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

FIRST GENERAL COUNSEL'S REPORT

MUR: 4503
DATE COMPLAINT FILED: October 10, 1996
DATE OF NOTIFICATION: October 17, 1996
DATE ACTIVATED: October 27, 1997

STAFF MEMBER: Tony Buckley

COMPLAINANTS: National Republican Senatorial Committee

RESPONDENTS: South Dakota Democratic Party
and Henry Maicki, as treasurer
Tim Johnson for South Dakota, Inc.
and Berniece F. Mayer, as treasurer

RELEVANT STATUTES:
11 C.F.R. § 102.5(a)(1)
11 C.F.R. § 106.1(e)
11 C.F.R. § 106.5(a)(2)(i)-(iv)
11 C.F.R. § 106.5(d)(1)
11 C.F.R. § 104.13(a)(2)
2 U.S.C. § 431(9)(A)
2 U.S.C. § 431(17)
2 U.S.C. § 434(b)(4)(H)(iv)
2 U.S.C. § 434(b)(6)(B)(iv)
2 U.S.C. § 441a(a)(1)(C)
2 U.S.C. § 441a(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)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was initiated by a complaint filed on October 10, 1996, by the National Republican Senatorial Committee ("the NRSC"). The NRSC alleges that the South Dakota Democratic Party ("the State Party") committed certain violations when it made expenditures for television advertisements broadcast in South Dakota in 1996 "in opposition to the candidacy of Republican candidate for election to the United States Senate, [United States Senator] Larry Pressler," and in coordination with the Tim Johnson for South Dakota, Inc. ("the Johnson Committee"). All respondents were notified of this complaint on October 17, 1996, and a joint motion to dismiss has been received from the State Party, the Johnson Committee and their respective treasurers (hereinafter "Respondents").

II. FACTUAL AND LEGAL ANALYSIS

A. The Complaint

The NRSC states in its complaint that the State Party made expenditures to television stations in South Dakota for the placement of "political advertisements" which opposed the reelection of Senator Larry Pressler. The State Party's 1996 October Quarterly report shows payments on September 20 and 26, 1997 in amounts totaling $100,000, to Media Strategies. Attachment 1.[1] According to the complaint, the State Party wrongly categorized these expenditures as being for "exempt 'issue advertisement[s]'" which could be allocated between federal and non-federal accounts. The complaint states that South Dakota law permits a state party committee to accept contributions which exceed the limitations set out at 2 U.S.C. § 441a

[1] That same report also shows a payment on August 20, 1996 to Media Strategies in the amount of $125,000, also for "issue advocacy." The complaint does not appear to suggest that this amount was incorrectly reported.

and permits the acceptance of direct contributions from unincorporated labor unions, and that such funds were used in paying for the costs of the advertisement.[2]

The complaint alleges further that the disclaimers contained in the subject advertisements did not include information required by 2 U.S.C. § 441d(a) regarding authorization by the Johnson Committee.

According to a transcript of the video and audio portions of the first advertisement attached to the complaint (identified as "Don't Cut Medicare Again"), it contained the following messages:

> June 29, 1995. Larry Pressler votes to cut $270 billion from Medicare to give another tax break to millionaires. Pressler voted eleven times for the Gingrich plan that raised premiums and co-payments, threatened rural hospitals, and denied millions their choice of doctors.
>
> Larry even voted to eliminate safety standards for nursing home care. Call Senator Pressler, ask Larry, please don't cut Medicare again.

According to a transcript of the video and audio portions of the second advertisement attached to the complaint (identified as "Government Pension"), it contained the following messages:

> [PICTURE]: Capitol Building, Senator Pressler on the right, and Text: "Guaranteed Government Pension" over Capitol.
>
> [VOICE OVER]: Senator Pressler has a guaranteed million dollar government pension.

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[2] According to information compiled by the Commission's Clearinghouse, South Dakota law differs from Section 441a by allowing political action committees to make unlimited contributions. South Dakota law does allow unincorporated labor unions to make unlimited contributions, but not out of dues or treasury funds. *Campaign Finance Law 96*, Chart 2-A, National Clearinghouse on Election Administration, Federal Election Commission, Washington, D.C.

[PICTURE]: People walking through gates to work, Picture of Senator Pressler on the right, and Text: Congressional Record book over that CQ.584 11/17/95, over the people walking.

[VOICE OVER]: But Larry voted to put our pensions at risk.

[PICTURE]: Office buildings, Picture of Senator Pressler on the right, and Text: Congressional Record book over that CQ.584 11/17/95, and Headline: "Bill Would Make Raiding Pension Plans Easier".

[VOICE OVER]: Making it easier for corporate executives to raid employee retirement funds.

