WEINBLATT & ASSOCIATES

ATTORNEYS & COUNSELORS AT LAW

Suite 1616 Pioneer Building
336 North Robert Street
St. Paul, MN 55101
Telephone: (612) 292-8770
Fax: (612) 223-8282

Alan W. Weinblatt
Lawrence E. Meuwissen *
Juan J. Martinez
Katharina E. Liston
Ronald J. Lundquist
*Also admitted in District of Columbia

December 5, 1996

VIA FAX AND MAIL

Alva E. Smith
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

RE: MUR 4516

Ms. Smith:

Enclosed for filing in connection with the above-referenced matter please find Respondent's Answer and Motion to Dismiss.

Alan W. Weinblatt

ALAN W. WEINBLATT
FOR
WEINBLATT & ASSOCIATES

AWW:js
cc: Kris Amundson
Charles Weed
Paul Schulte
Mark Elias
Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:

The Matter of the Democratic National Committee; Minnesota Democratic Farmer Labor Federal Account, Paul K. Schulte, et al.

MUR 4516

Respondents.

RESPONDENT MINNESOTA DEMOCRATIC FARMER-LABOR-PARTY

ANSWER AND MOTION TO DISMISS

Respondent Minnesota Democratic- Farmer-Labor Party[1] (the DFL) hereby moves the Federal Election Commission ("FEC" or "the Commission") to dismiss MUR 4516.

BACKGROUND

Before the Commission is one in a series of complaints filed by the National Republican Senatorial Committee ("NRSC") against the Democratic Party, its affiliated state parties regarding "issue advertisements" recently run by the various State Democratic Parties around the country. This MUR includes the Respondent DFL. In this complaint the NRSC alleges that an advertisement entitled Stop the False Ads (and one other advertisement) financed and run by the DFL in September and October, 1996 violated the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 et seq. ("FECA" or the "Act"). Because the NRSC's charge is completely without merit, MUR 4516 should be promptly dismissed against the DFL and its Treasurer.

[1] As well as its treasurer Paul K. Schulte.

The DFL advertisement was produced and aired by the DFL to advance its legislative and policy agenda by pressuring the Republican Party of Minnesota to adopt certain policy positions to wit: honesty in political advertising. The ad called upon viewers to contact the Minnesota Republican Party to express their displeasure with its support of false campaign advertising.

By "calling citizens to action" on these issues the DFL hoped to advance three interrelated goals. First, the DFL sought in influence the Republican Party's and the NRSC's conduct on matters that might come before a legislative body. Second, the DFL hoped to pressure the Minnesota Republican's Party and the NRSC members into taking public policy positions regarding truthful campaign ads that they would be compelled thereafter to follow. Finally, by bringing these important policy issues to the attention of the public, the DFL hoped to raise the general level of public support for truth in political advertising and to support statutory changes in the State legislation.

Contrary to the NRSC's assertions, this effort by the DFL to advance its legitimate legislative and policy interests were entirely legal and properly financed. Conspicuously absent from the NRSC's complaint is any evidence that the advertisement expressly advocated the election or defeat of any candidate for public office or contained an unambiguous "electioneering message" requiring application of the limits of 2 U.S.C. §441a(d) of the Act. The clear impact of the advertisements demonstrates that it was solely a call to action in support of truthful political advertising. The advertisement was properly treated by the DFL as administrative and party building/promotional expenses.

ARGUMENT

I. The DFL Advertisement Met the FEC's Previously Announced Standard to be Treated as an Administrative/Party Building Expense

The NRSC's complaint correctly notes that the Commission has in the past approved of political parties producing and financing issue advertisements in precisely the same manner as the DFL did in this case. In FEC Advisory Opinion 1995-25, the Commission concluded that "legislative 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 coordinate expenditures on behalf of any general election candidates of the Party under 2 U.S.C. §441a(d)." The Commission further stated that because "advocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry forward to its future election campaigns," the cost of the advertisements were not properly treated as coordinated expenditures; but rather, constituted party building and promotional expenses Id.

The record in this matter demonstrates that the DFL advertisement was produced and financed in accordance with the rules established by the Commission in Advisory Opinion 1995-25 which require that in order to be treated as a party building and promotional expense the advertisement not include an "electioneering message." In Advisory Opinion 1995-25 a number of factors were suggested to demonstrate an absence of "electioneering." First, while the ad mentioned a candidate who was also a Federal officeholder, it did not contain words of express advocacy or an electioneering message.

