UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERAL ELECTION COMMISSION, Plaintiff-Appellee, v. JODY L. NOVACEK, REPUBLICAN VICTORY COMMITTEE, INC., *also known as* REPUBLICAN VICTORY 2004 COMMITTEE, BPO, INC., and BPO ADVANTAGE, LP, Defendants-Appellants	No.: 10-10516 Response to Appellee's Motion for Summary Affirmance

APPELLANTS' RESPONSE TO
APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

NOW COMES JODY L. NOVACEK, Defendant-Appellant and files this her Response to Appellee's Motion for Summary Affirmance. Said motion should be denied as the record on appeal will show that Ms. Novacek raised genuine issues of material fact in response to the Federal Election Commission's ("FEC") Motion for Summary Judgment. That motion was improperly granted despite the genuine issues of material fact that were before the court. The district court also did not follow the correct summary judgment standard when it viewed some of the facts and drew inferences from them in the light most favorable to the FEC rather than in the light most favorable to Ms. Novacek. Accordingly, because of the lower court's oversight of genuine issues of material fact and its misapplication of law, the appellate process should proceed forward and the Appellee's Motion for Summary Affirmance should be denied.

Standard of Review

The Fifth Circuit Court reviews a grant of summary judgment *de novo*. *Croft v. Governor of Tex.*, 562 F.3d 735, 742 (5th Cir. 2009). Summary Judgment should only be granted if there are no genuine issues of material fact and movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "An issue is material if its resolution could affect the outcome of the action." *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001). "In deciding whether a fact issue had been created, the court must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.*

ARGUMENT

I. APPELLANTS RAISED GENUINE ISSUES OF MATERIAL FACT AND THEREFORE SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED

The district court incorrectly found that Appellants willing and knowingly violated the Act by fraudulently misrepresenting themselves as part of the Republican Party. Novacek offered arguments and material facts to support the Appellants' defense. The district court errored in its analysis of these facts and there are reversible errors of law, this Motion for Summary Affirmance should be DENIED.

The FEC Claimed the Appellants "willing and knowingly" committed fraudulently mispresented they were part of the Republican Party.

Appellants do not dispute that Ms. Novacek drafted the two solicitation scripts, hired the call centers, and authored the one mail piece. The Appellants used the term "Republican Party" in both scripts and the mail piece and argued to the district court that

they had the right to do so, because they were a part of the Republican Party. *Defendant's Amended Response to Plaintiff's Motion for Summary Judgment Pp.7-8.* The Court errored when it ruled the RVC was not part of the Republican Party and ruked in favor of the FEC when it should have upheld the pro se Appellants. Neither the FEC not the court cited any law that prohibited the RVC from claiming they were part of the Republican Party. No precedence was sited in support of the Opinion on this key issue before the Court. The issue was material because its resolution could affect the outcome of the action. Summary Judgment should have been denied by the District Court and any inference should have been in favor of the Appellants, not the FEC.

The FEC charged the Appellants' use of the term "Republican Party" in it solicitations violated 2 U.S.C. § 441h(b) which provides that:

> No person shall: (1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

The question before the district Court was not if the Appellants used the term "Republican Party". The Appellants' never denied this fact. The question before the Court was if they were part of the Republican Party?_At a minimum, Novacek believed at the time, the RVC was part of the Republican Party as she does today. And as such, the Court errored in ruling the Appellant's actions "willing" and "knowingly" violated the Act.

The FEC did not reference any law or court case in support of its claim that Appellants were not a part of the Republican Party. In fact there is no such law, regulation or process to become an officially certified part of the Republican Party. The

Act has many definitions of political committees and entities and many types of federal election activities, but it does not have a definition that constitutes whether a group is, or is not, a part of a political party.

