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January 15, 1999

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
JAN 15 1 25 PM '99

Re: MUR 4378

Dear Mr. Noble:

Please find enclosed the response of the National Republican Senatorial Committee to the General Counsel's Brief in this matter.

Sincerely,

Erika King

Erika King

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	MUR 4378
National Republican Senatorial Committee; Stan Huckaby, as treasurer	)	

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
JAN 15 1 25 PM '99

REPLY BRIEF OF THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE

This brief responds on behalf of the National Republican Senatorial Committee ("NRSC") to the General Counsel's Brief of November 13, 1998, in Matter Under Review 4378. The Commission granted the NRSC an extension of time until today, January 15, 1999, in which to file a responsive brief.

As explained below, the facts gathered by the General Counsel's Office in its investigation do not support, and in fact preclude, a "probable cause to believe" finding of any violations of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 et seq. ("FECA"). The General Counsel's Brief also misstates the law governing this Matter. Furthermore, the General Counsel's Office switched to a new legal theory in this Matter after the reason-to-believe stage of the process, in violation of the Administrative Procedure Act.

STATEMENT OF THE CASE

This Matter arises from a complaint filed in 1996 on behalf of Senator Max Baucus and the Friends of Max Baucus '96 ("the Baucus complaint"). The Baucus complaint alleged that the NRSC made disbursements for radio and television advertisements in coordination with then Montana Lieutenant Governor Dennis Rehberg's campaign for the United States Senate seat held by Baucus.[1] As a result of these disbursements, the Baucus complaint alleged, the NRSC exceeded the limit on coordinated expenditures imposed by 2 U.S.C. § 441a(d). The Baucus complaint also alleged that the NRSC impermissibly used non-

[1] Seven advertisements are at issue. The radio advertisements aired initially on April 16, April 25, and May 8, and the television advertisements on May 12, May 24, May 31, and June 21. The NRSC paid either in whole or in part for the production and placement of the advertisements. The NRSC is not prepared to concede that it spent exactly $309,292 on the advertisements, however, see Brief at 22; the checks in question covered advertising in more than one state and the staff simply chose to "assign" half of each check to Montana. See Brief at 21 n.7, n.8. The scripts are laid out in the General Counsel's Brief at pages 15 (April 16 and 25), 16 (May 8), 17 (May 12), 18 (May 24 and 31), and 20 (June 21). The staff also investigated an advertisement for Rehberg that was broadcast by one radio station with an NRSC sponsorship identification. The NRSC submitted uncontroverted evidence that it did not pay for this advertisement, including a sworn affidavit from the media agency that produced the advertisement, explaining that it had -- on its own initiative -- produced two versions of the spot, one of which contained the NRSC sponsorship identification. The radio station in question apparently ran the NRSC label in error. Although the General Counsel's Brief mentions the Rehberg advertisement, Brief at 20, 22-24, the staff appears to have abandoned any efforts to attribute this advertisement to the (continued . . .)

federal funds to finance the advertisements, in violation of 2 U.S.C. § 441b. In addition, the Baucus complaint alleged that the NRSC failed to report the disbursements as coordinated expenditures, in violation of 2 U.S.C. § 434(b).

The NRSC responded to this complaint on July 10, 1996. The response included a factual account of each of the advertisements at issue, supported by affidavits from Rehberg's campaign manager as well as the media buyer who placed the NRSC advertisements. On June 17, 1997, the Commission nevertheless found "reason to believe" that the NRSC advertisements violated 2 U.S.C. §§ 434(b), 441a(f), and 441b. This finding was based on a Factual and Legal Analysis which asserted, among other things, that "the NRSC's response leaves a number of questions unanswered." Analysis at 22. On August 26, 1997, the NRSC responded with additional factual information and legal argument intended to put to rest the questions that the Analysis had deemed "unanswered."

Following the submission of the NRSC's August 26, 1997 response (attached as Exhibit A), which may not have been shared with the Commission, the General Counsel's Office conducted an investigation. That investigation included the deposition of

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NRSC for purposes of finding a FECA violation. See Brief at 52-55.

three individuals -- Dennis Rehberg (the candidate), Ladonna Lee (a consultant for the Rehberg committee), and Jo Anne Barnhart (the political director of the NRSC in 1996). The NRSC also provided a variety of documents to the Commission relating to the advertisements at issue, complying fully with the staff's investigation. On November 16, 1998, after concluding its investigation, the General Counsel's Office recommended that the Commission find "probable cause" to believe that violations of 2 U.S.C. §§ 441a(f), 441b, and 434(b), and 11 C.F.R. § 102.5 had occurred -- and that a violation of 2 U.S.C. § 441a(h) had occurred. Section 441a(h) had not been mentioned before this point in the proceeding.

ARGUMENT

I. The "Facts" Gleaned by the General Counsel's Office Do Not Support, and in Fact Preclude, a Finding of Coordination.

The General Counsel's Brief concludes with the observation that "the evidence shows that . . . the actual advertisements which the NRSC ran in the spring of 1996 *were apparently produced without input from the Rehberg campaign* and *were placed without the latter's prior knowledge or approval as to content, timing, and target audiences.*" Brief at 53. This concession alone precludes any finding of coordination.

A. The Undisputed Facts Show That There Was No Coordination Between the NRSC and the Rehberg Campaign.

Although the NRSC does not have copies of the depositions taken by the General Counsel's Office and has not seen the other materials gathered by the staff in the course of its investigation, we assume that the General Counsel's Brief contains the excerpts the staff deemed most helpful to the General Counsel's case. Even so, the facts presented in the General Counsel's Brief do not support a finding of coordination. First, the deposition excerpts selected by the staff indicate that each deponent unequivocally denied coordination:

> • **Barnhart**. "When asked whether the NRSC had consulted with any Republican candidates or their consultants about the content and placement of such advertising prior to the 1996 primary elections, Ms. Barnhart replied, 'No.'" Brief at 32 (Barnhart Dep. at 45). "Ms. Barnhart was asked if she discussed a prospective advertising campaign with Dennis Rehberg when he visited the NRSC in October of 1995. Her response was 'No, absolutely not. I didn't. It's not that I don't remember. I know that I didn't.'" Brief at 36 (Barnhart Dep. at 36). "'Oh, to my knowledge, in no way was this ad, the contents of this ad, shared with the Rehberg campaign prior to its running. As I explained, we had a very strict policy on that; that was communicated to my staff, and I oversaw this process.'" Brief at 41-42 (Barnhart Dep. at 96). "With regard to the other scripts, Ms. Barnhart again responded 'No' when asked if the Rehberg campaign would have seen them prior to their being aired.'" Brief at 42 (Barnhart Dep. at 109, 111).
>
> • **Rehberg**. "When asked if he talked with NRSC representatives about media advertising, he answered

'No. Never been -- at any meeting, we didn't talk about media.'" Brief at 33 (Rehberg Dep. at 43). With respect to the NRSC media campaign, "he stated 'You asked did we ask to have Baucus included. We never did.'" Brief at 35 (Rehberg Dep. at 92). "When asked if he remembered any conversations about the NRSC media campaign during his time in their building in October, Mr. Rehberg replied, 'Never.'" Brief at 36 (Rehberg Dep. at 81). "Asked again whether, during his meetings at NRSC headquarters on March 21st, he discussed a media campaign, Mr. Rehberg replied: 'There was never a discussion of media.'" Brief at 40 (Rehberg Dep. at 106). "When asked during his deposition if he had discussed possible scripts with an NRSC representative at any time, Mr. Rehberg responded: 'Never.'" Brief at 42 (Rehberg Dep. at 124). "A: Under no condition did we ever discuss media, content or ads. Q: So you were never shown language . . . prior to airing? A: I didn't even know the ads existed prior to airing." Id.

• **Lee**. "Q: Did she ask for any input from you? A: No. They never ask for any input from us. Q: They didn't ask for your critique as to [the] content of what they were planning to do, or ask for suggestions? A: No. We did not see their content. Q: What about stations they were planning to place ads with? A: No. Q: What about timing? A: No." Brief at 37-38 (Lee Dep. 26-32). "Q: So when [the advertising campaign] finally did [happen], were you surprised? A: Frankly, yes." Brief at 40 (Lee Dep. at 83). "She consistently stated that . . . neither she, the Rehberg campaign nor Mr. Rehberg himself had prior knowledge of the scripts involved or of their placement. She stated: 'I had no involvement with any of the NRSC ads.'" Brief at 44 (Lee Dep. at 60).

