FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 4476
DATE COMPLAINT FILED: September 20, 1996
DATE OF NOTIFICATION: September 27, 1996
DATE ACTIVATED: October 27, 1997

STAFF MEMBER: Anne A. Weissenborn

COMPLAINANTS: National Republican Senatorial Committee

RESPONDENTS: Wyoming State Democratic Central Committee
Betty Jo Beardsley, as treasurer
Karpan for Wyoming
Roger Schreiner, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 441a(a)(1)(C) and (a)(2)(C)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441a(d)(3)(A)
2 U.S.C. § 441a(f)
2 U.S.C. § 434(b)(4)(H)(iv) and (b)(6)(B)(iv)
11 C.F.R. § 102.5(a)(i)
11 C.F.R. § 106.1(e)
11 C.F.R. § 106.5(a) and (d)
11 C.F.R. § 104.13(a)(2)

INTERNAL REPORTS CHECKED: National Republican Senatorial Committee

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was initiated by a complaint filed on September 20, 1996, by the National Republican Senatorial Committee ("the NRSC"). The NRSC alleges that the Wyoming State Democratic Central Committee ("the State Party") exceeded the limitations on general election-

related coordinated party expenditures at 2 U.S.C. § 441a(d) when it made expenditures for a television advertisement broadcast in Wyoming in 1996 "in opposition to the candidacy of the Republican nominee for election to the United States Senate, Wyoming State Senator Mike Enzi" and on behalf of the general election campaign of Kathy Karpan for the U.S. Senate. The complaint also alleges that the monies used by the State Party from its non-federal account for these media purchases were in part derived from contributions which would be excessive under the Federal Election Campaign Act, ("the Act"), thereby resulting in a violation of 2 U.S.C. § 441a(a), and that the State Party failed to include a complete disclaimer with the advertisement in violation of 2 U.S.C. § 441d(a). All respondents were notified of this complaint on September 27, 1996, and a joint response, in the form of a motion to dismiss, was received from the State Party, Karpan for Wyoming, and their treasurers (hereinafter "Respondents").

II. FACTUAL AND LEGAL ANALYSIS

1. The Complaint

The NRSC states in its complaint that the State Party, on or about September 10, 1996, made expenditures to television stations in South Dakota, Colorado, Wyoming and Montana, through Media Strategies of Lakewood, Colorado, for placement of a "political advertisement" which opposed the election of Wyoming State Senator Mike Enzi to the U.S. Senate. The State Party's 1996 October Quarterly Report shows a payment on September 10 to Media Strategies for "advertising" in the amount of $70,800, which was allocated 43% federal share and 57% non-federal share. (Attachment 1). According to the complaint, the State Party wrongly categorized these expenditures as being for an "exempt 'issue advocacy' or 'legislative advocacy' advertisement" and thus as allocable between federal and non-federal accounts.

The complaint states that Wyoming law permits the receipt of contributions by a state party committee which exceed the limitations set out at 2 U.S.C. § 441a(a). [According to information compiled by the Commission's Clearinghouse which is attached to the complaint, Wyoming law differs from Section 441a by permitting unlimited contributions by individuals to political parties, so long as they are not designated for a particular candidate, and unlimited contributions by separate segregated funds. Wyoming law prohibits bank, corporate and union contributions. Campaign Finance Law 96, National Clearinghouse on Election Administration, FEC.]

The complaint alleges further that the disclaimer contained in the subject advertisement read "Paid For By Wyoming State Democratic Party" and thus did not include information required by 2 U.S.C. § 441d(a) regarding authorization by the Democratic candidate for the U.S. Senate in 1996, Kathy Karpan, and her principal campaign committee, Karpan for Wyoming.[1]

According to a transcript of the video and audio portions of the State Party advertisement attached to the complaint, the advertisement contained the following messages:

> Left side picture: Legislative Journal
> Right side picture: Mike Enzi
> "Take a look at one Republican who actually supports tax increases.
> Revenue committee member Mike Enzi."
>
> Right pix: Senior Citizens
> Caption under pix: SF 57, 92, Journal, p. 215
> HB 292, 93, Journal, p. 425
> "He voted to raise taxes on seniors and veterans."
>
> Right pix: Business person
> Caption: Casper Star Tribune 9/1/94
> "Mike Enzi proposed to raise taxes on small businesses."