There are many committees, organizations, and groups that make up the Republican Party, as well as its individual members. There are even opposing factions within the Republican Party such as pro-life and pro-choice Republican groups. The affiliated groups span the philosophical spectrum from Conservative to Progressive depending on the issue of focus. For example, the Republican Hispanic Committee, the Republican Women's group, the Young Republicans, the National Republican Senatorial Committee, the Republican Congressional Committee all are part of the Republican Party. All these committees raise money as part of the Republican Party. There is no formal process for any to be "certified" as part of the Party. Further, there is no entity charged with the power to "certify" groups as official "republican groups". All these entities, including RVC, were started and "self-declared" as part of the Republican Party. Additionally, in the Person Affidavit provided by the RNC, it clearly states that the RNC does not have authority over entities of the Republican Party. "...however, the RNC is an independent entity that does not maintain control over state parties..." *Apx 570 at 6-7.* The RNC also does not maintain authority over national republican groups such as the National Republican Senatorial Committee, for example.

These groups and their political speech are protected by the First Amendment just as it protects the political speech of individuals. Likewise, for individuals there is no formal process to be approved as a member of the Republican Party. An individual fills out a voter registration card and they "self-declare" membership into the Party. A

committee/group/organization has the same right to "self-declare" its affiliation. All the groups above work under this self-declaration, as did the RVC. The district court ruled that the Appellants' argument that RVC was a part of the Republican Party and had the right to represent itself as such was a position that was "unsupportable". The court stated, "This position is unsupportable. The Republican Party is an unincorporated association under the general management of the Republican National Committee." *Op. p. 10.* The court errored in this reasoning. What is unsupportable is the court's opinion that the RNC had the right to disassociate any group at will, with disregard for the First Amendment rights of that group. Further the FEC did not reference any process or authority within the RNC to exclude groups and forbid then from speaking as part of the Party.

Any entity or law given this authority would have the power to chill political speech at will and therefore any such authority given would be unconstitutional. Speech itself is of primary importance to the integrity of the election process, any speech arguably within the reach of rules created for regulating political speech is chilled. As supported in *Citizens United v. FEC*, a speaker wishing to avoid civil or criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency (or in this case, if the district court's Opinion is upheld, the National Republican Party) for prior permission to speak. The restrictions thus function as the equivalent of a prior restraint, giving the FEC (in this case, the RNC) power analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statue that chills speech can and must be invalidated where its facial invalidity has been demonstrated. *Citizen United v. FEC, Pp.12-20.* In this case, there simply is no

internal rule or regulation and the Court errored in implying there was one in favor of the FEC.

Because speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people including leaders of any political party—political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny. If the Court's and FEC's interpretation of a political parties bylaws, granting day-to-day management of the party is upheld, political speech will be chilled for corporations and potentially for individuals. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion. *Citizen United v. FEC Pp. 20-25.* Therefore, the question is can the RNC disfavored speakers? The RVC was in disfavor with the RNC because it was using a call center in India *Apx 487,* and unbeknown to Novacek, the RNC had a history of "problems" tied to India. *Apx 604-612.*

Similar to Appellants' activity in 2004, recently former Bush Chief of Staff, Carl Rove and former Chairmen of the Republican National Committee, Ed Gillespie, have founded several organizations that are raising money to support Republicans. (See attached news articles.) Also reported, Michael Steel, the current Chairman of the RNC, is at odds with these new groups and founders. Rove and company are considered Republican power-players and with resources of a reported $30 million, can certainly defend any challenge by the RNC to their right to declare they are part of the Republican Party or their rights to raise money on behalf of the Party and spend it as they see fit in support of Republican candidates or in opposition to other candidates. One

article states that they formed these groups to "go around the National Republican Committee" to raise funds.

Ironically, Gillespie was Chairman of the RNC when it filed the FEC complaint and now he is a leader of the same type of group. Raising funds to support Republicans is exactly what Novacek was trying to do in 2004 when she founded RVC. Her deposition states she wanted to "build a better mousetrap" to help Republicans win more elections. *Apx 60-61.* The Appellants have violated no law in "self-declaring" they are part of the Republican Party and raising money. The RNC in filing their complaint against the Appellants attempted to chill a small "Washington outsider" political voice. The court drew inference in the FEC's favor on this issue with no law or case precedence to support it's Opinion. The First Amendment and decisions noted above support the Appellant's pro se arguments. Summary Judgment should have been denied as should Appellee's Motion four Summary Affirmance.