The heart of the General Counsel's investigation -- and the heart of the staff's case -- was the deposition of these three individuals. All three witnesses, under oath and with extensive cross-examination by the staff, denied coordination and indeed denied any discussion of the content, timing, or

placement of the NRSC advertisements. The General Counsel's Office concedes that "*[t]he deponents all testified that there was no prior coordination with regard to specific content, timing and placement of the individual NRSC advertisements.*" Brief at 30 (emphasis added).

Second, the evidence selected by the staff for the General Counsel's Brief shows that the NRSC faxed press releases about the advertisements to the Rehberg campaign -- and to the media generally -- only after the advertisements began airing.

> • **Barnhart**. "Our policy, pretty much, was that after they went up, the ads went up, and they were actually on the air and running, we . . . let them know." Brief at 32 (Barnhart Dep. at 45) (emphasis added). "Ms. Barnhart stated that it was a 'routine' procedure to send such a press release to a campaign representative. Later in her deposition Ms. Barnhart testified: 'We had a blast-fax capability at the committee. And when we put out a press release like this, it would go out to media, probably hundreds of media outlets throughout the country, as well as to the campaign.'" Brief at 36 n.12.
>
> • **Lee**. "Q: That was their policy, to send these out to all the candidates involved? Is that correct? A: It's my understanding. Q: It was not that you asked for it? A: No. Fax and mail we get every day." Brief at 39 (Lee Dep. at 32).
>
> • **Rehberg**. "A: So, every time they ran an ad, to my knowledge, we received supporting documentation as to its accuracy, but never in advance of the ad, nor did we know the next ad was going to be on term limits. We did not know that." Brief at 43 (Rehberg Dep. at 127-29) (emphasis added).[2]

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[2] Although the staff writes in one place that "the Rehberg campaign was informed of the content and timing by means of NRSC (continued . . .)

Third, the deposition excerpts selected by the staff make it quite clear that the NRSC pursued its own agenda in Montana. The advertisements at issue were part of the NRSC's 1996 issue advocacy campaign, which was designed to promote the Republican agenda. Brief at 31 (Barnhart Dep. at 37-38). Barnhart explained that the NRSC aired advertisements in Montana, in particular, because political advertisements in the state are comparatively inexpensive. Brief at 31 (Barnhart Dep. at 41-42). Each of the advertisements at issue here addressed pending federal legislation: either the term limits initiative or the balanced budget plan. Each mentioned Senator Baucus by name, usually identifying his ideology (liberal) and his prior position on related legislative issues (legislative salaries and tax cuts). The NRSC targeted Senator Baucus, in particular, because he was on the finance committee and "had been a supporter of welfare reform," Brief at 31 (Barnhart Dep. at 41-42) -- the NRSC viewed him as a potential swing vote on budget issues. Id. Barnhart explained that the NRSC "wanted to spend

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press releases containing the full texts which were issued on the same day or just prior to the first broadcast of each ad," Brief at 30 (emphasis added), it nowhere else in the brief suggests the information was released or received prior to airing. Moreover, none of the evidence recounted by the staff, see Brief at 12-49, supports the allegation that the press releases were released and received prior to airing.

[its] money the best place [it] could in terms of likelihood of convincing someone to change their mind." Id.

Fourth, the undisputed evidence shows that the Rehberg campaign opposed the advertisements. Rehberg stated in his deposition, for instance, "we would not have wanted those ads -- did not want those ads to be run." Brief at 42 (Rehberg Dep. at 124-26). This statement cannot be squared with the staff's theory of coordination. Also, Lee testified that she notified the NRSC that one of the advertisements contained a factual error and was hurting the Rehberg campaign. "Q: What was the NRSC's response? A: Shrugged their shoulders, so what. . . . Q: Was there ever any correction done? A: Not to my knowledge." Brief at 46 (Lee Dep. at 63).

B. The Staff's Efforts To Base Coordination on this Record Fail.

The General Counsel's theory that the advertisements were coordinated is premised on five elements:

1. Rehberg and his campaign committee were aware of the NRSC's legislative advertising campaign, just as the general public was, and they remained in contact with the NRSC even after the advertising campaign began, Brief at 52;

2. Lee had knowledge of the content of the NRSC advertisements after the advertisements ran and contacted the NRSC to notify it of factual misinformation about Senator Baucus in one of the spots, Brief at 53;

3. Rehberg signed a clean campaign pledge, Brief at 45, 53;

4. Barnhart and Lee met for lunch in 1995 and Lee recalls discussion of an "ad campaign," Brief at 37 (Lee Dep. at 54); and

5. In a 1995 memorandum, under the heading "State Party," Lee wrote that "the [State] party is going to undertake a message program showing MB out of touch w/Montana. Our recommendation is a series of radio ads ASAP telling MT that Max has already voted against their cut in taxes, reducing government, etc. The messages will then be adapted depending upon the news cycle. Jo Anne said that they [the State party] have $35,000 to begin the program with and could spend over $100,000 between now and the beginning of the year." Brief at 39.

None of these supports "probable cause to believe" coordination occurred.[1]

First, that Rehberg and his campaign committee were aware of the NRSC's intended legislative advertising campaign and came into contact with the NRSC after the advertising campaign began shows only the existence of an opportunity to coordinate. As explained below, and as conceded by the General Counsel's Office, see Brief at 10, FECA requires proof of actual coordination.

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[1] The General Counsel also investigated a "Controversial Advertising Campaign Report" placed in the public file of KRTV (Great Falls, MT). That report described the May 12 advertisement as one for "the defeat of Max Baucus on his re-election campaign for 1996." The NRSC submitted uncontroverted evidence that this report was generated by the station's general manager, not the NRSC, and that the characterization of the advertisement is attributable solely to him. Although the brief mentions the report, Brief at 24, the staff did not rely on it in its final analysis, Brief at 49-56.

Second, although Lee had knowledge of the content of the NRSC advertisements after the spots ran and notified the NRSC of factual misinformation in one such advertisement, as explained below "coordination" must occur prior to the disbursement in question. It is illogical to posit that contacting the NRSC to request that it pull a factually inaccurate advertisement constitutes "coordination with" the NRSC; the staff's theory is all the more unpersuasive because the NRSC did not change or withdraw the advertisement in question.

Third, the General Counsel's innovative theory that Rehberg intended to convey a message to the NRSC by signing a so-called clean campaign pledge also fails. Adoption of such a theory by the Commission would chill speech in violation of the First Amendment because no candidate would ever know when an independent group would air advertisements based upon the group's mere perception of a hidden "message" in a campaign speech. Moreover, the theory does not fit the facts; Rehberg repeatedly testified that the NRSC issue advertisements were inconsistent with his clean campaign pledge. See, e.g., Brief at 45 (Rehberg Dep. at 52-54, 56-57).

Fourth, while the staff suggests Lee's testimony about her lunch with Barnhart in 1995 corroborates its theory about coordination, see Brief at 37, 52-53, in fact Lee testified that

Barnhart never asked for input about the NRSC advertisements, never showed Lee the content of any advertisements, and never discussed the placement or timing of any advertisements. Brief at 37-39 (Lee Dep. at 26-32).

Fifth, Rehberg testified that Lee's memorandum to the campaign committee file simply documented her recommendation regarding what the State Party -- not the NRSC -- should do. Brief at 39 (Rehberg Dep. at 62). The staff has presented nothing to contradict this explanation.

In short, the staff is suggesting that the Commission find coordination based on mere opportunities to coordinate. Even assuming evidence of such opportunities might be a basis for conducting an investigation, the undisputed evidence gathered during the investigation demonstrates that no coordination occurred.

II. The General Counsel's Brief Misstates the Governing Law.

A. For a Disbursement To Be a Coordinated Expenditure, the Parties Must Have Coordinated Prior to the Disbursement in Question, and There Must Have Been an Actual Meeting of the Minds.

The regulation on which the staff relies for a definition of "coordination" provides that an expenditure is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate"

where there is "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. § 109.1(b)(4) (emphasis added).[4] Timing is fundamental to coordination: as the regulation recognizes, the arrangement between the parties must occur prior to the disbursement in question. The evidence gathered in the General Counsel's Brief shows only that the Rehberg campaign committee - just like other campaigns and hundreds of media outlets -- received and read the scripts after the advertisements ran. See Brief at 53 (after the spots aired, the Rehberg campaign received "facsimiles of the NRSC's press releases which announced each ad and provided each one's content"). The brief presents no evidence that there was any discussion of the content, timing, or placement of the advertisements prior to their running -- indeed, it concedes that there was none. Brief at 53. This concession precludes a finding of coordination.