[1] Ms. Karpan lost the general election with 43% of the vote.

Right pix: Person at a cash register
Caption: HB 292, 95, Journal, p. 329
"He voted to add one cent to our sales tax."

Right pix: Hunters
Caption: HB 173,95, Journal, p. 277
Casper Star Tribune 3/14/96
"And Enzi even voted to increase fees for hunting and fishing licenses."

Left side: words, "8 million new taxes."
Right pix: State Capitol -
Caption: HB 462, 89, Journal, p. 584
HB 79, 89, Journal, p. 147
"Documents show Wyoming taxpayers paid over $8 million for Enzi's new taxes just last year."

Background: American Flag
Words: No More Tax Hikes
Write Mike Enzi
(Mike's home Address)

Disclaimer: PAID FOR BY WYOMING STATE DEMOCRATIC PARTY
"So tell Mike Enzi, no more tax hikes that hurt local businesses and working families."

The complaint asserts that the expenditures for this advertisement did not meet a three-part test for differentiating between exempt administrative costs, which, while allocable, do not constitute contributions to a candidate or committee, and coordinated expenditures which are subject to the limitations at 2 U.S.C. § 441a(d). The three elements discussed in the complaint as necessary for an advertisement to qualify as an exempt expenditure are: (1) a message which contains a "call to action" focused upon a specific legislative matter, (2) placement of the advertisement within the legislative district of the officeholder targeted in the advertisement, and (3) the absence of coordination between a candidate and the party committee regarding the placement of the advertisement. The complaint argues: "Not only does the text of this

advertisement fail to focus on any legislative initiative pending before the Wyoming legislature, the text is widely focused on a generic policy issue [the burden of taxes] which is, without argument, an issue facing each and every level of government." Further, the "call to action" in the advertisement was allegedly one which "could not be acted upon" because the state legislature had adjourned by the time the advertisement was aired, (emphasis in original), and the geographic areas served by the television stations involved did not include State Senator Enzi's 24th State Senate District centered in Gillette, Wyoming. The complaint cites Advisory Opinion 1995-25 as having set the rules for subject matter and geographic placement, and argues that the State Party's 1996 advertisement here at issue did not meet these requirements. Finally, the complaint alleges that there was coordination between the State Party and Karpan for Wyoming with regard to these advertisements.

2. The Law

2 U.S.C. § 441a(a)(1)(C) and 441a(a)(2)(A) and (C) limit to $5,000 per calendar year the amount which any person may contribute to a political committee established by a state party, and the amount which a multi-candidate committee, including a state party committee, may contribute to a candidate or to a (or another) state party committee. 2 U.S.C. § 441a(f) prohibits political committees from accepting contributions or making expenditures in violation of the statutory limitations.

2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1) define "contribution" as including "any gift, subscription, loan, advance, . . . or anything of value made by any person for the purpose of influencing any election for Federal office . . . ." 2 U.S.C. § 431(9)(A)(i) and 11 C.F.R. § 100.8(a)(1) define "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . ." 2 U.S.C. § 431(11) and 11 C.F.R. § 100.10 define "person" as "an individual, partnership, committee, association, labor organization, or any other organization or group of persons . . . ." "Anything of value" includes in-kind contributions. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).

Pursuant to 2 U.S.C. § 441a(d)(3)(A) and 11 C.F.R. § 110.7(b), a state committee of a political party may also make expenditures "in connection with" the general election campaigns of candidates who are affiliated with such party for election to the United States Senate which do not exceed the greater of 2 cents multiplied by the voting age population of the state involved, or $20,000. The limits at Section 441a(d) are adjusted annually for inflation. See 2 U.S.C. § 441a(c). As is noted by the Supreme Court in Colorado Republican Federal Campaign Committee v. FEC, 116 S.Ct. 2309, 2315 (1996) ("Colorado Republicans"), this special provision for party committee expenditures (which the Court termed the "Party Expenditure Provision") is an exception to the rules limiting contributions in federal elections which are set out at 2 U.S.C. § 441a(a). "[B]ut for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976).