The FEC Alleged the Appellants "willing and knowingly" fraudulently misrepresented they were part of the National Republican Committee (RNC).

Novacek denied all allegations that the Appellants said they were the RNC *Defendant's Amended Response to Plaintiff's Motion for Summary Judgment p. 8; Novacek Affidavit p. 5.* and provided evidence to support her argument. Improperly, the FEC co-mingled the RNC allegation with the Republican Party allegation, as does the Court in its Opinion. *Op. Pp. 10.* However, these allegations are distinct from one another as are the RNC and the Republican Party. The Court should have treated then as distinct allegations. As part of the Republican Party, the RVC could make the claim to be a part of the party. However, RVC could not claim they were part of or acting on behalf

of the RNC, and they did not. Novacek disputed the Appellants told anyone they were raising money for the RNC and never represented to anyone they were affiliated with the RNC. *Apx 150-152; Apx 171-172; Apx 174-175. at 17-25; Novacek Affidavit p.5 at 8-9.* However, the Commission argued and the court erroneously agreed that evidence supported these claims of fraudulent misrepresentation. At most, FEC's view of the evidence creates a genuine issue of material fact and Summary Judgment should not have been granted. Accordingly, the Appellee's Motion for Summary Affirmance should be denied and Appeallants should be allowed to continue in the Appeals process and have their "day in court".

The Appellants' don't dispute the scripts contained a reference to the "Republican National Committee". However, they argued its use does not constituted "willing and knowingly" fraudulent misrepresentation. The only reference to the RNC in the script is contained in the rebuttal section of the script. *Apx 479-483.* "Rebuttal" is an old-time telemarketing term. A more modern term would be "Questions and Answers" (Q&A) section. As the Appellants' argued, this is information provided to assist any solicitee who may have needed information about *other* Republican groups and the highest quality standard of telemarketing. *Defendant's Amended Response to Plaintiff's Motion for Summary Judgment p.4.* If the Appellants' were representing their calls were on behalf of the RNC, the script would have read, "I can give you *our* national office phone number in Washington DC or *our* web address."

Additionally, the FEC provided no evidence from actual call transcripts or otherwise, that any caller used the section of the script that references the RNC. The FEC provided transcripts of eight telephone calls. *Apx 613-633.* The Commission also

provided twelve recordings of additional calls and despite promises to provide Novacek the transcripts of these additional calls, never has. Plus, the FEC provided a Declaration of Srini Vasan. *Apx 601-602.* as evidence the transcripts were authentic and true and accurate recordings of phone solicitations. However, nowhere in any of the transcripts is there any evidence this section of the script referencing the RNC was ever used by any caller and communicated to any solicitee.

The FEC alledged many people believed they were contribution to the Republican Party, the RNC, the GOP or Bush-Cheney '04, as evidenced by the fact that nearly 100 checks deposited by Novacek were either made payable to those organizations, or the memo lines indicated that the money was intended for those entities. In support of this, the FEC provided 122 copies of checks with some duplicates out of almost 1,800 checks mailed to the RVC. *Apx 442-747.* These 122 checks total $3,180.00 of the roughly $50,000 RVC received as a result of these solicitations. *Op. p. 2.* Of the "almost 100 checks" claimed by the FEC, only seven were made out to RNC and an additional three had RNC noted on the memo line. An accounting of those checks follows:

Apx #	Made out to	Memo Line	Amount
740	RNC	George Bush	$50.00
737	RNC	none	$15.00
736	RNC	none	$25.00
730	Victory 2004	RNC	$10.00
717	Victory 2004	RNC 2004	$25.00
673	Victory 2004	RNC	$10.00
709	RNC	none	$60.00
695	RNC Presidential Victory Team	none	$25.00
710	either RNC or RVC	none	$20.00
464? (code blocked)	RNC	none	$60.00
Total			$300.00

$300.00 is less than 1% of the roughly $50,000 raised. Seven checks are less than 1% of

the roughly 1,800 checks received. The evidence does not support the court's ruling that many people thought they were contributing to the RNC and at best creates a contested issue of material fact.