The regulation on which the staff relies also provides that "coordination" must be actual; the existence of a mere "opportunity" to exchange information does not suffice. It requires an actual exchange of information. Branstool v. FEC,

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[4] The Commission's regulations do not define "coordination." We assume for the purposes of this brief that 11 C.F.R. § (continued . . .)

No. 92-0284 (WBB) at 10 n.5 (D.D.C. Apr. 4, 1995) (memorandum granting summary judgment). Particularly in light of the Supreme Court's decision in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996), a presumption of coordination on the basis of nothing more than the opportunity for exchange of information would be unconstitutional.

Courts in other, similar contexts typically require "'a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (standard for concerted activity in an antitrust case) (quoting Edward J. Sweeney & Sons v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980)). Despite acknowledging this proposition, see Brief at 10, the General Counsel's Brief in fact continues to apply an "opportunity to coordinate" standard, see Brief at 52-53.

Furthermore, the alleged exchange of information, even if proved, flowed the wrong way to establish coordination. Under 11 C.F.R. § 109.1(b), an expenditure may be presumed to be coordinated only when it is "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a

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109.1(b)(4) is relevant to the meaning of "coordinated," as that term is used in 2 U.S.C. § 441a.

view toward having the expenditure made," 11 C.F.R. § 109.1(b)(4)(i)(A) (emphasis added), or made by or through an officer or agent of the candidate's committee, 11 C.F.R. § 109.1(b)(4)(i)(B). In short, according to the regulation, the staff must prove that the candidate provided information to NRSC. Even if the NRSC shared its plans with the Rehberg campaign, the staff presented no evidence whatsoever that information about Rehberg's needs flowed to the NRSC at any time, much less "with a view toward having" a particular expenditure made. This, too, precludes a finding of coordination.[5]

B. The Colorado Republican Decision Is No Basis for the Commission Unilaterally To "Legislate" a Convergence of Sections 441a(d) and 441a(h).

The General Counsel's Office changed its legal theory from one of "coordinated expenditures" to one of "in kind contributions" in the course of one footnote on page three of its brief. Admitting that the Commission had initially "found reason to believe that the NRSC violated **2 U.S.C. § 441a(f)**," the staff now writes that nonetheless it has since "determined

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[5] The General Counsel also suggests that the Rehberg Campaign's knowledge of the NRSC issue advertising campaign "would have been a factor" in decisions about allocation of its resources. Brief at 54. The brief cites no evidence to support this allegation. More importantly, however, the theory is legally flawed because, as explained in the text, coordination requires a flow of information from the candidate to the expending party.

that the better approach is to find that national party committees which go beyond their Section 441a(d) limitations . . . violate the contribution limitations established at **2 U.S.C. § 441a(h)**." Brief at 3, note 1.

Sections 441a(f) and 441a(h) are, in fact, completely different provisions. Section 441a(d) places a dollar limit on coordinated expenditures by national party committees. Section 441a(f) provides that no political committees may make expenditures or accept contributions in violation of Section 441a. By way of contrast, Section 441a(h) provides that -- notwithstanding any other provision of FECA -- Senatorial and national party committees may not contribute more than $17,500 to a Senatorial candidate during a year in which there is an election in which he is a candidate. Logically, then, a national party committee that exceeds its Section 441(a)(d) limitation has violated Section 441a(f) -- not Section 441a(h).

Any administrative action predicated upon a theory that the NRSC's issue advertisements were impermissible contributions suffers from the additional legal flaw that a contribution must be "accepted by" a candidate committee. Brief at 5. In other words, one cannot make an unaccepted contribution. To our knowledge, the Rehberg campaign has not been accused of accepting any improper contributions. To the extent that this reflects a legal judgment that the Rehberg

campaign did not receive a contribution, the same legal judgment should apply, conversely, to the NRSC -- which, therefore, did not make one.

The General Counsel relies on the Supreme Court's decision in Colorado Republican for its conclusion that coordinated expenditures are -- or may be treated as -- in kind contributions.[1] The Court ruled in Colorado Republican that national party committees may and, indeed, do make independent expenditures. The General Counsel's Office characterizes the holding as one that coordinated expenditures must be "actually" coordinated, and states that as a result, the standards for "coordinated party expenditures" and "in kind contributions" have "converged." Brief at 10. The staff cites no authority for this proposition; the brief simply states that the concepts "have" converged. "Because of this convergence," the General Counsel's Office writes, "excessive Section 441a(d)

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[1] The General Counsel's Office also relies on 2 U.S.C. § 441a(a)(7)(B)(i) for its conclusion that coordinated expenditures are the equivalent of in kind contributions. (Section 441a(a)(7)(B)(i) provides that "expenditures made by any person in cooperation, consultation, or concert with . . . a candidate . . . shall be considered to be a contribution to such candidate.") But even if "cooperation" between a candidate and another party with respect to some disbursements makes the disbursements "contributions" for the purposes of FECA, as explained below issue advertising is wholly outside the scope of the Act. If a communication does not contain words of express advocacy, the disbursement in question is not an "expenditure" - and if it is not an expenditure, then it cannot be an "in kind contribution" under the staff's theory.

expenditures are now, as stated above, considered Section 441a(a) in-kind contributions and are thus subject to the Section 441a(a) limitations. By extension, the same holds true for a Senate campaign committee's excessive coordinated expenditures which would become subject to the Section 441a(h) limitation." Id. The result of this alleged "convergence" is that now, as to national party committee disbursements, the General Counsel's Office will employ the same substantive analysis (the so-called "electioneering standard" that courts have repeatedly rejected) when investigating both alleged coordinated expenditures and alleged in-kind contributions.

Even if analytically sound (and it is not), this effort to "announce" the equivalence of two fundamentally separate provisions in FECA is improper. The staff is advocating a new and different construction of the statute. Such a change is more appropriate for a rulemaking, if at all, than for an enforcement proceeding.

Moreover, the staff's effort is contrary to settled principles of statutory construction. In the staff's view, two separate statutory provisions should be read as duplicative of one another. Courts routinely reject such arguments. See, e.g., Bungys v. United States, 485 U.S. 759, 778 (1988) (describing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

C. FECA's Limitation On Coordinated Expenditures Reaches Only Disbursements For Communications Containing Express Advocacy.

The General Counsel's Brief posits, at page 6, that FECA does not impose an "express advocacy" standard on Section 441a(d) coordinated expenditures. The Commission has been told time and again by the federal judiciary, however, that the First Amendment imposes that "express advocacy" standard.[7]

The line of cases imposing the "express advocacy" standard begins with Buckley v. Valeo, 424 U.S. 42 (1976), in which the Supreme Court held that the First Amendment requires limitations on expenditures "relative to a clearly identified candidate" to be construed as reaching only "communications containing express words of advocacy of election or defeat" -- such as vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, or reject. See id. at 39-59. The Court applied this same express advocacy standard to

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[7] Despite arguing that the First Amendment imposes an express advocacy standard on Section 441a(d), we do not concede the constitutionality of the provision. In 1996, the United States Supreme Court remanded a case to the Tenth Circuit to determine whether this provision is constitutional. Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). Four justices indicated their willingness to reach the question and to hold the limitations unconstitutional. See 518 U.S. at 630 (Kennedy, J., concurring in the judgment and dissenting in part); 518 U.S. at 644 (Thomas, J., concurring in the judgment and dissenting in part). The issue is currently pending before the district court in Denver on cross motions for summary judgment.

provisions employing the phrase "for the purpose of . . . influencing." Id. at 78-80.

Lower courts have uniformly applied this express advocacy standard in other contexts. It is now well established that the limitations on national bank, corporate, and labor union expenditures in 2 U.S.C. § 441b survives constitutional scrutiny only if the phrase "in connection with" is similarly limited to expenditures for disbursements financing communications that expressly advocate the election or defeat of a clearly identified candidate. See, e.g., FEC v. Massachusetts Citizens For Life, 479 U.S. 238, 249 (1986).

The provision at issue here, Section 441a(d), uses the same phrase -- "in connection with" -- that is used in Section 441b. Thus, consistent with a line of First Amendment cases stretching back to the 1976 Buckley decision, Section 441(a)(d) must similarly be read as reaching only express advocacy. Indeed, courts have repeatedly rejected broader readings of the term "expenditure," even in relation to political committees. See, e.g., FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) (en banc); FEC v. Christian Action Network, Inc., 110 F.2d 1049, 1052 (4th Cir. 1997). See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).

