McDonald, Smith, Thomas, and Weintraub dissenting. The Commission then voted on a motion to take no further action as to the reason to believe determinations and to close the file. This motion passed 6-0.[3]

---

[1] Complaint of the Michigan Republican State Committee, RE: Michigan Democratic State Central Committee and Roger Winkelman, Treasurer; MUR 5146 (November 6, 2000).
[2] Commissioners Mason, McDonald, Thomas, Toner and Weintraub voted affirmatively, Commissioner Smith dissented. Federal Election Commission, Minutes of an Executive Session at 6-10 (November 4, 2003).
[3] *Id.*

As explained below, because the Advertisement did contain express advocacy, and because Respondents failed to include a disclaimer on the Advertisement, the undersigned concur that there was reason to believe a violation occurred in this matter. However, the undersigned also voted to conduct discovery in this matter as proposed by OGC and believe the Commission erred in not taking such discovery and pursuing this matter to conclusion.

II. Factual and Legal Analysis[4]

a. The Advertisement

The Advertisement at issue appeared in two newspapers on November 1, 2000. The Advertisement was a full page ad that took the form of a letter signed by 32 individuals discussing the differences between the positions of the Republican and Democratic presidential candidates on issues purportedly of interest to the Arab-American community.[5] The Advertisement began with the following statement:

> "Michigan is ground zero for those seeking the White House and our community is registered, organized and accounts for three to four percent of the statewide vote. For those reasons, this year's election has been about courting Arab Americans rather then returning our campaign contributions or denying our endorsements.
>
> *Newsweek's* headline read "A New Fight for Arab Votes." The Economist boasted about the "creation of a political machine." Political pundits appeared on CNN and in the Washington Post talking about the endorsement of Governor Bush by two Michigan-based groups. For years we have fought for this kind of recognition and now we have the power to affect the presidency. We have every right to be proud.
>
> That is the good news.
>
> However, we all know that with this power comes great responsibility. We must choose wisely. Those of us supporting the Democratic ticket want our community to know the facts." [Emphasis added.]

The Advertisement further stated:

> "Unfortunately, some in the media have chosen to highlight Senator Lieberman's nomination as being negative for Arab Americans simply because of his faith. However, we know as Arab Americans that our concerns are not with Senator Lieberman's religious beliefs but

[4] The activity involved here occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). All references or statements of law herein regarding FECA refer to the Act as it existed before BCRA's effective date. Similarly, all references to the Commission's regulations or statements of law regarding any specific regulation refer to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

[5] Federal Election Commission, First General Counsel's Report, MUR 5146 at 3 (September 15, 2003).

with his record on U.S.-Mideast policy. We were encouraged though with Senator Lieberman's balanced expression of concern of Palestinians and Israelis during the Vice-Presidential debate. We will continue to disagree with Joe Lieberman on some issues, but we support the Democratic ticket because on the whole, we agree with it more then we disagree." [Emphasis added.]

The Advertisement concluded with the following statement:

"We believe that the Democratic Party, more then the Republican Party, is listening because the vast majority of our allies in Congress are Democrats. Al Gore heads a coalition that brings together those allies, like David Bonior, John Dingell and John Conyers. We need to give our allies a President who will work with them to end profiling, to end secret evidence and to bring about a just peace in the Middle East." [Emphasis added.]

The Advertisement does not contain any notice indicating that the Respondents paid for it.[6]

b. Express Advocacy and the Disclaimer Requirement

i. The Law

At the time of the Advertisement's publication, the Act required that any person making "an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate" must display a disclaimer. 2 U.S.C. § 441d(a). The Commission promulgated a regulation, in light of *Buckley v. Valeo*, 424 U.S. 1 (1976), that defines "expressly advocating" as a communication that uses explicit phrases of electoral advocacy such as "vote for the President" or "support the Democratic nominee" 11 C.F.R. § 100.22(a).[7]

ii. Analysis

The Advertisement at issue expressly advocates the election of a clearly identified federal candidate. The Advertisement's declaration that "we *support* the Democratic ticket," (emphasis added), invokes one of the exact phrases of electoral advocacy recognized by the Supreme Court as an example of "express advocacy." *See Buckley*, 424 U.S. at 44 n.52. In fact, this phrase is almost identical to one of the illustrative phrases contained in 11 C.F.R. § 100.22(a), which states that "support the Democratic candidate" is an example of a communication containing express advocacy.