And, there are material facts that indicate the Appellants'made attempts to get the solicitee to fill out their check correctly, further evidence they in did not "willing and knowingly" try to misrepresent they were the RNC. The transcripts provided by the FEC validate this. "...just to confirm I spoke with you, I do need the number of the check that you plan to use..." *Apx 615.* This is an attempt to have the person go get their checkbook so that the caller could instruct them how to fill it out, so the check was ready when the mail piece arrived. *Defendant's Amended Response to Plaintiff's Motion for Summary Judgment p. 5; p. 9. Novacek's deposition Apx 124-125.* Contrary to the FEC's assertions, the mail piece submitted as evidence the Motion for Summary Judgment clearly indicates it's from The Republican Victory Committee and to make the check payable to Victory 2004, not the RNC (or Bush-Cheney '04. And, it's printed in boldface type and underlined for emphasis. *Apx 484.* A donor was only able to mail in a check after they received the follow-up letter which included as self-addressed, postage paid return envelope, further indicating who the donation was going to. The fulfillment letter directly contradicts that the Appellants' "willingly and knowingly" fraudulently misrepresented who was conducting the fundraising. The mail piece had no reference whatsoever to the RNC. Additionally, the Appellants argued the logic of how a person fills out a check does not indicate the Appellants' "willing and knowingly" committed misrepresentation. *Defendant's Amended Response to Plaintiff's Motion for Summary Judgment Pp. 9-10.*

The only evidence provided that any solicitee was ever told this was the RNC was provided by Novacek in her deposition. *Apx 173-174.* During monitoring, Novacek heard *one* caller answer "yes" when asked if this was the RNC. The testimony also states that the caller was immediately re-trained on this issue, the solicitee in question did not contribute and if they had, the pledge would have been held in quality verification, instead of being mailed the fulfillment mail piece, and called back to correct the mistake. This was not disputed by the FEC. *Novacek Affidavit Pp. 5-6.*

Additionally Novacek testified that she felt the caller didn't even realize they had given out wrong information. Because of "speech mannerisms" within the Indian culture, they positively respond to questions as a mannerism, not an answer. They say "yes" after questions as an acknowledgment of the question, not an answer. None-the-less the caller needed immediate retraining and that's what occurred. The FEC never disputed this testimony nor did they offer any other evidence that any solicitees were ever told this was RNC fundraising.

Furthermore, the FEC alledged that the Appellants represented they were associated with the RNC to vendors (call center Apex). In support of this, they produced an Affidavit by Apex employee Tom Maddux. *Apx 550-555.* Novacek's Affidavit disputes the Maddux Affidavit and creates a genuine issue of material fact. *Novacek AffidavitPp. 1-3; Pp. 9-10.* The court said, "Although there is evidence in the record supporting this contention, (*See Appx. At 149-52, 158-60.)* Novacek's discussions with Maddux and Apex are relevant only as to whether those non-parties were also complicit in the fraudulent scheme." *Op. p. 7.* The contradicting evidence of the two affidavits are material in that they go to Novacek's state of knowledge and her motivation and raise

another genuine issue of material fact on this issue.

The material facts simply do not support this allegation by the FEC and the court drew inference in the FEC's favor when the evidence supports Appellants. This creates genuine issue of material fact. The Motion for Summary Judgment should have been denied by the District Court and the Appellee's Motion for Summary Affirmance should be denied by this Court.

The FEC Alledged the Appellants "willing and knowingly" fraudulently mispresented they were part of Bush-Cheney '04

The FEC alledged the Appellants told solicitees they were with Bush-Cheney '04. *Op. p. 5.* The rebuttal section of the script contains information related to Bush-Cheney:

> **"Unhappy with President Bush.** Your money will not go to President Bush. The Republican Victory 2004 Committee is a national group that supports state and local candidates..." *Apx 481.*
>
> **"Bush-Cheney Campaign:** The national headquarters is in Arlington, VA. The number is 703-647-2700. The web site is GeorgeBush.com." *Apx 483.*
>
> **"Bush Bumper Stickers:** You'll need to get those from the Bush-Cheney campaign. I can give you their web site. GerorgeWBush.com. If you go to the bottom of the home page you will find "W Stuff". You should find bumper stickers there." *Apx 483.*

This evidence does not lend any support to the FEC's allegations that the RVC was attempting to mislead the solicitees that the calls were from Bush-Cheney '04. In fact the "Unhappy with President Bush" rebuttal and the scripting, "I can give you *their* web site." clearly indicates RVC was not Bush-Cheney '04. The court's opinion is not supported by the material facts on this issue and the court needed to draw all inferences from the evidence in the Appellants favor.