Ignoring the solid precedent against it, the General Counsel's Office relies on the Tenth Circuit's now-vacated opinion in FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), for the broad applicability of its alternative "electioneering message" standard. The Supreme Court expressly vacated the Tenth Circuit's judgment in the case. It is black letter law that a Supreme Court decision vacating the judgment of the court of appeals deprives that court's opinion of any precedential effect. O'Connor v. Donaldson, 422 U.S. 563, 578 n.2 (1975). The Commission cannot rely in good faith on the Tenth Circuit's vacated decision. Although we pointed this out in August 1997, the General Counsel's Brief does not address the point, relying still (and without comment) on the vacated decision. Brief at 6-7. No judicial opinion that has adopted the Commission's broad definition of committee expenditures has ever survived appeal.

The staff also relies on advisory opinions that have been overruled or superseded. For instance, Advisory Opinion 1983-12, cited at Brief at 10, involved disbursements by an independent political action committee for advertisements meeting the "electioneering" standard. Advisory Opinion 1983-43, cited at Brief at 51 n.14, involved "electioneering" by a corporation. The Supreme Court has made it clear in a number of

rulings that the First Amendment protects from regulation speech by both independent political committees and corporations that does not meet the express advocacy standard. See, e.g., Citizens Against Rent Control v. City of Berkley, 454 U.S. 290 (1981) (political committee); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)(for-profit corporation); Massachusetts Citizens for Life, 479 U.S. at 249 (non-profit corporation). The staff's citation of these Advisory Opinions as support for its "electioneering" message standard is simply not candid.

In addition to citing now-overruled advisory opinions, the staff conspicuously failed to cite Advisory Opinion 1995-25, which expressly allows political party advertisements addressing issues of national importance to be allocated between federal and non-federal accounts. The staff's neglect of Advisory Opinion 1995-25 is an oversight fatal to its position.

None of the advertisements at issue in this Matter contained words of express advocacy; none urged viewers to "vote against" Baucus, to "defeat" him, or to "oppose" him. Nor did they urge voters to "vote for" Rehberg (or anyone else), to "elect" him, or to "support" him. There were simply no words in the advertisements urging viewers to take any action with respect to any election whatsoever. Indeed, none of these advertisements even satisfies the Commission's own legally

incorrect standard of "electioneering message." Unlike the proposed advertisements discussed in Advisory Opinions 1984-15 and 1985-14, cited by the General Counsel as the genesis of and authority for its electioneering standard, none of the advertisements urged viewers to "Vote Republican" or, for that matter, to vote for or against anyone at all. The advertisements contained no reference at all to any of Baucus's potential challengers and did not even refer to the general election then some five or six months away. Also, the fact that Baucus was unopposed in the June 4 primary precludes a finding that the advertisements -- the vast majority of which were in April or May -- involved "electioneering."

Similarly, the First Amendment does not permit the even more broad "timing, content, placement, and target audience" analysis also advanced in the General Counsel's Brief. After 37 pages detailing the factual material accumulated during its investigation, the General Counsel's Office could muster nothing more than two paragraphs of actual application of the law to these facts, at the end of which it simply appended the conclusory statement: "based upon their timing, content, placement and target audiences, it is clear that the advertisements were designed primarily to reduce support for Senator Baucus' continuation in office." Brief at 51. As the Supreme Court has pointed out time and again, if political

speech is to fall at all within the purview of the Federal Election Commission, the line delimiting which speech is regulated and which speech is not regulated must be clear and precise. Just as the "electioneering message" fails this standard, see Massachusetts Citizens For Life, 479 U.S. at 249, so too does this brief's amorphous "timing, content, placement, and target audience" analysis.[8]

Moreover, each of the elements cited in the Brief as support for its "timing, content, placement, and target audience" conclusion is, in fact, a key aspect of successful legislative advocacy. See generally Brief at 50-51. First, the General Counsel's Office observes that each of the NRSC advertisements "contained references to Senator Baucus' position as an incumbent member of the U.S. Senate and to his record in this office; certain ones referred to him as 'liberal Max Baucus'; and all disparaged his positions on particular issues." As we pointed out in August 1997, a viewer would have little reason to call Max Baucus unless the advertisements identified his office and would have little basis on which to predict his

[8] The staff relies in part, in this analysis, on the testimony of Rehberg campaign staff, that "the advertisements were interpreted by viewers and by the Rehberg camp as negatively election-related." Brief at 51. The distinction between speech that may be regulated and speech that may not be regulated can not, however, consistent with the First Amendment, turn on the subjective responses of listeners. See Buckley, 424 U.S. at 43.

vote on upcoming issues unless the advertisements identified his ideology and cited his position on similar issues.

Second, the Brief notes that the advertisements "were broadcast just before the 1996 primary election in Montana and at the beginning of the general election campaign." Brief at 51. The General Counsel's Office itself concedes that votes on term limits and the balanced budget "were to come before the Senate shortly." Brief at 51. It is the Senate calendar, and not the election calendar, that determines the timing of issue advertisements. (Moreover, as noted, Baucus was unopposed in the June 4 primary.)

Third, the Brief emphasizes that the advertisements were placed with stations broadcasting into Montana, rather than the "broader constituencies which would have been interested in the legislative issues," Brief at 51, even though it is obvious that a successful campaign to convince Senator Baucus to change his position would rely on the voices of his constituents.

Fourth, the Brief asserts that the advertisements did not provide detailed information about the precise timing of the Senate votes in question, even though such predictions are virtually impossible.

In short, the advertisements at issue were issue advocacy, describing Baucus's position on specific legislative issues, criticizing his position on those issues, and urging

voters to call him and to urge him to change his position. They were part of the NRSC's effort in 1996 to press the Republican agenda throughout the country and to reinvigorate the public debate on national legislative issues. They were not "expenditures" within the meaning of FECA.[9]

III. The General Counsel's Brief Is Procedurally Defective.

The Commission cannot issue a probable cause determination for violation of 2 U.S.C. § 441a(h)-- which governs contributions to senatorial candidates -- because neither its original letter of June 5, 1996, notifying the NRSC of the Baucus complaint, nor its reason-to-believe letter of June 27, 1997, mentioned the provision. Those documents alleged instead a violation of 2 U.S.C. §§ 441a(d) and 441a(f), which place a dollar cap on coordinated expenditures by national party committees. Both FECA and the Commission's procedures in enforcement actions allow a respondent two opportunities to respond to charges against it, one prior to the "reason to

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[9] Because the disbursements at issue were not "expenditures," they did not place the NRSC in violation of 2 U.S.C. § 441a(d). It follows from this that the remainder of the General Counsel's analysis must fail. Thus, the NRSC did not violate 2 U.S.C. § 434(b) by failing to report the disbursements as "coordinated expenditures" and did not violate 2 U.S.C. § 441b by paying for the advertisements in part with non-federal funds. Additionally, of course, the NRSC could not itself have violated Section 441b, which prohibits contributions and expenditures by national banks, corporations, and labor organizations. (The NRSC is none of these.)

believe" finding and one, after discovery, at the "probable cause" stage. See 11 C.F.R. §§ 111.6, 111.16.[10] The NRSC did not, however, have an opportunity to file a Section 111.6 response with respect to the "in kind contribution" allegation. To issue a probable cause determination without allowing the NRSC an opportunity to marshall evidence in its defense prior to a reason-to-believe vote contravenes both FECA and the Commission's regulations. Moreover, the agency's deviation from its own procedures would violate the Administrative Procedure Act, 5 U.S.C. § 706, and the Due Process Clause. See, e.g., Service v. Dulles, 354 U.S. 363 (1957) ("[R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen."); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

Nor may the Commission apply a new and more restrictive interpretation of FECA retroactively in an enforcement proceeding. The General Counsel's Office concedes in its brief that it means to introduce a new interpretation of FECA -- specifically, that it means now to "apply common

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[10] Section 437(g)(a)(1) of FECA provides that before the Commission conducts a vote on the complaint (i.e., the reason-to-believe vote) the respondent "shall have" the opportunity to demonstrate that no action shall be taken, and Section 437 (g)(a)(3) separately provides that the respondent may submit a brief at the probable cause stage in response to the General Counsel's Brief.

standards to the contents of party committee communications financed by these two categories of expenditures [Section 441a(a) in-kind contributions and Section 441a(d) coordinated expenditures]." Brief at 11. As explained above, what the General Counsel's Office proposes to do is "converge" Section 441a(d) and Section 441a(h). Under the new theory, national party committee disbursements that fund what the Commission calls "electioneering" communications would be prosecutable under either provision. "This change in the standard of content," the brief explains, "is intended to apply only to party committees and only to the communications financed by such committees." Id. Not only does promulgation of new rules without notice and comment violate the Administrative Procedure Act, 5 U.S.C. § 553, but the agency may not apply even a new interpretation retroactively in an enforcement proceeding. See Health Ins. Ass'n of America v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994)("[I]nterpretive rules, no less than legislative rules, are subject to [the] ban on retroactivity.")(citing 5 U.S.C. § 551(4)).

