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April 19, 1999

Mr. Andrew Turley
Office of the General Council
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: MUR 4883

Dear Mr. Turley:

This letter is in response to the Complaint filed by Mr. Aldo Vitagliano against PROCHOICE VOTER (PCV), Westchester Coalition for Legal Abortion, Inc. (WCLA) and Westchester Coalition for Legal Abortion PAC (WCLA-PAC). PROCHOICE VOTER is a federal PAC, WCLA is a nonprofit organization, and WCLA-PAC is a New York State PAC. Enclosed please find a designation of counsel executed by each of the respondents.

Allegations Beyond the FEC's Jurisdiction

In his Complaint, Mr. Vitagliano includes a number of spurious allegations about matters beyond the FEC's jurisdiction, including questions about WCLA-PAC's use of a nonprofit mail permit, WCLA's charitable status in New York State, and the financial relationship between WCLA and WCLA-PAC. Because these allegations are irrelevant to the federal election law and are not within the Commission's jurisdiction, they have not been addressed in this response.

For ease of reference, the remainder of this response letter is organized by respondent.

ProChoice Voter and Robert Wall as Treasurer

PCV is a federally registered PAC. See Exhibit 1 (statement of organization). Although the Complaint fails to allege any specific PCV violations of the Federal Election Campaign Act (FECA), it nevertheless implies that PCV has engaged in duplicitous or perhaps even illegal activity. Such suggestion is wholly unwarranted and any threat of an enforcement action against PCV should be dismissed forthwith.

PCV did not make contributions or expenditures during the 1998 election cycle. See Exhibit 2, Affidavit of Robert Wall, ¶ 2 (hereinafter "Wall Affidavit"). For this reason, PCV did not report any such contributions or expenditures. All statements on PCV's FEC reports regarding the 1998 election cycle were accurate and true when made, and remain accurate and true today. Wall Affidavit ¶ 3.

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Andrew Turley
April 19, 1999
Page 2

Westchester Coalition for Legal Abortion

WCLA is an incorporated nonprofit organization that is exempt from tax under section 501(c)(4) of the Internal Revenue Code. See Exhibit 3. As a general matter, WCLA does not make contributions to or independent expenditures for or against federal candidates. See Exhibit 4, Affidavit of Polly Rothstein ¶ 5 (hereinafter "Rothstein Affidavit"). Nevertheless, due to a misunderstanding of the law, during the 1998 election cycle WCLA made at least one extremely small prohibited contribution and arguably may have made others. The total value of such contributions, under the light least favorable to WCLA, may be as much as \$2,224.09. Because the existence of all but a small contribution is questionable, and because WCLA is a small organization that can ill-afford a lengthy and expensive battle with the FEC, WCLA is offering to pay a conciliatory penalty of \$1,117.70. This figure represents the value of the staff time attributable to WCLA's participation in the press conference plus one-half of the value of the potentially prohibited contributions in the WCLA newsletter. The following analysis is organized according to the allegedly illegal activities raised in the Complaint.

The Press Conference

On September 29, 1998, Polly Rothstein, President of WCLA, participated in a press conference called by Mr. Schumer's campaign. Rothstein Affidavit, ¶ 7. Although Ms. Rothstein does not recall the specifics of her press statement, it is likely that she expressly advocated the election of Mr. Schumer, and that she did so as a representative of WCLA. Rothstein Affidavit, ¶ 9. Ms. Rothstein was under the mistaken impression that, so long as her participation in the press conference was done during her lunch hour, she was acting in a volunteer capacity and therefore no corporate contribution would arise. Rothstein Affidavit, ¶¶ 6, 8. However, because she likely was speaking on behalf of WCLA rather than in her individual capacity, it is probable that there was a corporate contribution. For this reason, WCLA is offering to pay a conciliatory penalty of \$11.31. This figure represents the full cost of the staff time necessary for Ms. Rothstein to participate in the press conference. Rothstein Affidavit, ¶ 13.