The Court Inferred the RVC needed to donate funds raised to a Republican Candidate or Committee.

The Court incorrectly concluded that the FEC's allegation that Appellants made no contributions to Republican candidates or committees was evidence the Appllants "willing and knowingly" fraudulently misrepresented they were part of the Republican Party. *Opinion P. 6.* Based on the definitions delineated by the Act, RVC was a "political committee", but neither an "authorized committee" nor a "connected organization". *See* 2 U.S.C. §431(4)(A); 2 U.S.C. §431(6); 2 U.S.C. §431(7). As defined by the Act, RVC conducted both "electioneering communication" and "federal election activity" with the second telephone calls made by the call center Advantage in October 2004 within weeks of the federal election. By doing so, RVC contributed to Republican candidates running in the 2004 general election. Interestingly, neither the court nor the FEC referenced a law that required Appellants to make contributions to any political candidate or committee. Rather according to the law, Appellants could conduct its own "electioneering communications" which is what it did.

The FEC argued that the Appellants scripts were "electioneering communications" as defined by 2 U.S.C. § 434(f)(3). Appellants do not dispute this. The second program in October 2004 meets the requirements of "electioneering communications". It was performed within 60 days of a general election and was targeted to a relevant electorate. Contrary to the FEC's assertion and the court's conclusion, the calls contributed to Republican candidates by promoting and supporting them. The calls also contributed by attacking and opposing Democratic candidates and getting the solicitee out to vote for Republicans and against Democrats. *Apx 385 Pp. 1.*

There is no law that required the Appellants to make a monetary contribution to any candidate or committee. Under the Act, the Appellants could raise funds and implement their own electioneering communications in support of Republicans at all levels, including for Federal office, and that's exactly what they did. The court errored when it said Appellants did not make a contribution to a candidate or political committee and used the incorrect conclusion to infer that Appellants "willingly and knowingly" committed fraud and misrepresentation .

Appellants are not the first group to spend their raised funds in support of candidates without making direct monetary contributions to the candidate or a committee. Examples of this abound. The National Rifle Association raises funds and spends them to impact elections. The US Chamber of Commerce did a huge telephone program in 2000 in support of Republicans to advance their pro-business agenda, including President Bush.

Appellants initiated their own "expenditure" as defined by the Act. *See* 2 U.S.C. § 431(9). Appellants' expenditure was partisan (vote Republican) by Election Law. Additionally, Appellants' second script was a "Federal election activity" as defined by Election Law. *See* 2 U.S.C. § 431(20)(A).

From the Court's inference that Appellants did not make any contributions to Republican candidates or committees it took a leap in logic and concluded that Appellants did nothing to "qualify" as part of the Republican Party and therefore by erroneously concluding that they made no contributions, further supported its ultimate conclusion that the Appellants' activities were "willing and knowingly fraudulent misrepresentations". The facts and definitions within the Act do not support this finding.

The second script shows that Appellants did support Republicans and oppose Democratics with funds raised. The court drew in favor of the FEC on this issue, erroneously.

The FEC Inferred the Appellants misused funds.

The FEC implied and the court concurred that, "After paying Apex and Advantage, Novacek appears to have directed the remaining funds to the BPO entities." *Op Pp. 6 at 22-23, p. 7.*

The FEC investigated the finances of all the Appellants for almost 5 years (June 2004 –March 2010) including all bank accounts, expenditures, etc. If there were any issues of financial wrong doing, the FEC via the Justice Department would have filed official charges. Instead the FEC continues to insinuate there was financial wrong doing in their pleadings to this court. *Appellee Motion for Summary Affirmance p. 7.* These are unsubstantiated assertions, suggestions and arguments that the district court used to support it's decision Appellants "willing and knowingly" committed fraudulent misrepresentation. In fact, the Act *requires* that companies performing Federal election activity be paid. Accordingly, the FEC's Motion for Summary Judgment should have been denied by the District Court and its Motion for Summary Affirmance must be denied by this Court.