CONCLUSION

For the reasons set forth above, the Commission should find "no probable cause to believe" any violation of FECA occurred, and close the file.

Respectfully submitted,

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Dated: January 15, 1999

Exhibit A

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August 26, 1997

The Hon. John Warren McGarry
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Matter Under Review 4378

Dear Chairman McGarry:

This letter responds on behalf of the National Republican Senatorial Committee ("NRSC") to your letter dated June 27, 1997, and the attached Factual and Legal Analysis ("Analysis"). The Commission granted the NRSC an extension of time until today, August 26, 1997, in which to respond.

I. INTRODUCTION

This matter arises from a complaint filed on behalf of Senator Max Baucus and the Friends of Max Baucus '96' ("the Baucus complaint"). The Baucus complaint alleged that the NRSC made disbursements for radio and television advertisements in coordination with then Montana Lieutenant Governor Dennis Rehberg's campaign for the U.S. Senate seat held by Senator Max Baucus. As a result of these disbursements, the Baucus complaint alleged, the NRSC exceeded the limit on coordinated expenditures imposed by 2 U.S.C. § 441a(d). The Baucus complaint also alleged that the NRSC impermissibly used non-federal funds to finance the radio and television advertisements at issue. In addition, the Baucus complaint alleged that the NRSC failed to report the disbursements as coordinated expenditures.

The NRSC responded to this complaint on July 10, 1996. This response included a factual account of each of the advertisements at issue, an account that was confirmed through supporting affidavits of Rehberg's campaign manager as well as the media buyer who placed the NRSC advertisements.

On June 17, 1997, the Commission found "reason to believe" that the NRSC advertisements violated provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), specifically 2 U.S.C. §§ 434(b), 441a(f), and 441b. This finding was based, in part, on a Factual and Legal Analysis which found, among other things, that "the NRSC's response leaves a number of questions unanswered." Analysis at 22.

With this response, the NRSC today provides additional factual information and legal argument that should put to rest the questions that the Analysis deemed "unanswered." While this information and argument is entirely consistent with the information provided by the NRSC in its initial response to the Baucus complaint, it is here provided at a level of detail that the pace of events during the June and July 1996 campaign season simply did not permit. Based on this additional factual information, we respectfully submit that the Commission should find no probable cause and close this file.

II. THE REHBERG COMMITTEE ADVERTISEMENTS

Before addressing the NRSC advertisements, it is necessary to dispose of a lingering factual issue: the allegation that the NRSC financed a Rehberg radio advertisement that was sometimes broadcast during the primary campaign with the disclaimer, "Paid for by the National Republican Senatorial Committee." See Analysis at 7 (quoting the text of the ad).

Notwithstanding the disclaimer, the NRSC simply did not pay for this advertisement. NRSC Response at 5. Nor did the NRSC authorize the use of its name in connection with this advertisement, as is demonstrated by the attached Affidavit of Fred Davis, ¶ 8 (attached as Exhibit A). Rather, the NRSC adhered to its long-standing policy of not becoming involved in contested Republican primaries. Id.

As the NRSC has explained, and as the attached Supplemental Affidavit of Mike Pieper, ¶ 3 ("Pieper Supp. Aff.") (attached as Exhibit B) demonstrates, the Rehberg Committee prepared and paid for this advertisement entirely on its own initiative with no cooperation, coordination, consultation, or other contacts of any kind with the NRSC. The company that produced the advertisement prepared two versions -- one with the Rehberg Committee's disclaimer and

one with the NRSC's disclaimer. Id. at 5-6; see also Davis Aff., ¶¶ 5 and 7. As discussed below, some radio stations incorrectly used the version of the advertisement with the NRSC's disclaimer. NRSC Response at 6. Immediately after becoming aware of the fact that some stations were broadcasting a version of the advertisement with the NRSC's disclaimer, the Rehberg Committee campaign manager immediately acted to notify the stations that these versions should be taken off the air. Pieper Supp. Aff., ¶ 4.

Although the NRSC submitted much of this information in what the Analysis describes as a "detailed denial," Analysis at 23, the Analysis states that "questions remain, particularly with regard to how the production company was sufficiently informed to prepare two versions of the advertisement." Id. at 24. The Analysis also raises a question about the identity of the company that produced the advertisement. Id. at 23.

As set forth in the attached affidavit of Fred Davis, the Rehberg Committee advertisements, including the advertisement at issue, were produced by a production company named Strategic Perception, Inc. Davis Aff., ¶ 6. This company is located in Hollywood, California and routinely produces political advertisements for candidates across the United States. Id., ¶¶ 1-2. Fred Davis was the employee of Strategic Perception responsible for the production of the Rehberg advertisements. Id., ¶¶ 1-2.

As Mr. Davis attests, the preparation of duplicate advertisements that differ only in the disclaimer attached at the end is a common practice in the political advertising industry. Id., ¶ 7. Producers produce the disclaimer with almost the same care and attention that they produce the main text of the advertisements. Id., ¶ 3. They carefully control the voice, tone, and pace of the disclaimer to insure that it is (1) intelligible; and (2) consistent with the production of the main text of the advertisement. Id.

In Mr. Davis's experience, it is common for the committee paying for an advertisement to change with little or no notice. Id., ¶ 4. If the committee paying for an advertisement changes suddenly and an alternative disclaimer has not already been produced, the advertisement must be delayed until a new disclaimer can be produced. Id. Also, producing disclaimers separately is more expensive than producing them together at the same time that the text of the advertisement is produced. Id., ¶ 4. As a veteran of

political advertising, Mr. Davis knew that if Mr. Rehberg won the Republican primary, as was widely anticipated, any change in the financing of the advertisement would likely be from the Rehberg Committee to the NRSC. Id., ¶¶ 5 and 7. As Mr. Davis attests, he therefore produced two versions of the disclaimer at the same time that he produced the main text of the advertisement. Id., ¶ 7. He did so without any direction, input, or other communication with, to, or from the NRSC. Id., ¶ 8.[1/]

In sum, the NRSC did not pay for the Rehberg campaign's radio advertisements. The sole suggestion to the contrary -- the fact that one of the advertisements bore an NRSC disclaimer -- was the result of radio stations mistakenly broadcasting the wrong version of the advertisement.

III. THE NRSC'S ADVERTISEMENTS WERE NOT COORDINATED EXPENDITURES

Assuming that the Act's limitations on coordinated expenditures are constitutional, which the NRSC disputes,[2/] the Analysis concludes that whether political party expenditures are limited by 2 U.S.C. § 441(a)(d) "involves a two-pronged test." Analysis at 20. One prong of this test is whether the language of the advertisements renders them "expenditures" subject to limitation under FECA; the other

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[1/] The NRSC notes that the disclaimer would be incorrect if the NRSC had, in fact, paid for the advertisements. This is just further evidence that the NRSC had nothing to do with the disclaimer.

[2/] The Supreme Court's recent decision, Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 116 S.Ct. 2309, 2321 (1996), remanded the case to the Tenth Circuit to determine whether the Act's limits on coordinated party expenditures is constitutional. Although the plurality of Justices were unwilling to reach this question, four Justices were willing to reach this question and hold the limitations unconstitutional. 116 S.Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part); 116 S.Ct. at 2330 (Thomas, J., concurring in the judgment and dissenting in part). The NRSC hereby challenges the constitutionality of the Act's limitations on coordinated party expenditures and reserves the right to reassert this challenge in subsequent proceedings.

prong is whether the advertisements were coordinated. As the Analysis observes, "[i]f the answer to either question is 'no,' a prong is missing and the expenditures made for the communication would not be limited by Section 441a(d)." Analysis at 21. That is, so long as a communication is not an "expenditure," the NRSC may pay for it even if it is coordinated with a candidate. Conversely, so long as a communication is not coordinated with a candidate, the NRSC may pay for it even if it is an "expenditure."

The NRSC advertisements at issue here do not satisfy either prong of this test.

A. The NRSC Advertisements Do Not Contain An "Electioneering Message," Much Less Express Advocacy.

The first, and threshold, question is whether the disbursements rise to the level of "expenditures" that may be limited under the Act. As the Analysis rightly observes, unless the communications are "expenditures," they may not be limited by 2 U.S.C. § 441a(d).