Thus, party committees are entitled to make both direct and in-kind contributions to candidates up to $5,000 and also to make coordinated expenditures in connection with the campaigns of the same candidates up to their Section 441a(d) limitations. However, once those limitations are exhausted, any additional expenditures made in coordination with a candidate are no different than any other excessive contributions made by the party committee and received by the candidate committee, and thus result in violations of 2 U.S.C. § 441a(a)(2)(A) and of 2 U.S.C. § 441a(f) by these committees respectively.

In June, 1996, the Supreme Court in Colorado Republicans rejected the Commission's conclusion at 11 C.F.R. § 110.7(a)(5) that party committees, by virtue of their close relationship with candidates, are incapable of making independent expenditures, and that, as a result, all expenditures made by such committees in support of a candidate should be deemed "coordinated" with the candidate. Rather, the Court held that political parties can make expenditures independently of candidates which are not subject to the limitations of 2 U.S.C. § 441a(d). 116 S.Ct. at 2315-2316.[3] Actual coordination is now an essential element of any determination that expenditures are subject to the limitations of Section 441a(d).

Definitions of "coordination" are found only indirectly in the Act and in the Commission's regulations. 2 U.S.C. § 441a(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . . ." See Buckley v. Valeo, 424 U.S. 1, 46 (1976). 2 U.S.C.

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[3] Colorado Republicans addressed certain expenditures for advertisements in opposition to the record of then-U.S. Senator Timothy Wirth made by the Colorado Republican Party prior to the primary elections in that state in 1988.

§ 431(17) and 11 C.F.R. § 109.1(a) and (b)(4) each address what constitutes coordination in the context of defining an expenditure as not independent when it 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." Section 109.1(b)(4) then further defines the concept of non-independent, and therefore coordinated, expenditures related to communications as follows:

> "Made with the cooperation or with the consent of . . ."
>
> > (I) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -
> >
> > > (A) Based 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; or
> > >
> > > (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.

In Colorado Republicans, the Supreme Court addressed the issue of coordination in a case involving expenditures by a state party committee for an advertising campaign. The Court found statements submitted as evidence to have been insufficient to establish coordination between the state party committee and a candidate because they were "general descriptions of party practice. They do not refer to the advertising campaign at issue here or to its preparation." 116 S.Ct at 2315. The Court then found the subject advertising campaign to have been independent, because

the statements cited as evidence of coordination did not "conflict with, or cast significant doubt upon, the uncontroverted direct evidence" that the campaign at issue had been "developed . . . independently and not pursuant to any general or particular understanding with a candidate." Id. Consequently, the Court found the expenditures involved not to have been subject to Section 441a(d) limitations.

The Supreme Court left unanswered in Colorado Republicans the question of whether party expenditures which are coordinated with candidates can be constitutionally limited by Section 441a(d), and remanded the case to the lower courts to address this particular issue. 116 S.Ct. at 2319. Thus, absent further judicial interpretation in this or another context, Section 441a(d) limitations are applicable to party committee expenditures which have been coordinated with a candidate. Consistent with the law outlined above, such "coordinated expenditures" constitute in-kind contributions by the party committee which are "accepted by" the candidate's committee. Again, when such coordinated expenditures by a party committee, alone or in combination with direct contributions to a candidate made pursuant to Section 441a(a)(2)(A), exceed the combined limitations of Sections 441a(a)(2)(A) and 441a(d), violations of 2 U.S.C § 441a(a)(2)(A) by the party committee and of 2 U.S.C. § 441a(f) by the recipient candidate committee result.

In addition to the issue of coordination, an important element in determining whether the limitations at 2 U.S.C. § 441a(d) and/or 2 U.S.C. § 441a(a) apply to particular expenditures is the content of the party committee messages being addressed. "Independent expenditures," which may be made without limit, include only expenditures which "expressly advocat[e] the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17). The Act does not,

however, impose the same express advocacy requirement upon the party expenditures permitted by, but also limited by, 2 U.S.C. § 441a(d), nor upon contributions subject to the limitations of 2 U.S.C. § 441a(a).