Second, the ad contained a "call to action' -- urging the viewer to contact the Republican Party with respect to the important policies of truth in political advertising. Finally, the advertisement contained the proper disclaimer and was properly paid for and reported. Because the DFL advertisement meets these criteria it, too, is lawful in all respects.

A. The DFL Advertisement did not Contain an Electioneering Message

The NRSC does not and explicitly cannot argue that the DFL advertisement contained any words of express advocacy or an electioneering message. The NRSC's reluctance to make this argument is well-founded. As discussed, infra the DFL advertisement did not contain words of express advocacy. The advertisement did not instruct the voter to "vote for," "vote against," "elect," or "defeat" anyone. In fact, the only "call to action" contained in the ad was clear and unambiguous -- it directs viewers to "call the Republicans" not any specific candidate. Nowhere in the ad did it suggest that viewers vote for or against anyone. Because the call to action was clearly aimed at contacting the Republican Party to express their views on the subject of truth in political advertising rather than at "exhorting" the viewer to vote for or against any candidate or candidates, there cannot be any suggestion of express advocacy.

Nor can "express advocacy" be found from an electioneering message. The complete absence of an electioneering message is plain also from a review of the Ninth Circuit's 1987 opinion in FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) on which the Commission's current regulations are based. In that case the Ninth Circuit held that "speech need not include any words in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific

candidate." Id. at 864. The court then established a three-part standard to determine if particular political speech meets this test:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakenable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and this speech that is merely informative is not covered by the Act. Finally it must be clear what action is advocated. Speech cannot be express advocacy of the election or defeat of a clearly identified candidate when reasonable minds could differ as a to whether it encourages a vote for or against candidate or encourages the reader to take some other kind of action.

Id. (emphasis added).

This same test is embodied in the Commission's regulatory definition of "express advocacy." 11C.F.R. §100.22. Section 100.22 defines express advocacy to include communications that include explicit words of express advocacy such as "vote for," "vote against," "elect," and "defeat." 11 C.F.R. §100.22(a). However, like Furgatch, it also includes communications that

> when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the lection or defeat of one or more clearly identified candidate(s) because --
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. §100.22(b) (emphasis added).

The DFL advertisement did not fall within the boundaries of "electioneering" established in Furgatch and Commission regulations. Most importantly, the

advertisement's sole call to action was for viewers to contact the Minnesota Republican Party and urge it to re-adopt the policy of truth in political advertising that previously had prevailed in Minnesota. 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 kind of action" other than voting.

In this important respect the DFL advertisement was significantly different from the advertisement that was at issue in Furgatch. Unlike the DFL advertisement that contained a clear call to action, in Furgatch the court found that the advertisement was "bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." Id. at 865. Noting that the advertisement simply told the public "don't let them do it," the Ninth Circuit found itself "presented with an express call to action, but no express indication of what action is appropriate." Id. After reviewing and ruling out all possible non-electoral actions that the ad could have encouraged (impeachment, judicial or administrative action), the Ninth Circuit was left to conclude that "the only way to not let him do it was to give the election to someone else." Id.

In contrast to Furgatch, in the instant matter there is no ambiguity as to what action the advertisement encouraged. The advertisement's call to action unambiguously asked viewers to call the Republican Party (giving its phone number) to express their displeasure with the untruthfulness of the Republican Party's political ads.

Second, the central question in reviewing this advertisement is not whether it portrayed any candidate favorably or unfavorably. The DFL talked about the absence of truth in the Republican ads and what persons who support truth in such advertising should do. Furgatch, instructs courts and the FEC to focus on what the advertisement urges the

viewer to do rather than on the tone of the ad. 807 F.2d at 864. ("The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it"). In this case, it is clear that the only "call to action" involved telephoning the Republican Party and urging it to run only truthful ads. Similarly, both the Furgatch opinion and the Explanation and Justification for the Commission's regulatory definition make clear that when evaluating an advertisement the most important consideration is its objective content, rather than the subjective intent of its sponsor. See Furgatch, 807 F.2d 863; 60 F.R. 35292, 35295 (July 6, 1995). In this instance, the advertisement speaks for itself -- it is an issue ad -- a call to support truthful political advertising.

Finally, in considering this matter, the Commission should be mindful of the Ninth Circuit's admonition that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy." Id. In this case the most reasonable reasoning of the advertisement is a reading of the plain text, of what the ad in plain English actually communicates.