The Analysis asserts that a communication is an "expenditure" under 2 U.S.C. § 441a(d) if it contains an "electioneering message"; that is, a communication that is intended either to diminish or garner support for a clearly identified candidate. Analysis at 24. The NRSC strongly disputes this assertion. There is simply no basis for this assertion in the Act, judicial opinions interpreting the Act, or the Commission's own precedent.

The pertinent statute, 2 U.S.C. § 441a(d), limits political party "expenditures in connection with the general election campaign of candidates for Federal office." (Emphasis added.) Thus, Section 441(a)(d) adopts the same "in connection with" formulation of the definition of expenditures adopted in Section 441b. Time and again, courts have held that Section 441b limitations on political committee "expenditures" can survive constitutional scrutiny only if the phrase "in connection with" limits "expenditures" to disbursements financing communications that expressly advocate the election or defeat of a clearly identified candidate. E.g. FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 249 (1986). To constitute express advocacy, the expenditures must "use language such as 'vote for,' 'elect,' 'support,' etc." E.g., id. at 249. Courts have repeatedly

rejected attempts to impose broader limitations on expenditures as "totally meritless." FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) (en banc); see also FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1052 (4th Cir. 1997). Indeed, no judicial opinion that has adopted any broader definition of "expenditure" by a committee has ever survived appeal. See FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), vacated by, 116 S.Ct. 2309 (1996). The Analysis offers no reason -- let alone a constitutionally cognizable one -- for defining the term "expenditure" as used in Section 441a(d) any differently than the term is defined in Section 441b.

The Analysis' heavy reliance on the Tenth Circuit's opinion, FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), as authority for a broader definition of "electioneering message" is egregiously misplaced. The Supreme Court of the United States expressly vacated the Tenth Circuit's judgment in Colorado Republican Federal Campaign Committee v. FEC, ___ U.S. ___, 116 S.Ct. 2309, 2321 (1996). It is black letter law that a Supreme Court "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect." O'Connor v. Donaldson, 422 U.S. 563, 578 n.2 (1975); see also, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979); Fleet Aerospace Corp. v. Holderman, 848 F.2d 720, 721 n.1 (6th Cir. 1988). While "[a] decision may be reversed on other grounds, . . . a decision that has been vacated has no precedential authority whatsoever." Durning v. Citibank, N.A., 950 F.2d 1419, 1424 (9th Cir. 1991) (emphasis added). The Commission simply cannot proceed in good faith by relying on the Tenth Circuit's vacated decision.

Nor can a broader definition of electioneering be justified by Commission precedent. To the contrary, that precedent requires that an "electioneering message" contain express words of advocacy. In Advisory Opinion 1984-15, for example, both proposed advertisements concluded with express words of advocacy -- "Act today to preserve tomorrow. Vote Republican" and "Vote Republican." Advisory Opinion 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5766, at 11,067-3. Similarly, some of the advertisements discussed in Advisory Opinion 1985-14 included the admonition, "Vote Democratic." Advisory Opinion 1985-14, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5819, 11,182. At any rate, Advisory Opinion 1985-14 held that the proposed advertisements were not subject to the limitations of Section 441a. Id. at 11,186. The opinion

contains no finding that the advertisements at issue satisfied the "electioneering message" test.

For several reasons, the communications at issue here were not expenditures under either the express advocacy test required by Supreme Court precedent or the unconstitutional "electioneering message" test that the Analysis adopts. The advertisements plainly cannot satisfy the express advocacy standard. They did not urge viewers to "vote against," "defeat," or "oppose" Baucus. Similarly, they did not urge voters to "vote for," "elect," or "support" Rehberg. There are simply no words urging viewers to take any action with respect to any election whatsoever.

In addition, the advertisements did not contain an "electioneering message." Unlike the proposed advertisements discussed in Advisory Opinions 1984-15 and 1985-14, none of the advertisements urged viewers to "Vote Republican" or, for that matter, to vote for or against anyone else. The advertisements contained no reference at all to any of Baucus' potential challengers and did not refer in any way to the general election -- then some five to six months away.

The Analysis concedes that at least part of the advertisements "look like issue advocacy." Id. at 25. In fact, the advertisements were exactly what they "look like" -- legislative advocacy. They accurately described Baucus' positions on several specific legislative issues that were then before the Senate, criticized Baucus' positions on those issues, and urged voters to call Baucus and urge him to change his position.[3/] The Analysis does not dispute that the advertisements accurately stated Baucus' position on the legislative issues in question. Analysis at 24. The Analysis likewise does not dispute the NRSC's "evidence that the timing of the advertisements coincided with Senate floor debates in April and May, 1996, on those issues." Id. The Analysis concedes that the advertisements "ended with calls for action involving particular legislative issues," id., not electoral issues. Although the Analysis does not dispute the NRSC's

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3/ The NRSC's initial response contained detailed information including the text of the advertisements; the timing of the advertisements in relation to the Senate calendar; the accuracy of the advertisements; and the financing of the advertisements. Because we understand that the Analysis does not dispute this evidence, we will not repeat it here, although it is incorporated by reference.

evidence that its legislative advocacy advertisements concerned specific legislative issues actually pending or soon to be pending before the Senate, the Analysis also fails to recognize its significance. The fact that each advertisement discussed bona fide issues currently before or soon to be before the U.S. Senate placed the advertisements even more squarely within the core First Amendment activity that Section 441a cannot limit.

The primary basis for the Analysis' conclusion that the advertisements were "expenditures" subject to the limits of Section 441a(d), is that the advertisements:

> "were critical of [Baucus] as an incumbent U.S. Senator; they cited his office, referred to him as 'liberal Max Baucus;' and included negative statements about events which occurred during his tenure such as salary and tax increases." Analysis at 24.

Such characteristics, however, cannot convert an otherwise clear piece of legislative advocacy into an expenditure subject to the Act. Most importantly, political speech, including legislative advocacy is "core speech" protected by the First Amendment. The United States Supreme Court has been unwavering in its requirement that any definition of expenditures be clear, precise, and limited lest it deter the exercise of unregulated speech. As several courts have made clear, the oft-rejected "electioneering message" test fails this standard. Massachusetts Citizens for Life, Inc., 479 U.S. at 249. It is exactly because the First Amendment requires clear, bright lines that the elastic "electioneering message" test repeatedly fails.

Second, the characteristics of the advertisements cited in the Analysis are each necessary components of effective legislative advocacy. A viewer would have little reason to call Max Baucus unless the advertisements "cited his office." A viewer would also have little basis on which to predict Baucus' vote on upcoming issues unless the advertisements identified his ideology and cited Baucus' position on previous, similar issues. And casting such things as Baucus' votes on salary and tax increases in a critical light is an important means of persuading viewers that these are issues that the viewers should care enough about to write down a phone number and call their Senator.

The only other basis of the Analysis' conclusion that the NRSC advertisements were "electioneering" appears to be an erroneous "controversial advertising campaign report" that was prepared and placed in a public file by one of the television stations that broadcast one of the advertisements. This report, however, was not prepared by the NRSC or its media buyer. Supplemental Affidavit of Dwight Sterling, ¶ 3 ("Sterling Supp. Aff.") (attached as Exhibit C). Rather, the report was prepared by the President and General Manager of KRTV with no guidance or direction from the NRSC or its media buyer. Id. Upon learning of the General Manager's error, the NRSC's media buyer alerted the Manager to his possible mistake. Id. The Manager acknowledged his mistake by cancelling his previous report and preparing a revised report that accurately described the purpose of the advertisement -- "The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure." Id. The Manager's erroneous report is absolutely no indication of the NRSC's intent or purpose in preparing, producing, and broadcasting the advertisement.

In sum, the NRSC's advertisements cannot be deemed "electioneering," much less "express advocacy." The advertisements therefore do not satisfy the "expenditure" prong of the Commission's two-pronged test.

B. The NRSC Advertisements Were Not Coordinated with the Rehberg Committee.

The second question is whether the NRSC advertisements were made in coordination with the Rehberg Committee.

The Commission's regulations nowhere define "coordination." The Analysis purports to find a definition for coordination within 11 C.F.R. 109.1(b)(4). That regulation, however, concerns the level of cooperation, prior consent, or consultation that is sufficient to place an expenditure outside the scope of an "independent expenditure." 11 C.F.R. 109.1(b)(4), which was promulgated under the authority of 2 U.S.C. § 431(17), does not define the level of coordination required to render an expenditure subject to the limits of 2 U.S.C. § 441a. 11 C.F.R. 109.1 does not even use the words "coordinated" or "coordination." Nor is there any reason to suppose that the level of cooperation, consent, or consultation that is sufficient to render an expenditure "not-independent" will be sufficient to render it "coordinated."