As stated above, the Act's definitions of both "contribution" and "expenditure" employ the phrase "for purposes of influencing any election for Federal office . . . ." Thus, payments to, or in cooperation with, a candidate and his or her authorized committee need only be made "for purposes of influencing" a federal election in order to be subject to the limitations at 2 U.S.C. § 441a(a). The Commission has addressed the phrase "for purposes of influencing" on many occasions, including in the context of so-called "issue advertising." For example, in Advisory Opinion 1983-12 the Commission found that the payments for television messages to be aired by a political committee would be "expenditures" because the messages' timing and their content were "designed to influence the viewers' choices in an election . . . ."

As is also stated above, 2 U.S.C. § 441a(d) permits limited expenditures to be made by party committees "in connection with general election campaign[s] of candidates for federal office," including expenditures for communications such as media advertising. The Supreme Court in Colorado Republicans did not address the appropriate measure of the content of such communications. However, the Court of Appeals in its earlier decision in FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), had reversed the District Court's finding that, in order for expenditures for advertisements to have been made "in connection with" a general election and thus limited by 2 U.S.C. § 441a(d), the advertisements had to constitute "express advocacy." Rather, the Court of Appeals expressly deferred to the

Commission's long-standing "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message . . . ." 59 F. 3d at 1022, citing Advisory Opinion 1984-15.

2 U.S.C § 431(18) defines "clearly identified" as meaning "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 11 C.F.R. § 100.17 amplifies the statute by defining "clearly identified" as meaning

> the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for the Senate in the State of Georgia'.

With regard to "electioneering messages," the Court of Appeals in Colorado Republicans addressed the standard for the content of such communications. The court quoted at length from Advisory Opinion 1984-15 in which the Commission found that the advertisements there at issue constituted electioneering messages because they had as "their clear import and purpose . . . to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee." 59 F.3rd at 1023. The Court of Appeals also cited Advisory Opinion 1985-14 in which the Commission addressed, inter alia, a sample mailer to be paid for by the Democratic Congressional Campaign Committee ("DCCC"); the Commission in that opinion found that expenditures for the proposed mailer, which was to be critical of Republicans vis a vis the "coastal environment," would be subject to Section 441a(d)

...nations because the mailer would name a specific member of Congress and be distributed in part or all of that member's district.[4] The court noted the Commission's citation in AO 1985-14 of U.S. v. United Auto Workers, 352 U.S. 567, 587 (1957), in which the Supreme Court defined "electioneering message" as "statements 'designed to urge the public to elect a certain candidate or party'." Id. The court then concluded that the Colorado Republican Party's 1988 advertisements in opposition to then Senator Timothy Wirth's record "unquestionably contained an electioneering message." According to the court, these advertisements had left "the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." Id.

The Tenth Circuit thus found the Commission's standard of "electioneering message" for Section 441a(d) communication-related expenditures, and its definitions thereof, to have been reasonable, and was willing to defer to the Commission's judgment in this regard. The Supreme Court in Colorado Republicans vacated the Court of Appeals' opinion on other grounds; however, on the issue of "electioneering message" as the standard for content, the Court was silent.

Should a state party committee elect not to make directly the expenditures permitted by Section 441a(d), it may assign its expenditure limitation to a national Senatorial campaign committee, thereby designating that committee as its agent for purposes of making coordinated

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[4] In Advisory Opinion 1985-14, the Commission also addressed two proposed scripts for radio and television advertisements. The Commission concluded that the advertisements which cited "Republicans in Congress" would not be subject to Section 441a(d), regardless of whether they also included "Vote Democratic" or another "electioneering message." With regard to the advertisements which cited "your Republican Congressman" and included the words "Vote Democratic," the Commission was unable to agree.

party expenditures. FEC v. Democratic Senatorial Campaign Committee, 484 U.S. 27 (1981). When a state party committee follows this course with respect to a particular election, its Section 441a(d) limitation is effectively transferred to its agent, leaving the state party committee able to make only general election contributions to its nominee within the 2 U.S.C. § 441a(a) limitations. Under these circumstances any state party committee expenditures made in coordination with a candidate would be no different than any other in-kind contributions limited by 2 U.S.C. § 441a(a), and, if made in an aggregate sum exceeding $5,000, would become excessive contributions made by the party committee and received by the candidate committee.