B. The DFL Advertisement Included a Proper Call to Action

As noted above, the NRSC places it primary focus on the advertisement's "call to action." Specifically, the NRSC argues that the call to action -- "Call the Republicans. Tell them to stop the attacks and stick to the facts" -- was insufficient because it did not refer to a particular piece of legislation that was currently pending before Congress. The NRSC's objection is without merit.

Advisory Opinion 1995-25 does not require the DFL to employ a call to action that is limited to specific, pending legislation at the Congressional level. 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. For example, a proper issue ad could include the following call to action. "Call John Smith and ask him to promise that, if elected , he won't raise gasoline taxes." Such a call to action would be appropriate even if no such tax increase was currently before Congress and even if Candidate Smith was not currently a Member of Congress. Similarly, permissible would be a call to action (like the one in Christian Action Network) that simply implores viewers to contact the advertisement's sponsor for more information. In short, the propriety of a given call to action that is intended to influence future public policy does not rest upon Congress' current legislative calendar.

This is especially the case with respect to ads by political parties. The fact is that parties have platforms containing numerous policy positions not directly tied to pending legislation and they certainly have the right to attempt to influence the legislative process by framing the issues that will likely be advanced in the future, even if those issues are not currently in concrete legislative form before Congress.

The DFL had ample reason to be concerned over the absence of truth in the Republican ads. In State v. Jude, 554 N.W.2d 750 (Minn. App. 1996) (copy attached) a Minnesota Trial Court had adopted the Republican candidate's arguments that the Minnesota truth in political advertising law, MInn. Stat. §211B.06, subd. 1 (a) was pre-empted by the FECA and (b) was unconstitutional. The Court of Appeals subsequently modified the trial court ruling but affirmed the unconstitutionality in part, 554 N.W.2d 750. Unless the public could be motivated to insist that Republican ads be truthful, there might be no other way to insure that honesty in political advertisements would be the rule. To create public awareness of the need for truthful political ads was a major focus of the DFL.

The D'Amato attack ads were new to this state and at odds with our historic policy and tradition of honesty in political advertising. To help ensure that such policy be continued the ad urged the above stated call to action. Unless the public was educated about the evils of untruthful political ads like those sponsored by Senator D'Amato and the Republican Party in 1996, the DFL effort to secure passage of corrective legislation in 1997 to reverse the decision in State v. Jude, Supra would be impeded.

Parties have a legitimate interest in advancing all types of policy objectives with equal vigor. The fact that some are connected to concrete pieces of proposed legislation while others reflect the policy commitment that may be applied to a number of possible bills or potential legislation is of no legal significance. What is important is the DFL's ability to promote its ideas (as opposed to its candidates) and to pressure candidates to commit to those policy positions. The Court in Buckley and elsewhere has guaranteed this right without governmental intrusion or interference. The Furgatch Court reaffirmed this right and made it clear that a more fluid "electioneering message test" should not be construed to burden protected issue communication. 807 F.2d at 864.

In sum, if, as the Furgatch court held, there are no "magic words" required for "express advocacy," then there is certainly no one formula for a call to action. The call to action in this case asked viewers to contact the opposing political party that had run untruthful ads to pressure it on an issue of public importance truthful political advertising.

These issues and the DFL advertisement, fall squarely within the legislative and policy agenda that the DFL seeks to advance. The promotion of these ideas through ads such as that at issue, helps build the DFL generically by generating popular support among the public for its popular ideas and initiatives. It also strengthens the DFL by forcing the

Republican Party to commit to supporting these policies. In short, actively addressing the Republicans' position on campaign advertising by having viewers call the Republican Party directly is important for the advancement of the DFL agenda. As such the DFL advertisement qualifies as issue advocacy protected by the First Amendment.

C. *The DFL Advertisement Contained the Correct Disclaimer and was Property Financed*

In Advisory Opinion 1995-25 the Commission concluded that advertisements advocating a party's legislative agenda should be characterized "as administrative costs or generic voter drive costs." That is precisely what was done in this instance. The DFL treated these costs as administrative/Party building and they were paid for under the appropriate state allocation formula accordingly. 11 C.F.R. §106.5(d). In addition, the DFL advertisement contained an appropriate disclaimer which stated that it was paid for by the DFL.