The FEC Alledged Donors were confused about who was making the calls.

There was no evidence that Appellants were aware of any confusion on the part of donors as to who was calling and for what purpose. Despite the FEC's statements to the contrary, Novacek admitted no such thing and there was no evidence submitted by the FEC that shows otherwise. This is fabrication or at best, speculation on the part of the

FEC. During Novacek's deposition, the FEC asked about the "confusion issue". Novacek stated from her *past work* in political fundraising, because there are so many different Republican groups out raising money, there can be confusion in the marketplace. *Apx 146-148.* Because of that, she worked especially hard to provide the call centers with the proper training, scripted rebuttals, quality control monitoring, 100% pledge confirmation and a requirement that the script be adhered to verbatim. *Apx 408, Script and Rebuttal Adherence.* The FEC provided no evidence of any confusion by the solicitees called on this program. The transcripts of calls the FEC claimed are representative of the hundreds of thousands of calls made have no indication of any confusion by the solicitees. *Apx 613-633.*

The FEC claimed people asking about a Bush-Cheney bumper sticker indicated they thought the calls were from Bush-Cheney '04. Novacek certainly wanted to promote Republicans in anyway possible. Her career has been in the telemarketing field (not the political fundraising field as the FEC alleged) and she believes in conducting the highest quality telemarketing programs. Novacek took the time to call the Bush-Cheney campaign and found out how to get a bumper sticker. She then added this information to the program so that the callers could assist a solicitee when they asked, "Do you know how I can get a Bush-Cheney bumper sticker?" *Apx 483.* A solicitee inquiring about bumper stickers does not imply that they are confused about who is calling. Rather, the only inference that can be drawn is that they had seen cars with the bumper sticker and wanted one. Furthermore, within the scripting, it clearly states the money was NOT going to Bush. *Apx 481.*

The Court Ruled the Appellants did not state the calls were not authorized by the Republican Party

The court incorrectly ruled the Appellants needed to state their calls were not authorized by the Republican Party. "The callers did not state that RVC was not authorized by the Republican Party..." *Op p 5*. The Act does not require any group to state their calls are not authorized by a political party. The court sited no reference to the Act or any other law in making this statement in error.

The FEC Alledged RVC should not have made the second call because they received a Cease-and-Desist Letter from the RNC

The Appellants' don't dispute that they conducted a second call after receiving a cease-and-desist letter from the RNC. The Appellant does dispute that the cease-and-desist letter is relevant evidence to support the Appellants "willing and knowingly" violated 2 U.S.C. 441h(b).

The Court's opinion states, "In June 2004, Novacek received a cease-and-desist letter from the RNC demanding that she stop holding out RVC to the public as an official representative of the Republican Party." *Op. p. 2.* This is not what the cease-and-desist letter demanded and the judge errored in using it to support the FECs pleadings. *Apx 366 p. 1.*

The RNC Cease-and-Desist letter doesn't claim any authority over the Republican Party. It only states that the RVC efforts "constitutes trademark infringement...and a violation of the Texas Deceptive Trade Practices Act." However, the FEC has not claimed, nor has the RNC filed any trademark violation charges in any court in more than six years since the RVC conducted calls. Additionally, in the RNC complaint they state the following, "Furthermore, the RNC claims no ownership of the term, "Victory Committee," *Apx 475*. The RNC's complaint is also void of any claim of ownership to the words "Republican" or "Republican Party" and the FEC referenced no law that was

violated by the Appellants with regard to the use of "Republican Victory Committee." The Appellants received a copy of the RNC's complaint before they engaged in the second phone call in October 2004 and thus knew that the RNC's cease-and-desist letter was a veiled attempt to intimidate the Appellants, and nothing more.

The cease-and-desist letter demanded Novacek stop all solicitation activity immediately. At the time of the letter, June 2004, no activity was being conducted. The campaign ran at Apex in January and February of 2004.