[PICTURE]: Pad locked fence, Pressler picture on the right, and Text: Congressional Record book over that CQ.517 10/26/95, and "Pressler Voted for Corporate Tax Breaks to Move Jobs Overseas".

[VOICE OVER]: Pressler even voted to give special tax breaks to big corporations that lay-off workers, then move our jobs over seas.

[PICTURE]: Three guys in suits walking down capitol steps, Pressler picture to the right, and Text: "Tell Senator Pressler to Stop Voting Big Business" and phone # (605) 335-1990.

[VOICE OVER]: So call Senator Pressler, tell Larry to stop voting with big business.

[PICTURE]: Capitol Building, over that people walking to work, Pressler on right, and Text: "Tell Senator Pressler Protect Jobs & Pensions", Phone # (605) 335-1990, and Picture of Tim Johnson next to text "Paid for by the South Dakota Democratic Party".

[VOICE OVER]: And start voting for working families. To protect our jobs and pensions.

According to the complaint, the expenditures for these advertisements 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).[3] The complaint argues that

> there is unambiguous "express advocacy" in opposition to the candidacy of Larry Pressler and a 'call to action' which does not relate to any legislative issue currently pending before the United States Senate. That these advertisements continue to run on South Dakota television stations weeks after the Senate has adjourned *sine die* for the year further supports the assertion that the "call to action" in the advertisements cannot be expected to be acted upon by candidate and officeholder Pressler.[4]

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 advertisements here at issue did not meet these requirements. Finally, the complaint alleges that there was coordination between the Johnson Committee and the State Party with regard to these advertisements.

Commission records show that the State Party made no direct contributions to the Johnson Committee.

B. <u>The Law</u>[5]

The Federal Election Campaign Act of 1971, as amended ("the Act"), limits to $5,000 per calendar year the amount which any person may contribute to a political committee established by a

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[3] The three prongs discussed in the complaint as necessary for an exempt expenditure are: (1) a message which contains a "call to action" focused upon a specific legislative matter, (2) the 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.

[4] The complaint goes on to state that, in the case of the "Don't Cut Medicare Again" advertisement, no phone number or office address is even given at which Pressler could be contacted by viewers of the advertisement. In fact, the same phone number for Pressler that appears in the "Government Pension" advertisement appears on screen in the "Don't Cut Medicare Again" advertisement.

[5] The following recitation of the law applicable in this matter, in particular as related to definitions of "coordination" and to standards for the content of party communications subject to 2 U.S.C § 441a(d) and § 441a(a) limitations, comports with Commission directions formulated during the discussion of these issues at the Executive Session of May 19, 1998.

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. *See* 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(2)(A) and (C). 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 an aggregate of $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.[6] 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

[6] *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.

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. § 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)

limitations because the mailer would name a specific member of Congress and be distributed in part or all of that member's district.[7] 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'." 59 F.3rd at 1023. 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.

In situations in which a party committee has not otherwise yet 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 additional

[7] 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

coordinated expenditures by the same committee would place it in violation of 2 U.S.C. § 441a(a). 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, it has become reasonable for the Commission also 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

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"electioneering message." With regard to the advertisements which cited "your Republican Congressman" and included the words "Vote Democratic," the Commission was unable to agree.

influencing a federal election," as this phrase defines Section 441a(a) "contributions" and "expenditures," should 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.[8]

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,

[8] 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."

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 with the Commission or the Secretary of the Senate, as appropriate. 2 U.S.C. § 434. 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) require that party committees report expenditures made pursuant to 2 U.S.C. § 441a(d). Each report must disclose the identification of each political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(3)(B). Moreover, committees other than the authorized committees of candidates must disclose the name and address of each political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(6)(B)(i). Authorized committees of candidates must report the full name and address of any political committee from which it receives a contribution, along with the date and amount of the contribution. 2 U.S.C. § 434(b)(3)(B). In-kind contributions must also 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.

C. Motion to Dismiss/Response to the Complaint

1. "Background"

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 Senator Larry Pressler to adopt certain legislative and policy positions. The ad called upon viewers to contact Senator Pressler to express their displeasure with his prior support of efforts to cut Medicare and allow corporate raiding of employee pension funds.

(Motion, page 1).

The motion to dismiss goes on to cite three goals addressed by "calling the citizens to action" in the advertisement, namely the influencing of Senator Pressler as a Member of the United States Senate "on matters that might come before Congress;" the pressuring of Senator Pressler 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 "to raise the general level of support for [the Party's] agenda and platform." With respect to these goals, the motion to dismiss states that "the Democratic Party has publicly promoted a specific party policy agenda entitled 'The Democratic Families First Agenda'," and that issues included in this agenda are "Dependable Retirement" and "Corporate Responsibility." According to Respondents, the advertisements at issue in the present matter "are wholly consistent with advancing this agenda to protect Medicare and pensions," and through them the Democratic Party "helped advance its

overall policy positions by educating the public and pressuring Republican Senators and candidates." (Motion, page 2).