In situations in which a party committee has assigned or otherwise used its entire Section 441a(d) limitation with regard to a particular candidate, questions arise as to the standard to be applied to the content of communications purchased with party committee funds in coordination with a candidate when determining whether and by how much other coordinated expenditures by the same committee would place it in violation of 2 U.S.C. § 441a(f). As noted above, the Commission has applied a "for purposes of influencing" test in the context of 2 U.S.C. § 441a(a) contribution limitations and a "clearly identified candidate/electioneering message" test in the context of 2 U.S.C. § 441a(d) expenditures. The most significant difference between these tests for the contents of communications has been that, for purposes of the Section 441a(d) limitations, an "electioneering message" has had to be accompanied by a reference to a "clearly identified candidate," while Section 441a(a) expenditures/in-kind contributions for communications made "for purposes of influencing a federal election" have not been so limited.

As a result of the Supreme Court's requirement in Colorado Republicans of actual coordination before party expenditures may be deemed subject to Section 441a(d) limitations,

there has come about a convergence, with respect to coordination, of the standards for coordinated party expenditures limited by Section 441a(d) and for in-kind contributions limited by Section 441a(a). Because of this convergence, excessive Section 441a(d) expenditures are now, as stated above, considered Section 441a(a) in-kind contributions and are thus subject to the Section 441a(a) limitations.

In light of this new, common standard of actual coordination with regard to both Section 441a(a) in-kind contributions and Section 441a(d) party expenditures, the Commission has decided to apply common standards to the contents of party committee communications financed by these two categories of expenditures. Hence, in the context of party committee expenditures for communications, the standard of "for purposes of influencing a federal election," as this phrase defines Section 441a(a) "contributions" and "expenditures," will encompass the same elements as those required for a communication financed pursuant to Section 441a(d), i.e., both an electioneering message and a clearly identified candidate.[5]

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[5] As stated, this change in the standard of content is intended to apply only to party committees and only to the communications financed by such committees. In the first regard, separate treatment of party committees is justified in light of the special considerations given such committees in the past. For example, Section 441a(d) was intended by Congress to provide party committees with additional possibilities for assisting specific candidates, possibilities not available to other political committees. The standard for the content of Section 441a(d) party communications, with its "clearly identified candidate" and "electioneering message" components, grew in turn out of the need to distinguish between party communications which meet the Section 441a(d) criteria, and are thus limited, allocable to specific candidates and 100% federal, and another special category of party expenditures - those for generic communications which, although allocable between a party committee's federal and non-federal accounts, are unlimited in amount and not allocable between or among specific candidates. See 11 C.F.R. §§ 106.1 and 106.5 as discussed below.

Expenditures for non-communication purposes, e.g., for equipment, travel, telephone charges, etc., are not affected by this change. In these instances, "for purposes of influencing a federal election" will continue not to require a "clearly identified candidate."

11 C.F.R. § 102.5(a)(1) requires that political committees which make expenditures "in connection with both federal and non-federal elections" either establish separate federal and non-federal accounts or set up a single account "which receives only contributions subject to the limitations and prohibitions of the [Federal Election Campaign] Act." If separate federal and non-federal accounts are established, all expenditures made in connection with federal elections must be made from the federal account.

Pursuant to 11 C.F.R. 106.1(e), party committees that make disbursements for certain specific categories of generic activities which are undertaken in connection with both federal and non-federal elections, but which are not coordinated with a candidate and thus not attributable, must allocate those expenses between its federal and non-federal accounts in accordance with the rules at 11 C.F.R. § 106.5. These categories include administrative expenses, fundraising costs, the costs of certain activities which are exempt from the definitions of "contribution" and "expenditure," and the costs of generic voter drives. 11 C.F.R. § 106.5(a)(2)(i-iv). Generally, state party committees must allocate administrative and generic voter drive expenses according to the ballot composition method, using the ratio of federal offices to total federal and non-federal offices expected to be on the ballot in the next general election in that particular state. 11 C.F.R. § 106.5(d)(1).