The WCLA Newsletter

WCLA publishes a quarterly newsletter that includes a variety of articles related to reproductive rights. The Autumn 1998 newsletter, which was mailed in conjunction with a WCLA-PAC voting guide endorsing certain federal candidates, included some articles that arguably contain express advocacy on behalf of federal candidates. The newsletter and voting guide together made up a twenty-page mailing.

When drafting and printing the newsletter articles, WCLA was operating under the definition of express advocacy established in *Buckley v. Valeo*, as upheld in more recent cases

Andrew Turley
April 19, 1999
Page 3

including *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).¹ Rothstein Affidavit, ¶ 15. However, WCLA has recently been counseled that FEC regulations contain a more broad definition of express advocacy and that there is an ongoing legal dispute regarding its constitutionality. 11 C.F.R. §100.22.

2172
Although judicial rulings holding the expanded definition of express advocacy unconstitutional likely render the regulatory definition unenforceable in WCLA's geographic area², WCLA can ill-afford a protracted and therefore expensive legal dispute with the FEC. Therefore, WCLA is offering to pay a conciliatory penalty equal to one-half of the cost of producing and mailing those portions of the newsletter which, under the regulatory definition of express advocacy, arguably constitute contributions to federal candidates.

The total mailing, which included an 18-page WCLA newsletter and a two page WCLA-PAC voting guide, cost \$31,031.27 to produce and send; thus, each page cost \$1,551.56. Rothstein Affidavit, ¶16. WCLA's offer therefore translates into a total of \$1,106.39 for those portions of the newsletter that arguably constitute express advocacy, broken down as follows:

1/3 of page 1 = \$517.18
1/7 of page 4 = \$221.64
3/4 of page 5 = \$1,163.66
1/5 of page 7 = \$310.30

Total = \$2,212.78

Proffered Penalty = \$2,212.78 / 2 = \$1,106.39

Although WCLA does not concede that its newsletter contained express advocacy in violation of the federal election law, it offers to pay this conciliatory penalty for the purposes of avoiding an expensive and protracted battle with the FEC.

Phone Bank

The Complaint alleges that WCLA paid for telephone calls expressly advocating the election of Senate candidate Chuck Schumer. Although it is true that WCLA made such telephone calls, the Schumer campaign agreed to pay for all of the costs associated with the calls. Rothstein Affidavit, ¶ 19. For this reason, the phone calls do not constitute a prohibited

¹ See also *FEC v. Christian Action Network*, 110 F.3d 1049(4th Cir. 1997); *Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me), *aff'd* 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468 (1st cir. 1991).

² *Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).

Andrew Turley
April 19, 1999
Page 4

corporate contribution.

The phone calls made by the phone bank included some calls expressly advocating the election of Mr. Schumer and Eliot Spitzer, a candidate for New York Attorney General, as well as some calls expressly advocating the election of Schumer, Spitzer and Naomi Matusow, a candidate in the New York 89th Assembly District. Rothstein Affidavit, ¶ 20.

The total cost of the phone bank was \$31,073. Rothstein Affidavit, ¶ 21. On January 26, 1999, Chuck Schumer's authorized campaign committee paid WCLA \$10,000 to cover the estimated cost of the portion of the phone bank that benefitted Mr. Schumer. Rothstein Affidavit, ¶ 22. Since that time, WCLA has determined that approximately 46% of the phone bank was attributable to express advocacy on behalf of Mr. Schumer. Rothstein Affidavit, ¶¶ 23-31. Consequently, the costs of the phone bank attributable to Schumer were approximately \$14,293. Rothstein Affidavit, ¶ 32.