2. Asserted Lack of Express Advocacy or Electioneering Message

Respondents rely in great part upon Advisory Opinion 1995-25, arguing that the South Dakota advertisements "were produced and financed in accordance with the rules established by the Commission" in that opinion.[9] Respondents assert that the State Party's advertisements contained neither express advocacy nor "electioneering messages," although they mistakenly equate one with the other. In support of their argument, Respondents cite *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir 1987) and its "three-part standard" for determining whether certain speech "meets this test."[10] (Motion, pages 4-5). The motion to dismiss also cites the definition of "express advocacy" at 11 C.F.R. § 100.22, and concludes: "Thus, under the Commission's regulatory test, as well as under *Furgatch*, the ad did not contain an electioneering message

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[9] In AO 1995-25, the Commission addressed a media advertising program proposed by the Republican National Committee ("RNC") which was to focus on "a series of legislative proposals being considered by the U.S. Congress." The Commission determined that a party committee's media advertising programs which "focus on national legislative activity and promote the Republican Party" should be treated as having been "made in connection with both Federal and non-federal elections, <u>unless</u> the ads would qualify as coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. § 441a(d)." The criteria for qualification as coordinated expenditures were not discussed in AO 1995-25.

[10] The motion to dismiss sets out the three-part *Furgatch* test for "express advocacy":

> (1) The message must be "unmistakable and unambiguous, suggestive of only one plausible meaning."
>
> (2) "The speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act."
>
> (3) "[I]t must be clear what action is advocated. *Speech cannot be 'express advocacy' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.*"
>
> (Emphasis in original).

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 ones 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 advertisements in the present matter contained "no ambiguity as to what action [they] encouraged. The advertisements' call to action unambiguously asked viewers to call Senator Pressler to express their displeasure with his policy position on several issues of importance in the current political and policy debate." (Motion, page 6).

With regard to the tone of the advertisements, the motion to dismiss argues that "*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." (Emphasis in original). . . . "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 advertisements speaks for themselves - they are issue ads." (Motion, page 6).

Respondents assert that the advertisements contained a "proper call to action." It notes that the complaint was in error in stating that the "Don't Cut Medicare Again" ad failed to provide a phone number at which Senator Pressler could be called directly.

Moreover, the motion to dismiss argues, Advisory Opinion 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, page 7).

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 calls to action in the State Party's advertisements were intended to compel constituents to bring pressure to bear on Senator Pressler "on several policy matters that were and are central in both the State and national political debate -- protecting Medicare and pension funds." According to Respondents, these issues and the advertisements were part of the Party's policy agenda, helped build the Democratic Party generically by generating popular support among the public for its ideas and initiatives, and strengthened the Party by forcing Republican candidates to commit to supporting these policies if and when they are elected. (Motion, page 8).

3. Disclaimer

The motion argues that the disclaimer included with the subject advertisements, "Paid for by the South Dakota Democratic Party," was correct and properly financed. It cites Advisory Opinion 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).

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6. Lack of Express Advocacy

Finally, Respondents assert the lack of express advocacy in the advertisements at issue. "The only call to action was for viewers to make a telephone call to express their opinions" to Senator Pressler. (Motion, pages 20). "Nor is it relevant that the Party's advertisements clearly expressed a negative opinion about Senator Pressler, who supported cutting funding for Medicare and allowing corporate raids on pension funds." Again, the Respondents cite *Christian Action Network* in support of this argument. (Motion, pages 20-21).

D. <u>Analysis</u>

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2. Calls to Action and Timing

Both the Complainant and Respondents rely in large measure upon AO 1995-25 as it addressed calls to action in political party advertisements and the timing of those ads. However, as stated above, the Commission in that opinion made the following statement: "[L]egislative advocacy media advertisements that focus on national legislative activity and promote the . . . Party should be considered as made in connection with both Federal and non-federal elections, unless the ad would qualify as coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. § 441a(d)." (Emphasis added.) The conditional clause in this sentence opened a separate area of inquiry which the advisory opinion did not address.

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7. Disclaimer

2 U.S.C. § 441d requires disclaimers with regard to communications which expressly advocate "the election or defeat of a clearly identified candidate." As noted above, while the language in the advertisements constitutes "electioneering messages", they do not constitute express advocacy. Therefore, this Office recommends that the Commission find no reason to believe that the State Party violated Section 441d(a).

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III. RECOMMENDATIONS

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2.

3. Find no reason to believe that the South Dakota Democratic Party and Henry Maicki, as treasurer, violated 2 U.S.C. § 441d(a).

4.

5.

6.

7.

8.

6/25/98
Date

Lawrence M. Noble
General Counsel