The Commission may not simply graft a regulation promulgated in the independent expenditure context into an enforcement proceeding involving allegedly coordinated expenditures.

Even assuming arguendo that 11 C.F.R. 109.1(b) is relevant to determining whether an expenditure is subject to the limitations of 2 U.S.C. § 441a, the NRSC's legislative advocacy advertisements do not meet the standard of "coordination" required by that regulation. Under 11 C.F.R. 109.1(b), an expenditure is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate" where there is "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. 109.1(b)(4). An expenditure may be presumed to be coordinated when it is "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a view toward having an expenditure made," 11 C.F.R. 109.1(b)(4)(i)(A), or made by or through an officer or agent of the candidate's committee, 11 C.F.R. 109.1(b)(4)(i)(B).

Here, there is no evidence of coordination. To the contrary, the NRSC's initial response emphatically denied any such coordination. NRSC Response at 5 and 6. Further, the Rehberg Committee's Campaign Manager unequivocally stated in a sworn affidavit that "the NRSC's legislative advocacy advertisements were not coordinated with the Rehberg campaign nor were the Rehberg advertisements coordinated with the NRSC in any way." Affidavit of Mike Pieper, ¶ 3. Although the Analysis acknowledges that both the NRSC and the Rehberg Committee denied coordinating the NRSC advertisements, the Analysis complains of the NRSC's use of the word "executed." See NRSC Response at 6 (the NRSC advertisements "were not executed in consultation with the Rehberg Committee"). According to the Analysis, "the word 'execution' can . . . be read as limiting the denial only to aspects of the production and possibly the content of the advertisements, leaving room for consultation on the need for such advertisements." Analysis at 22. The NRSC did not intend the word "execution" to have such a strained, limited meaning. Lest there be any confusion, however, Mr. Pieper's supplemental affidavit makes clear that there was no consultation between the Rehberg Committee and the NRSC on the "need" for the legislative advocacy advertisements. Pieper Supp. Aff., ¶ 5. Id. The sole communication between the NRSC and the Rehberg Committee

concerning the advertisements of which we are aware came after the advertisements were broadcast when the Rehberg Committee sought copies of the advertisements and supporting documentation so that it could respond to press inquiries about the accuracy of the advertisements. Id.

The Analysis' finding of "evidentiary support for a preliminary finding of coordination" appears to be based on nothing more than evidence that (1) Mr. Rehberg travelled to Washington to meet "with NRSC officials prior to, or simultaneously with, the broadcasts of the NRSC's Baucus advertisements" and (2) "the [NRSC's] silence on the nature and content of" these visits. Analysis at 23. This "evidence" cannot support a preliminary finding of coordination.

The existence of a mere "opportunity" to exchange information cannot be sufficient to give rise to a presumption of coordination. Even assuming that 11 C.F.R. 109.1(b) applies (which the NRSC disputes), for a presumption of coordination to arise under that regulation there must be evidence that the advertisements were "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a view toward having an expenditure made." 11 C.F.R. 109.1(b)(4)(i)(A). Thus, the regulation requires not just the opportunity for the exchange of information, but an actual exchange of information. Branstool v. FEC, No. 92-0284 (WBB) at 10 n.5 (D.D.C. Apr. 4, 1995) (memorandum granting summary judgment). In this case, there is no evidence that any such information actually was exchanged.

Courts in similar contexts also have required more than the mere opportunity for "coordination." Indeed, courts have required more that the mere exchange of information to prove coordination to further an unlawful objective. Rather, courts typically require "'a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)). In light of these decisions and the Supreme Court's decision in Colorado Republican, a presumption of coordination based on nothing other than the mere opportunity for the exchange of information would be unconstitutional. Accordingly, the NRSC disputes the validity of 11 C.F.R. 109.1(b)(4)(i)(A), even if (contrary to fact) the Analysis had applied it properly.

Further, the Analysis' interpretation would produce an unreasonable presumption of coordination in the case of virtually any legislative advocacy disbursement by a national political committee. Every Democratic and Republican Member of Congress -- including Senator Baucus -- is a member of his or her party's Senatorial or Congressional Campaign Committee. Every Democratic or Republican Member of Congress meets -- often frequently -- with other members of his or her Senatorial or Congressional Campaign Committee. Such meetings are, however, nothing more than "general descriptions of party practice" and "do not refer to the advertising campaign at issue here or to its preparation." 116 S.Ct. at 2315 (Breyer, J.). Just as that Supreme Court recently rejected "general descriptions of party practice" as a basis for imposing a general presumption of coordination, the mere fact of a meeting between a candidate and his party's Senatorial or Congressional Campaign Committee cannot be a sufficient basis for a preliminary finding of coordination.

Further, the Analysis' interpretation is not supported by Commission precedent. Advisory Opinion 1984-30 did not involve mere "meetings" or "opportunities." Instead, it involved a multi-candidate committee that concededly "cooperated, consulted, and communicated, with the candidates and their committees on campaign strategy and needs with respect to the 1984 primary elections and [the multi-candidate political committee's] in-kind contributions." Advisory Opinion 1984-30, 1 Fed. Election Camp. Fin. Guide (CCH), ¶ 5775, at 11,092. The in-kind contributions included the "donation of time of [the committee's] staff" and "the provision of political consulting services by a third party." Id. In this case, there is no evidence that the NRSC "cooperated, consulted, and communicated, with the candidate [or his committee] on campaign strategy and needs." Nor is there any evidence that the NRSC contributed staff to the candidate's committee or contributed political consulting services by a third party.

Nor can the NRSC's "silence on the nature and content of Mr. Rehberg's contacts with the NRSC," Analysis at 23, give rise to a presumption of coordination. First of all, the statement is not accurate. Far from being "silent" on the issue, the NRSC stated, for example, that "The Rehberg Committee had no prior knowledge of, and w[as] not asked to consent to, the NRSC's own legislative advocacy program." NRSC Response at 5. Moreover, the Analysis' mischaracterization of the NRSC's response would be at most relevant to the question whether a presumption of coordination

has been rebutted once that presumption has arisen. It cannot be relevant to the question whether the presumption should arise in the first place. Otherwise, the presumption of coordination would arise from nothing other than the fact that candidates -- including virtually every incumbent Member of Congress -- meet with other members or staff of their Senatorial or Congressional Campaign Committees. Such an automatic presumption would be invalid under Colorado Republican -- "An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 116 S.Ct. at 2319 (Breyer, J.); see also 116 S.Ct. at 2321 (Kennedy, J. concurring in the judgment and dissenting in part).[4/]

IV. CONCLUSION

Because the advertisements in question do not satisfy either prong of the Analysis' two-pronged test, they were not "coordinated expenditures" and did not place the NRSC in violation of 2 U.S.C. § 441a(d). Similarly, the NRSC did not violate 2 U.S.C. § 434(b) by failing to report the disbursements as "coordinated expenditures." Further, the NRSC did not violate 2 U.S.C. § 441b by paying for its legislative advocacy advertisements, in part, with non-federal funds.

For the foregoing reasons, the NRSC respectfully requests that the Commission find no probable cause to believe

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[4/] There is also no evidence whatsoever that the NRSC's legislative advocacy advertisements were made by or through an officer or agent of the Rehberg campaign. Indeed, the Analysis does not make any attempt to justify its preliminary finding of coordination based on the criteria set forth in 11 C.F.R. 109.1(b)(4)(i)(B).

that the NRSC violated any provision of the Federal Election Campaign Act, and close the file in this matter.

If you have any questions about this response, please contact Bobby R. Burchfield at (202) 662-5350.

Sincerely,

Bobby R. Burchfield
Michael A. Dawson

Craig M. Engle
NRSC General Counsel

Of Counsel

A

BEFORE THE FEDERAL ELECTION COMMISSION

City of Hollywood)
) In re: MUR 4378
State of California)

AFFIDAVIT OF FRED DAVIS

Fred Davis, first being duly sworn, deposes and says:

1. I am Fred Davis. I am employed by Strategic Perception, Inc., a Hollywood, California company that produces radio and television advertisements for political candidates across the United States. I personally have been involved in the production of hundreds of political advertisements for radio and television. Unless otherwise specified, I have personal knowledge of the matters set forth in this affidavit.