Since discovering that the total cost of the Schumer calls exceeded the amount paid to WCLA by the Schumer campaign, WCLA has requested from and is actively pursuing the Schumer campaign for an additional \$4,293 to cover the outstanding balance. Rothstein Affidavit, ¶33. Further, it is WCLA's understanding that the campaign is behind on payments to a variety of vendors. Rothstein Affidavit, ¶ 34. Thus, the Schumer campaign committee's debt to WCLA has not been outstanding for more than a commercially reasonable time. Such a conclusion is necessary because all corporate vendors to whom the Schumer campaign owes money would otherwise be in the position of having made impermissible contributions. Because the Schumer campaign will have paid WCLA for all costs associated with the portion of the phone bank benefitting Chuck Schumer, WCLA has not made a prohibited corporate contribution.

WCLA-PAC

WCLA-PAC is a political action committee that is active in New York State elections. WCLA-PAC does not make contributions to or independent expenditures for or against federal candidates that in the aggregate exceed \$1,000 per federal election. Rothstein Affidavit ¶¶ 35, 36.

In the fall of 1998, WCLA-PAC mailed a voting guide endorsing 15 state candidates and six federal candidates. Rothstein Affidavit, ¶ 37. The WCLA-PAC endorsements appear on the second page of a 20-page mailing, the first two of which were paid for by WCLA-PAC and the following 18 of which constitute the WCLA newsletter and therefore were paid for by WCLA.

As stated above, the total cost of this mailing was \$31,031.27 or \$1,551.56 per page. Rothstein Affidavit, ¶16. The candidate endorsements appear on a single page of the voting guide. Of the twenty-one endorsements in the voting guide, six involve federal candidates. Consequently, costs of \$443.30 are attributable to federal candidates. WCLA-PAC paid for that

Andrew Turley
April 19, 1999
Page 5

portion of the voting guide. Rothstein Affidavit, ¶¶ 37-39. Nevertheless, WCLA-PAC has in no way violated the federal election law by making these expenditures or by failing to register and report them.

WCLA-PAC has not registered with the FEC as a political committee because it does not meet the definition of political committee under 11 C.F.R. § 100.5. WCLA-PAC has not received or made federal contributions in excess of \$1,000, is not a separate segregated fund as provided for in 2 U.S.C. 441b(b)(2)(C), is not a local committee of a political party and is not a candidate's principal or authorized campaign committee.

Furthermore, WCLA-PAC can demonstrate under 11 C.F.R. § 102.5(b) that, at the time the \$443.30 federal expenditure was made, WCLA-PAC had received sufficient federally qualified funds to pay for that expenditure. During 1998, WCLA-PAC received \$16,367 in individual contributions, with no individual contributing more than \$5,000. Rothstein Affidavit ¶ 41. In addition, in 1998 WCLA-PAC received \$100 in corporate contributions, and \$12,990 in contributions from other New York state political committees. Rothstein Affidavit ¶ 42. Clearly, the \$16,367 from individuals are federally qualified funds. In addition, some portion of the contributions from other New York state political committees are likely federally qualified. Therefore, when WCLA-PAC made the expenditure for the voting guide, it had sufficient federal funds to pay for that portion of the guide attributable to federal candidates.

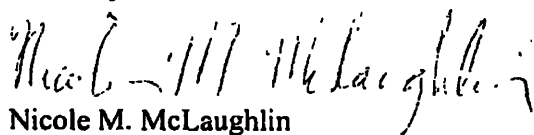
In the event that the Commission determines that WCLA-PAC should have registered as a federal political committee, WCLA-PAC should not be forced to pay a penalty for its failure to do so in 1998. Such a determination is not supported by the statute and/or regulations and has never been made public as an enforcement position.

Conclusion

In the interest of resolving this matter as expeditiously as possible, WCLA is willing to pay conciliatory penalties totaling \$1,117.70, covering the press conference and the voter guide activities. Except with regard to the press conference, the willingness to pay a penalty does not reflect any concession by WCLA that it has violated the FECA, but rather recognizes that the organization cannot afford the time or money demanded by an FEC investigation.

Please feel free to call me if you have any questions or to discuss a conciliation agreement. I can be reached at (202) 328-3500.

Sincerely,


Nicole M. McLaughlin