D. *The Placement of the DFL Advertisement* and any Coordination Between the Party and Campaign is not Relevant

In addition to addressing the "call to action" requirement of Advisory Opinion 1995-25, the NRSC's complaint includes a brief discussions of two "facts" of no particular import or consequence to the determination of this matter. Specifically, the NRSC argues that the "placement" of the advertisement (i.e. the media markets in which it aired) and alleged "coordination" between the Party and some unspecified campaign both support its complaint. The NRSC is mistaken on both counts.

There is no legal basis to support the NRSC's assertion that issue ads mentioning a specific public official may only be aired in his or her electoral district. As noted above,

the DFL advertisement, like all issue advertisements, sought to promote it's policy agenda in several ways. It is true that one manner of advancing that agenda is to place direct pressure on elected public officials via their own constituents. However, there are other more important objectives that advertisements such as this one serve. In this case the objective was to place pressure on the Republican Party and its surrogates. Any mention of a candidate was solely for the purpose of setting the context to demonstrate the untruthfulness of the Republican and D'Amato ads.

Advertisements like these place pressure on all political parties and candidates to take public stands on issues such as truth in political advertising that are central to the DFL's overall policy agenda. It is precisely at that time when candidates are facing the electorate that a political party is best able to achieve policy concessions from the opposing party. Given the nature of the message and the nature of the "call to action" the fact that this advertisement ran statewide is not surprising.

By forcing candidates and public officials of both parties to address issues of importance to the DFL the party achieves an important end in party building. This is especially true where, as here, the advertisement encourages direct public action on these issues. By directing the public to call the Republican Party about these issues, the DFL is both able to exact policy concessions from it as well as inform and excite the public about the issue.

The NRSC's second objection that the advertisement was coordinated with an undesignated campaign is simply a red herring meant to distract the Commission from the legally relevant issue in this matter. The DFL advertisement does not purport to be an independent expenditure. Thus coordination between the Party and its candidates is

simply irrelevant. To the contrary, it should come as no surprise that the DFL and its candidates might share common consultants and might even coordinate the methods they will use to promote the DFL's current policy agenda. It is the traditional role of the parties to formulate and coordinate message and platform positions with and for the candidates. In fact, at the time the Commission issued Advisory Opinion 1995-25, Commission regulations presumed that the parties always acted in coordination with their candidates and were incapable of independence. This fact alone that parties and candidates coordinate is irrelevant to the question of whether parties can engage in advocating issue positions.

In sum, candidates are, and should be, involved with the DFL in formulating its issues strategy. That does not alter or affect status as an issue advertisement. In fact, as discussed above, in Furgatch the Court explicitly disavowed any Commission attempt to delve into the "intent" of the ad's sponsor. 807 F.2d at 863. What is important is the advertisement's message not how it was produced, or who was involved in the production. When viewed in this light, it is clear that the DFL advertisement is a properly financed issue advertisement.

II. A Broad Construction of "Express Advocacy" that Prohibits Advertisement of Issues Would Violate the DFL's First Amendment Rights

In suggesting that the DFL advertisement should have been treated by the Party as an expenditure under section 441a(d) rather than an administrative or Party building expense the NRSC clearly hopes to rely upon an unprecedented application of the "express advocacy" standard what would encompass a free floating and ambiguous notion of "electioneering." The courts, however, have constantly held that the First Amendment

requires that limitations on political speech must be construed as narrowly as possible. Courts have routinely found that the narrowest limit on speech necessary to accomplish the Act's goals is the express advocacy standard construed and applied conservatively. Moreover, courts have found the application of an elastic electioneering message standard to political speech unconstitutionally vague and thus violative of the Fifth Amendment.

In addition, the result of the NRSC's arguments would be that the FEC would discriminate against political party committees by holding them to a higher standard of issue advocacy than it holds other non-party committees financing similar issue advertisements. As a result of several court decisions, the Commission has applied the express advocacy test to other committees. Concepts of Equal Protection require the Commission to act accordingly in this instance.

When reviewed through the proper legal lens, it is clear that the DFL advertisement was properly financed and accounted for by the Party because it did not "expressly advocate" the election or defeat of any clearly identified candidate for federal office. Instead, the advertisement focused on, and attempted to influence policy positions of import to the Party. Because such conduct is lawful, the NRSC's complaint should be dismissed.