---

[6] *Id.*

[7] When the Commission considered this matter, the U.S. Supreme Court had not yet issued its ruling in *McConnell v. FEC*, 124 S. Ct. 619 (opinion issued Dec. 10, 2003). Accordingly, the undersigned considered this matter without the benefit of the Supreme Court's decision in *McConnell* based on the prevailing law at that time.

In addition to using a specific phrase of express advocacy identified by *Buckley*, the Advertisement contains several other explicit electoral messages. For example, the Advertisement states that "[w]e must choose wisely. Those of us supporting the Democratic ticket want our community to learn the facts." The Advertisement further states that "[w]e need to give our allies a president who will work with them to end profiling, to end secret evidence and to bring about a just peace in the Middle East."

Because the Advertisement contained express advocacy under *Buckley* and 11 C.F.R. § 100.22(a), the MDSCC and its Treasurer violated Section 441d(a) of the Act by failing to include a disclaimer on the Advertisement.

c. Corporate and/or Labor Organization Contributions

i. The Law

The Act prohibits corporations and labor organizations from using general treasury funds to make a contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b. *See also* 11 C.F.R. §§ 114.2(b) and 114.1(a)(1) (prohibiting such contributions or expenditures to any "political party or committee"). The Act also makes it unlawful for any political committee "knowingly to accept or receive any contribution" prohibited by this section. 2 U.S.C. § 441b. The complaint alleges that the Respondents accepted corporate or union treasury contributions and then used those funds to pay for the Advertisement. A violation under this theory depended upon a conclusion that the Advertisement either constituted a coordinated expenditure, or that it contained "express advocacy," and therefore was a prohibited corporate or labor contribution.

ii. Analysis

No evidence suggests that the Respondents' expenditure for the Advertisement was coordinated with Gore/Lieberman or any other political committee. However, the Advertisement did contain "express advocacy," as discussed above. Since the Advertisement contained "express advocacy," the disbursement for the Advertisement constituted an independent expenditure. *See* 2 U.S.C. § 431(17). However, the Respondents failed to report any independent expenditures for either the 1999-2000 or the 2001-2002 election cycles. Political committees must report independent expenditures. 2 U.S.C. § 434(b)(4)(H)(iii). Therefore, there is reason to believe that the Respondents violated section 434(b)(4)(H)(iii).

In order to determine if the Respondent funded the Advertisement with corporate or union funds in violation of 2 U.S.C. 441b, the Commission needed to obtain more information about the Advertisement's funding. This information is not currently available because of the Respondents' failure to report independent expenditures. In order to obtain this information and make a determination whether the Commission should take further action, further discovery was needed.

Although we concurred that the Commission should not take any immediate action with respect to the corporate/labor organization contribution theory, we disagreed with our colleagues' decision to dismiss and close the file. Because the Advertisement contained "express advocacy" under 100.22(a), there is reason to believe that a violation occurred. We were therefore prepared to go forward with discovery, as recommended by OGC, to decide the question of whether the Advertisement was funded by corporate or labor treasury money. Our colleagues declined to take discovery in this matter, even though some of them concurred with us that the Advertisement contained express advocacy.

Three of our colleagues who agreed that the advertisement at issue contained express advocacy nonetheless declined to investigate and pursue this matter to conclusion, ostensibly because the Commission failed to conclude that express advocacy was present in other communications made by entirely different respondents. Express advocacy is a judicially-created doctrine which has presented continuing difficulties of interpretation for courts themselves. *See, e.g. Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Furgatch*, 807 F.2d 857 (1987); *McConnell v. FEC*, 124 S. Ct. 619 (2003). It should thus come as no surprise that a body of six Commissioners will sometimes disagree about whether particular statements constitute express advocacy. While we are certainly sympathetic to the proposition that the law should be enforced equitably, we do not agree that divisions over what constitutes express advocacy in other cases is an adequate rationale for failing to enforce the prohibition on corporate or union-funded express advocacy at all, especially where, as here, a majority of the Commission concurs that express advocacy is present and that a potential violation occurred.

We hope that a majority of the Commission will support taking appropriate discovery in future matters when there is consensus within the Commission that express advocacy is present.

June 25, 2004

Michael E. Toner
Commissioner

David M. Mason
Commissioner

FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO:	**Commissioners** **Staff Director** **General Counsel**
FROM:	**Office of the Commission Secretary**
DATE:	**August 3, 2004**
SUBJECT:	**Concurring Statement of Reasons MUR 5467** **By Chairman Bradley A. Smith and** **Commissioner Michael E. Toner**

The attached document is being circulated for a 48-hour review prior to public release. Absent objection, the Office of General Counsel will include this statement in the public record file in this case.

cc: Vincent Convery

Attachment