2. As a political advertisement production company, Strategic Perception routinely produces not just the main text of a political advertisement but also the disclaimer that advertisements are required, as a matter of federal law, to carry.

3. The disclaimer is produced with almost the same degree of care and attention with which the main text of the advertisement is produced. The production company typically produces the disclaimer with careful attention to the voice, tone, style, and pace of the person speaking the disclaimer. The production of the disclaimer is important to ensure that the words of the disclaimer are intelligible. In addition,

the production of the disclaimer is important to ensure that the tone and nature of the disclaimer does not detract from the main text of the advertisement. The production of the disclaimer is particularly important because it is the last component of the advertisement that the listener hears. A good advertisement can be ruined by a poorly produced disclaimer.

4. It has been my experience that the disclaimer will sometimes change in the course of a campaign. When I first began producing political advertisements I would often produce only one disclaimer. I discovered that this practice was undesirable. If the committee paying for the advertisement changed over the course of the campaign, it was necessary to produce another disclaimer. This was less efficient and more costly that producing the disclaimer at the same time that the main text of the advertisement was produced. Sometimes the advertisement would have to be delayed while I produced a new disclaimer. Also, the advertisement would have to be delayed as a new tape with the new disclaimer was delivered to radio and television stations in the targeted media markets.

5. To avoid these inefficiencies, expenses, and delays, I soon learned to prepare for the possibility of a change in the financing of an advertisement by preparing more than one disclaimer. Based on the nature of the race (Senatorial or Congressional), I now prepare two disclaimers

for each advertisement -- one with the candidate committee's disclaimer and one with the appropriate Senatorial or Congressional Committee disclaimer. In other words, I now make double disclaimered versions of every advertisement I produce for every campaign.

6. During the 1996 election cycle my company, Strategic Perception, Inc., was retained by the Rehberg Committee to produce a number of television and radio advertisements. I was the employee primarily responsible for producing these advertisements.

7. As is my standard practice, I produced two versions of the advertisements -- one with a Rehberg Committee disclaimer and one with a National Republican Senatorial Committee disclaimer. I chose to do this to avoid inefficiencies and delay if the financing of the advertisements changed. Based on my experience in many senatorial races, I knew that if the financing of the advertisement changed, the chances were that the NRSC would be the new financing committee.

8. I did not prepare the NRSC disclaimer at the direction or suggestion of the NRSC. Nor did I inform the NRSC that I was preparing a version of the Rehberg Committee advertisement with the NRSC disclaimer. I did not otherwise consult, coordinate, or act in concert with the NRSC during

the conception, design, production, editing, timing, finance or broadcast of the Rehberg advertisements.

The above is true and correct to the best of my knowledge, information and belief.

Fred Davis

Signed and sworn to before me this 26th day of August, 1997

Notary Public

My commission expires: Feb 19, 1998

RICHARD B. SKOLNICK
COMM. # 1009398
Notary Public — California
LOS ANGELES COUNTY
My Comm. Expires FEB 19, 1998

BEFORE THE FEDERAL ELECTION COMMISSION

City of Billings	)	
	)	In re: MUR 4378
State of Montana	)	

SUPPLEMENTAL AFFIDAVIT OF MIKE PIEPER

Mike Pieper, first being duly sworn, deposes and says:

1. My name is Mike Pieper. During the 1996 election cycle, I was the Campaign Manager for Montanans for Rehberg ("the Rehberg Committee"). Unless otherwise specified, I have personal knowledge of the facts set forth below.

2. During the primary, the Rehberg Committee retained Strategic Perception, Inc. to produce radio advertisements further introducing Dennis Rehberg to Montana voters and beginning to draw contrasts between Rehberg and his likely Democratic opponent, Max Baucus. Fred Davis of Strategic Perception, Inc. had principal responsibility for preparing the radio advertisements. The text of that advertisement is attached as Exhibit A to this affidavit.

3. The Rehberg Committee made the decision to retain Strategic Perception, Inc. and produce the radio advertisement entirely on its own initiative, without any prompting, guidance, direction, discussion, or any contact whatsoever with the National Republican Senatorial Committee ("the NRSC"). There were simply no contacts of any kind between the Rehberg campaign and the NRSC regarding production

between the Rehberg campaign and the NRSC regarding production or any other aspect of the Rehberg Committee's advertisement.

4. I understand that some radio stations in Montana broadcast a version of a Rehberg Committee radio advertisement that bore a NRSC disclaimer instead of a Rehberg Committee disclaimer. They did so mistakenly. The pre-primary Rehberg advertisement in question was in fact paid for entirely by the Rehberg Committee. The NRSC did not pay for this or any other of our pre-primary radio advertising. Once we discovered the error, I took immediate actions to correct it. In particular, I directed our media buyer to contact the radio stations and tell them that they were broadcasting the wrong version of the advertisement.

5. The first time I saw the NRSC advocacy advertisements was when they were broadcast over the public airwaves. I had no contact whatsoever with the NRSC regarding its legislative advocacy advertisements prior to their broadcast. Accordingly, the NRSC's advertisements were not made with my cooperation. I did not consent to the advertisements -- indeed, I would not have consented to these advertisements. Nor did I consult with the NRSC on the preparation of the advertisements. Further, there was absolutely no consultation between me or, to my knowledge, any member of the Rehberg Committee and the NRSC regarding any need for such advertisements. I made no requests or

suggestions to the NRSC with respect to the legislative advocacy advertisements prior to their broadcast. After the advertisements were broadcast, I requested only that the NRSC send me copies of the advertisements and the documentary back-up for the advertisements so that I could respond to press inquiries about the accuracy of the advertisements.

The above is true and correct to the best of my knowledge, information and belief.

Mike Pieper

Signed and sworn to before me this 26 day of August, 1997

Notary Public

My commission expires: 6/1/4

[Western guitar with gospel humming background throughout]

Dennis Rehberg: "November 5 seems a long way away. That's when we'll elect a new senator for Montana.

"I'm Denny Rehberg and I want to be that Senator."

"I've lived in Montana all my life. My kids go to school here."

"For the last five years I've served as your Lieutenant Governor."

"Marc Racicot and Denny Rehberg have done things I'm proud of."

"But this election is really about the future."

"It's about being firm in convictions. And not being something different around election time."

"It's about getting government off our backs. And it's about making government affordable again."

"I want you to watch the Denny Rehberg campaign and how it's conducted."

"No misleading ads. No hitting below the belt."

"I want you to understand how different Denny Rehberg and Max Baucus really are."

"I want you to know how Montana and America can once again be."

Announcer: "Paid for by Montanans for Rehberg."

C

BEFORE THE FEDERAL ELECTION COMMISSION

City of Alexandria)
) In re: MUR 4378
Commonwealth of Virginia)

SUPPLEMENTAL AFFIDAVIT OF DWIGHT STERLING

Dwight Sterling, first being duly sworn, deposes and says:

1. My name is Dwight Sterling. I am President of Multi Media Services Corporation, which is a creative consulting and media buying firm that has served many political committees across the country, including the National Republican Senatorial Committee ("the NRSC"). Unless otherwise specified, I have personal knowledge of the facts set forth in this affidavit.

2. During the 1996 election cycle, I was retained by the NRSC to provide creative consulting and media buying services to the NRSC. These included media buying for the NRSC's legislative advocacy advertisements in Montana.

3. One of the television stations with which I placed the NRSC's legislative advocacy advertisements was KRTV in Great Falls, Montana. As I later learned, KRTV prepared a "controversial advertising campaign report" regarding one of these advertisements. This report was not submitted by me or the NRSC to KRTV. Rather, the report was prepared entirely by KRTV staff. In fact, I believe the report was prepared by the President and General Manager of KRTV, William L. Preston.

KRTV prepared the report with absolutely no guidance or direction from me or, to my knowledge, anyone from the NRSC.

4. The original report described the advertisements as "television ads for: The defeat of Senator Max Baucus on his re-election campaign for 1996." (A copy of the original report is attached as Exhibit A to this Affidavit.) As soon as I became aware that the station manager had incorrectly described the purpose of the advertisement, I contacted him and called his attention to the report. Mr. Preston acknowledged that the report was erroneous by cancelling the report and replacing it with a revised report. See Fax cover sheet from Bill Preston to Dwight Sterling, May 24, 1996 (attached as Exhibit B). This revised report accurately described the purpose of the advertisement: "The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure." (Attached as Exhibit C.)

The above is true and correct to the best of my knowledge, information and belief.

Dwight Sterling

Signed and sworn to before me
this 11th day of August, 1997

Notary Public
My commission expires: 11/3/99