A. Only the Express Advocacy Standard is Sufficiently Narrowly Tailored to Survive the Strict Constitutional Scrutiny Applied to Restrictions on the First Amendment

The First Amendment of the United States Constitution embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Political expression, including discussion of public issues and debate on the qualification of

candidates, enjoys extensive First Amendment protection. FEC v. Christian Action Network, 894 F. Supp. 946, 952 (W.D. Va. 1995), aff'd. Mo. 95-2600, 1996 U.S. App. LEXIS 19047 (4th Cir. Aug. 2, 1996). Maine Right to Life Comm. v. FEC, 914 F. Supp. 8 (D. Me. 1996); FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979). The Supreme Court has held that this First Amendment protection imposes significant restrictions on the powers of state and federal government to regulate contributions and expenditures for political purposes. Buckley v. Valeo, 424 U.S. 1 (1976); Brownsburg Area Patrons Affecting Change v. Baldwin, No. 96-1357-CH/G, 1996 U.S. Dist. LEXIS 15827 (S.D. Ind. Oct. 23, 1996). Specifically, the First Amendment requires courts to "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Turner Broadcasting Sys. Inc. v. FEC, 512 U.S. 622, 114 S. Ct. 2445, 2459 (1994). "Exacting scrutiny" requires that restriction on political speech serve a "compelling government interest" in order to avoid unconstitutionality. Buckley v. Valeo, 424 U.S. at 22-25.

As noted above, courts have long recognized that communication on public issues must be afforded the broadest possible protection under the First Amendment. One result of this broad protection is that even when issue communication address widely debated campaign issues and draw upon a discussion of candidate's positions on particular issues, courts have held that these communication are not subject to regulation under the FECA. See, e.g. Buckley, 424 U.S. at 42; Christian Action Network, 894 F. Supp. at 951.

Indeed, the Court in Buckley recognized that in light of the "intimate tie" between public issues and candidates it is frequently difficult to distinguish between issue advocacy and election advocacy at all:

> The distinction between discussion of issues and candidates and advocacy of election and defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

In light of the inevitable difficultly in distinguishing between the discussion of issues and the advocacy of candidates, courts have consistently held that the First Amendment demands that issue advocacy be protected from regulation even if the speech could influence the election.

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, and as well more positive efforts to influence public opinion on them tend naturally and inexorably to exert some influence on voting at elections.

Buckley, 424 U.S. at 42n. 50 (quotations omitted). Notwithstanding this inevitable influence on elections, application of a conservative, closely drawn express advocacy standard "is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution." FEC v. Central Long Island Tax Reform, 616 F.2d 45, 53 (1980). As one District Court confronting this precise issue recently stated:

> FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion if issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but all costs avoids restricting in any way, discussion of public issues . . . . The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but is does

recognize the First Amendment interest as the Court has defined it.

Maine Right to Life, 914 F. Supp. at 12 (emphasis added).

Thus, the courts have strictly limited the definition of express advocacy to those instances in which the communication both clearly identifies a candidate and includes explicit words advocating the election or defeat of that candidate. In Christian Action Network, for example, the court held that an advertisement criticizing the Democratic agenda on homosexual civil rights was protected issue advocacy. While the ads clearly identified a candidate and, when viewed in context, were clearly hostile towards President Clinton's position on the issue, the court concluded that because they did not "exhort the public to vote" a particular way, they did not constitute express advocacy. Christian Action Network, 894 F. Supp. 946, 953. Recognizing the broad scope of protection afforded issue communications, the Fourth Circuit affirmed the lower court's decision, stating that "it would be inappropriate for us, as a court, to even inquire whether the identification of a candidate as pro-homosexual constitutes advocacy for, or against, that candidate." 1996 U.S. App. LEXIS 19407 at *4. Thus, consistent with Buckley, the Fourth Circuit concluded that even the exercise of evaluating whether a given issue as is "for" or "against" a particular candidate would impinge on the ad sponsor's First Amendment rights absent clear words of express advocacy.

Similarly, in AFSCME the court held that poster of a clearly identified candidate that did not also contain an exhortation to vote for or against that candidate was a protected issue communication under the First Amendment. In so holding, the court noted that "although the poster includes a clearly identified candidate and may have tended to influence voting it contains communication on a public issue widely debated during the

campaign. As such, it is the type of political speech which is protected from regulation under 2 U.S.C. §431." AFSCME, 471 F. Supp. at 317.