Each treasurer of a political committee must file periodic reports of receipts and disbursements. 2 U.S.C. § 434(a). Each report filed by a committee not authorized by a candidate must disclose all contributions made to candidates and their committees. 2 U.S.C. § 434(b)(6)(B)(i). All political committees must report the identification of each political committee which has made a contribution to the reporting committee, together with the date and

amount of any such contribution. 2 U.S.C. § 434(b)(3)(B). In-kind contributions must be reported as both contributions received and expenditures made. 11 C.F.R. § 104.13(a)(2).

2 U.S.C. § 441d(a) requires that communications "expressly advocating the election or defeat of a clearly identified candidate, which are "paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents," include a statement naming the persons paying for the communication and stating that the communication has been authorized.

3. Motion to Dismiss/Response to the Complaint

In their joint motion to dismiss the complaint in this matter, Respondents begin with a "Background" section which contains the following statement:

> The advertisement was produced and aired by the Party to advance its legislative and policy agenda by pressuring then-State Senator, and U.S. Senate candidate, Mike Enzi, to adopt certain legislative and policy positions. The ad called upon viewers to contact Enzi to express their displeasure with his prior support of efforts to raise various taxes on small businesses and middle class Americans.

(Motion, page 1).

The motion to dismiss goes on to cite three goals addressed by "calling citizens to action" via the advertisement, namely the influencing of State Senator Enzi as a member of the Wyoming Legislature "on matters what might arise in upcoming State Revenue Committee Meetings scheduled for this December;" the pressuring of Senator Enzi as a candidate to take "public legislative and policy positions during the campaign that he would be compelled to follow in the 105th Congress and beyond," and "bring[ing] these important policy issues to the attention of the public . . . ." With respect to these goals, Respondents state that "the Democratic Party has publicly promoted a specific party policy agenda entitled the 'Democratic Families

First Agenda'," and that the issues included in this agenda are "Economic Opportunity," "Educational Opportunity" and "Paycheck Security." According to Respondents, the advertisement at issue in the present matter "is wholly consistent with advancing this agenda to target tax cuts to the middle class and small businesses," and through it the Democratic Party "helped advance its overall policy positions by educating the public and pressuring Republican State officials and candidates." (Motion, page 2).

A. Asserted Lack of Express Advocacy or Electioneering Message

Respondents in the present matter assert that the State Party's advertisement contained neither express advocacy nor an electioneering message. In support of their argument that the subject advertisement did not contain the latter, Respondents cite FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir 1987) and its "three-part standard" as the test for an "electioneering message."[7] (Motion, pages 4-5). The motion to dismiss also cites the definition of "express advocacy" at

11 C.F.R. § 100.22, and states: "Thus, under the Commission's regulatory test, as well as under Furgatch, the ad did not contain an electioneering message because it encouraged the viewer to 'some other kind of action' other than voting." (Motion, page 5).

Next, Respondents differentiate between the advertisement addressed in Furgatch and the one presently at issue by asserting that, while the Furgatch ad, in the words of the court, "was bold in calling for action, but fails to state expressly the precise action called for . . . ," 807 F.2d at 865, the State Party's advertisement in the present matter contained "no ambiguity as to what action [it] encouraged. The advertisement's call to action unambiguously asked viewers to call Enzi to express their displeasure with his policy position on several issues of importance in the current political and policy debate both in Wyoming and elsewhere." (Motion, page 6).

With regard to the tone of the advertisement, the motion to dismiss argues:

> Furgatch instructs courts and the FEC to focus on what the advertisement urges the viewer to do rather than on the negative claims or tone of the ad. . . . Similarly, both the Furgatch opinion and the Explanation and Justification for the Commission's regulatory definition [of 'express advocacy'] make clear that when evaluating an advertisement the most important consideration is its objective content, rather than the subjective intent of its sponsor. . . . In this instance, the advertisement speaks for itself - it's an issue ad. (Emphasis in original.)