The letter also requested Novacek contact Jill Vogel, the RNC's Chief Counsel, by telephone. *Apx 367 p.2.* When contacted, Ms. Vogel expressed concern over only two issues. The first concern was that Appellants were using a call center located in India. *Apx 161.* Based on news reports from various sources in India and the United States, an Indian company, HCL, made 8 million fundraising calls to GOP voters between May 2002 and July 2003. *Apx 604-612.* Appellants were not aware of the RNCs "problems" in India nor the "urban legend" claiming that RNC outsourced calls to India at the time they made calls from India in January and February 2004. *Apx 487.* Novacek learned of this issue via an email from Maddux in the Spring of 2004, prior to receiving the cease-and-desist letter. From the call with Vogel, Novacek asserted the "real issue" was not misrepresentation, but rather Vogel's ranting that the Appellants' India calls were refueling the RNC problems. Novacek told Vogel there was no law prohibiting the use of off-shore call centers and that she could put Vogel in contact with individuals in India that had worked on the "problem" RNC program if she wanted to get information on the organization who had been making calls from India, stating they were the RNC, which was not the Appellants' program. Novacek could do this because Apex, had hired people

who claimed to have worked RNC programs at HCL, a neighboring call center to Apex. Some of these employees still worked at Apex. Novacek offered to give Vogel the Apex call center manager's name, email address and phone number. Vogel told Novacek, "I'll get back to you on that," but never did. It should also be noted the RNC leaked its FEC complaint against Appellants to an AP reporter, a violation 2 U.S.C 437g (a) 12. *Novacek Deposition Apx 4.* This was done in an attempt to defer the negative publicity the RNC had received prior to the RVC calls onto the Appellants. .

The second issue Vogel raised with Novacek was the name "Republican Victory Committee". Vogel informed Novacek that the RNC had implemented a fundraising program/campaign called "Republican Victory Committee" and that spring had released a huge mailing with this promotional name and thus they were upset there was now a political committee with the same name.

The RNC never stated the RVC could not raise money as part of the Republican Party. The RNC was trying to chill political speech of the RVC because it used an off-shore call center. The Cease-and-Desist letter does not support any relevant facts or issues of this case and the court errored in looking to it to support its opinion.

2 U.S.C. § 441d (a) and (c)

Rules of the Court instruct that the Appellants' Response to the Appellee's Motion for Summary Affirmance needs to be limited to 20 pages. Given the recent holding in Citizens United v. FEC, Appellants believe the District Court's and FEC's interpretation of 2 U.S.C. § 441d may be unconstitutional. In the Appellant's Appeal Brief, they will be supporting the assertion that they did not violate the Act and that the

Act chills freedom of speech by favoring certain preferred speakers and imposing restrictions on certain disfavored speakers.

Furthermore, the Appellants will be including evidence that when the District Court issued its Order, the Court clearly separated the activities of the Appellants into two distinct programs and assessed civil penalties accordingly. The activity outsourced to Apex in January and February 2004 and the activity outsourced to Advantage in October 2004. In doing so, the Court brings into consideration that the FEC's statue of limitations had expired on the Apex activity performed in January and February 2004. The FEC filed this case in District Court on March 9, 2009. *2 U.S.C. § 455.*

CONCLUSION

As evident by this extensive Response to the Appellee's Motion for Summary Affirmance, the Appellants' raised many genuine issues of material fact which were overlooked by the District Court resulting in a ruling in favor of the FEC when in fact it the District court should have denied the FEC's Motion for Summary Judgement and why this Court should deny the Appellee's Motion for Summary Affirmance, allowing the Appellants to continue in the Appeal process and be granted "their day in court."

Respectfully submitted,

/s/ Jody L. Novacek

Jody L. Novacek
For the Appellants
jodylnovacek@hotmail.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was delivered to counsel of record, Greg J. Mueller, Federal Election Commission in accordance with the Federal Rules of Civil Procedure via the 5th Circuit's electronic filing notification upon the filing hereof on this 23rd day of August, 2010.

/s/ Jody L. Novacek
Jody L. Novacek