In fact, courts have protected issue communications from regulation even where they raise highly controversial issues or express disfavor with a particular candidate's position:

> There is no requirement that issue advocacy be congenial or non-inflammatory. Quite the contrary, the ability to present controversial viewpoints on election issues has long been recognized as a fundamental First Amendment right.

Christian Action Network, 894 F. Supp. at 954-55 ("It is clear from the cases that expressions of hostility to the positions of an official, implying that the official should not be reelected even when that implication is quite clear do not constitute the express advocacy which runs afoul of [the FECA]").

B. An Elastic Electioneering Message Standard is Unconstitutionally Vague

There is a second, related reason why an elastic and subjectively applied "electioneering message" standard must be rejected here. The Supreme Court has long held that because the right to free political expression is at the core of the First Amendment "a statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fifth Amendment." Baggett v. Bullitt, 377 U.S. 360, 372 n.10 (1964). Because of this, the Court has consistently held that "standards of permissible statutory vagueness are strict in the area of free expression." NAACP v. Button, 371 U.S. 415, 432 (1963); see also Baggett, 377 U.S. at 372. The test for constitutional vagueness is whether the statute or regulation forbids the "doing of an act in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1929).

This problem of vagueness is precisely the one that caused the Supreme Court in Buckley to hold the Act's expenditure limitations "must be construed to apply only to expenditures for communication that in express terms advocates the election or defeat of a clearly identified candidate for public office." 424 U.S. at 44. In adopting this limiting construction, the Court expressed concern directly implicated in this manner that the Act's expenditure limitations might inhibit the free discussion and debate of issues and candidates:

> The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Id. at 42 (note omitted). In sum, as the Supreme Court later concluded, "Buckley adopted the express advocacy requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote particular persons." FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

It is just this distinction between the discussion of issues and candidates on the one hand and "exhortations to vote for particular persons" on the other that controls the outcome of this matter. There is no question that in the DFL advertisement the Party staked out a clearly delineated, and strongly expressed, position with respect to support for truth in political advertising. However, "in Buckley, the Court agreed that funds spent to propagate one's views on issues without expressly calling for the election or defeat of

a clearly identified candidate are not covered by the FECA." FEC v. NOW, 713 F. Supp. 428, 434 (D.D.C. 1989).

The vague standard urged by the NRSC lacks sufficiently clear and well marked boundaries so as to provide ample fair warning regarding the contours of the law. For this reason, courts starting with the Supreme Court in Buckley have squarely rejected a more subjective standard in favor of the bright line express advocacy standard. As Judge Oberdorfer recently stated in another case involving the FEC:

> In this sensitive political area where core First Amendment values are at stake, our Court of Appeals has shown a strong preference for "bright-line" rules that are easily understood and followed by those subject to them contributors, recipients, and organizations. As the Court of Appeals has explained, "an objective test is required to coordinate the liabilities of donors and donees. the bright-line test is also necessary to enable donees and donors to easily conform to the law and to enable the FEC to take the rapid, decisive enforcement action that is called for in the highly-charged political arena."

FEC v. GOPAC, Inc., 94-0828-LFO, 1996 U.S. Dist. LEXIS 2181 (D.D.C. Feb. 29, 1996) (citations omitted).

Other courts have expressed a similar preference for bright line rules in this area. For example, in Christian Action Network, both the District Court and Fourth Circuit rejected the FEC's attempt to apply the electioneering message test to an anti-Clinton "issue advertisement" on gay rights. Citing Buckley, the District Court noted that "what one person sees as an exhortation to vote . . . another might view as a frank discussion of political issues." 895 F. Supp. at 957. Continuing, the court states that "by creating a bright-line rule, the Court in Buckley, ensured, to the degree possible, that individuals would know at what point their political speech would become subject to governmental regulation." Id. at 958.

Similarly, in Maine Right to Life, the District Court rejected a similar attempt to interpose to vague electioneering message standard. Discussing the Supreme Court's ruling in Buckley, the District Court concluded:

> The Court seems to have been quite serious in limiting FEC enforcement to express advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language.

914 F. Supp. at 12.

A vague electioneering message test defeats the central purpose of the express advocacy standard by creating ambiguity where the Court had clearly intended that there be certainty. By reintroducing post hoc agency judgment into the process, the electioneering message standard recreates the unconstitutionally vague legal regime that the Buckley Court rejected twenty years ago.