(Motion, page 6).

B. Call to Action

Respondents assert that the advertisement contained a "proper call to action" related to legislation. It states that, while the Wyoming legislature had adjourned at the time the advertisement was aired, Mike Enzi was serving on the legislature's Revenue Committee, which, as one of several "interim committees," was addressing a State Supreme Court order to make changes in the Wyoming public education system by July 1, 1997. "In fact, as of the time of the

November election, the Revenue Committee had scheduled a December meeting. During this meeting Enzi would be in a very critical position to recommend or oppose new proposed taxes." (Motion, page 7).

Moreover, the motion to dismiss argues, AO 1995-25 did not require a party committee to use a call to action related only to specific, pending legislation. "One could imagine, for example, a call to action asking viewers to pressure a candidate through telephone calls to commit -- before an election -- to adhere to a particular legislative position if and when he or she is elected." The motion concludes in this regard that "the propriety of a given call to action that is intended to influence future public policy does not rest upon Congress' current legislative calendar." (Motion, pages 7-8).

Respondents also distinguish between promotion of policy or ideas and promotion of candidates, asserting that the former may or may not be linked to current legislative proposals. The motion cites protection of "issue communication" in both Buckley and Furgatch, and states that, as with express advocacy, "there is certainly no one formula for a call to action." The motion argues that the call to action in the State Party's advertisement was intended to bring pressure on Mr. Enzi "on several policy matters that were and are central in both the State and national political debate -- opposing taxes on the middle class and small businesses." According to the Respondents, these issues and the advertisement were part of the Party's policy agenda, "help[ed] build the Democratic Party generically by generating popular support among the public for its ideas and initiatives," and "strengthen[ed] the Party by forcing Republican candidates to commit to supporting these policies if and when they are elected." (Motion, page 9).

C. Disclaimer

The motion to dismiss argues that the disclaimer included with the subject advertisement, "PAID FOR BY WYOMING STATE DEMOCRATIC PARTY," was correct. It cites AO 1995-25 as having concluded "that advertisements advocating a party's legislative agenda should be characterized 'as administrative costs or generic voter drive costs'," and argues that the subject advertisement was so treated and paid for, using the appropriate state allocation formula. (Motion, page 9).

PAGES 22 AND 23 HAVE BEEN DELETED

F. Lack of Express Advocacy

Finally, Respondents assert the lack of express advocacy in the advertisement at issue. "The only call to action was for viewers to express their opinion" to Mr. Enzi. (Motion, pages 21-22). "Nor is it relevant that the Party's advertisement clearly expressed a negative opinion about those politicians, such as Enzi, who supported raising taxes on the middle class and small business." Again, the Respondents cite Christian Action Network, 895 F. Supp. at 954-955, in support of this argument. (Motion, page 22).

4. Analysis

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D. Disclaimer

2 U.S.C. § 441d(a) requires disclaimers with regard to communications "expressly advocating the election or defeat of a clearly identified candidate." Respondents have admitted that the State Party's advertisement here at issue was coordinated with the Karpan campaign. The advertisement included a disclaimer which only stated that the Party had paid for it; there was no language with regard to authorization or non-authorization by a candidate. The language of the advertisement constituted an electioneering message, but not express advocacy. Given the

express advocacy requirement of 2 U.S.C. § 441d(a), versus the lack of such a requirement for either coordinated expenditures covered by 2 U.S.C. § 441a(d) or contributions limited by 2 U.S.C. § 441a(a), it would be difficult to sustain a finding that the State Party violated 2 U.S.C. § 441d(a) by failing to include an authorization statement in its disclaimer. Therefore, this Office recommends that the Commission find no reason to believe that the Wyoming State Democratic Central Committee and Betty Jo Beardsley, as treasurer, violated 2 U.S.C. § 441d(a).

III. RECOMMENDATIONS

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2.

3. Find no reason to believe that the Wyoming Democratic State Central Committee and Betty Jo Beardsley, as treasurer, violated 2 U.S.C. § 441d(a).

4.

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6.

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6/10/98
Date

Lawrence M. Noble
General Counsel