In this case, the DFL had a right to rely upon a bright line test to determine with certainty before it financed its advertisement whether its conduct was lawful. Only a closely drawn, and well-delineated standard of express advocacy can provide the requisite certainty. The lesser standard advocated by the NRSC would once again leave political parties in the untenable and unconstitutional position of having to guess whether its speech was lawful prior to engaging in political speech.

C. Application of A Vague "Electioneering Message" Standard to Political Parties Would Violate the Constitution's Equal Protection Guarantee

The touchstone of equal protection is the concept that those similarly situated must receive equal treatment under the law and that the government must "apply its legislation

and actions evenhandedly to all persons similarly situated in a designated class." Guarino v. Brookfield Township Trustees, 980 F.2d 399, 410 (6th Cir. 1992); see also Bolling v. Sharpe, 347 U.S. 497 (1954). Under equal protection analysis, the court's level of review depends on the right infringed upon by the law. Rolf v. City of San Antonio, 77 F.3d 823 (5th Cir. 1996). Where, as in this case, the right infringed upon is considered a fundamental constitutional right, the courts will apply strict scrutiny analysis. Id. In sum, strict scrutiny analysis requires the state to show that the law advances a compelling state interest and that the law is narrowly tailored to meet that interest. Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992).

Application of a vague and subjective "electioneering message" test to the advertisement in this situation would violate the equal protection component of the Fifth Amendment where courts, and the FEC, have applied the "express advocacy" standard in analogous situations in the past. See, e.g. Central Long Island Tax Reform, 616 F.2d 45; Maine Right to Life Comm. v. FEC,914 F. Supp. 8; Christian Action Network, 894 F. Supp. 946; NOW, 713 F. Supp. 315. There simply is no compelling interest served by the application of a vague "electioneering message" standard to party committees where the express advocacy standard has been routinely applied to non-party political entities. Id. Both the Party and non-party organizations like the Christian Action Network and Maine Right to Life have, as their mission, in large measure, to advance their political ideas and objectives. Yet the NRSC would have the Commission apply the express advocacy standard to it's non-party political supporters while applying a more flexible, uncertain and subjective standard to the DFL. That result clearly violates the Fifth Amendment's equal protection guarantee.

Indeed, the Supreme Court has recently rejected precisely this kind of targeting of political party committees in Colorado Republican Fed. Campaign Comm. V. FEC, 116 S. Ct. 2309 (1996). In that case, the Court rejected the FEC's attempt to discriminate against political parties, stating "we do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." Id. at 4667. Similarly in this instance, it is a denial of the equal protection of the law for the NRSC to argue that political parties enjoy a lesser right to produce and finance issue advertisements than does the Christian Action Network or other similarly situated organizations.

D. The DFL Advertisement did not Expressly Advocate the Election or Defeat of a Clearly Identified Candidate

There can be no doubt that the DFL advertisement did not constitute "express advocacy" as defined in Buckley and later applied in cases such as Christian Action Network. As the court stated in Christian Action Network, "the advertisements were devoid if any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, advertisements such as this do not constitute express advocacy as that term is defined in Buckley and its progeny." 894 F. Supp. at 953. While the DFL advertisement might have associated the Republican Party of Minnesota with untruthful and deceptive ads "nowhere in the commercial were viewers asked to vote against [it]. Id. Indeed, as in Christian Action Network, the only call to action was for viewers to make a telephone call to express their opinion. In this case, viewers were asked to call the Republican Party directly to voice their views.

The plain fact is that the DFL advertisement did not expressly advocate the election

or defeat of a clearly identified candidate for federal office. Nowhere in the ad were voters told to "vote for," "vote against," "elect," or "defeat" any candidate in any election for federal office. Instead, viewers were expressly asked to "call" the Republican Party express their opposition to untruthful political advertising, an issue of enduring national importance to the DFL and the public. Issue advocacy such as this is clearly protected by the First Amendment and outside the scope of the FECA.

CONCLUSION

For the foregoing reasons, MUR 4516 should be dismissed.

Respectfully submitted,

WEINBLATT & ASSOCIATES

By Alan W. Weinblatt

Alan W. Weinblatt, #115332
Attorney for Respondents
Minnesota Democratic-Farmer-Labor
Federal Account, Paul K. Schulte, et al.
1616 Pioneer Building
336 North Robert Street
St. Paul, MN 55101
Tele: (612) 292-8770
Fax: (612) 223-8282