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**SENSITIVE**

September 20, 1999

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VIA COURIER

Scott E. Thomas  
Chairman  
Federal Election Commission  
999 E Street  
Washington, DC 20463

Re: MUR 4736: Sam Brownback for U.S. Senate Committee  
And Alan Groesbeck, as Treasurer

Dear Chairman Thomas:

Sam Brownback for U.S. Senate and Alan Groesbeck, as Treasurer ("Brownback for Senate"), respondents in the above-captioned Matter Under Review ("MUR"), hereby respond, by and through the undersigned counsel, to the Federal Election Commission's (the "Commission") Factual and Legal Analysis.

Since the Factual and Legal Analysis in MUR 4736 presents no new issues of law or fact,<sup>1</sup> the Brownback for Senate's response to the Factual and Legal Analysis in MURs 4568, 4633 and 4634 is incorporated by reference. The Factual and Legal Analysis offers no specifics to contradict Brownback for Senate's earlier submissions and no specifics to justify its continued investigation of the campaign. Indeed, the Commission has offered Respondents no explanation for its decision to open this MUR.

<sup>1</sup> Respondents note that the Commission omitted footnote three contained in the Factual and Legal Analysis for MURs 4568, 4633 and 4634 from the Factual and Legal Analysis for MUR 4736. This footnote erroneously defined "electioneering message" to include "statements which tend to garner or diminish support for a candidate, or which is designed to urge the public to elect a certain candidate or party." This definition is directly at odds with the United States Supreme Court's definition of express advocacy which requires advocating the election or defeat of a clearly identified federal candidate. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976); see also Darryl R. Wold, *et al.*, Statement of Reasons for the Audits of Clinton/Gore '96 and Dole/Kemp '96.

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In the Factual and Legal Analysis, the Commission indicates that it is investigating MUR 4736 jointly with MURs 4568, 4633 and 4634, which relate to the activities of Triad Management Services, Inc. during the time period of 1995 through 1996. The Commission's Factual and Legal Analysis in MUR 4736 restates the generalized allegations regarding Triad, CR and CREF, and the activities of other campaigns, but is short on specific allegations regarding Brownback for Senate. This Factual and Legal Analysis is based almost entirely on the baseless partisan opinions of the Democratic Minority on the Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaigns issued by the Committee on Governmental Affairs of the United States Senate ("Senate Report") and numerous after-the-fact newspaper articles. Of particular note is the Commission's selective omission of exculpatory material from the Senate Report, such as "[t]he Committee found no evidence to suggest that the Brownback campaign acted in any way illegally or improperly in its dealings with Triad." Senate Report at 4010.

Based upon these sources, the Factual and Legal Analysis alleges that Brownback for Senate "may have violated the Act by accepting what can alternatively be characterized as excessive in-kind contributions or prohibited corporate contributions from Triad and CREF." Factual and Legal Analysis at 23. Further, the Commission also alleges that Brownback for Senate "may have violated the Act by accepting indirect contributions from the Stauffers, which alternatively can be characterized as contributions made in the name of another or as excessive contributions." *Id.* The predicate for these allegations is that Triad's activities were coordinated with Brownback for Senate through the use of an alleged "Triad political audit" for the campaign.

As a matter of law, the Commission's coordination theory is without merit. The Factual and Legal Analysis does not contain any specifics that contradict Brownback for Senate's earlier submissions. During the time period in question, neither the Federal Election Campaign Act or Commission regulations defined "coordination." The Commission cannot engage in a rulemaking-by-MUR investigation. In the area of fundamental First Amendment rights, which is directly implicated in this MUR, Brownback for Senate cannot be subject to government reprisal without having clear notice of which activities are prohibited. *See Buckley v. Valeo*, 424 U.S. 1, 41 n. 48 (1976) (citations omitted) ("In such circumstances, vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked"). Absent such clear notice on what constitutes coordination, characterizing contacts as "[creating] an opportunity" is not a sufficient legal basis to warrant an enforcement action. *See Factual and Legal Analysis* at 23. In addition, in the instant Factual and Legal Analysis, the Commission has selectively omitted any mention of Triad's, the Stauffer's and the PAC's denials of coordination. These self-serving omissions, which directly contradict the Commission's primary theory in this MUR, only serve to discredit the Commission's continued prosecution of this investigation.

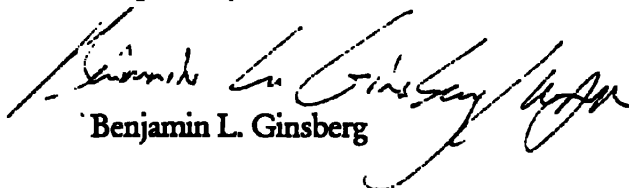
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Compare MURs 4568, 4633 & 4634 Factual and Legal Analysis at 21 n. 12 & 23-24 with MUR 4736 Factual and Legal Analysis at 21 n. 11 & 23. Since the Act and Commission regulations do not define coordination, the Commission cannot arbitrarily investigate Brownback for Senate in an effort to fill a gap in the regulatory scheme. The proper process for filling a gap in the regulatory scheme is the rulemaking process, not through an enforcement action.

Further, the coordination theory suggested in the Factual and Legal Analysis does not satisfy the coordination standard established in *FEC v. Christian Coalition*, No. 96-1781, 1999 U.S. Dist. LEXIS 11971 (D.D.C. Aug. 2, 1999) ("Christian Coalition"). As stated by the Court (in the context of expressive coordinated expenditures), coordination results if: (1) it is made at the request or suggestion of the campaign; (2) the candidate or an agent exercises control over the communication; or (3) there has been substantial discussion or negotiation resulting in the candidate and the spender emerging as partners or joint venturers. *Id.* at \*137-38. In the "Triad political audit", Triad did not learn of any information that had not already been available to the public. Further, the alleged meeting occurred before the primary election. Not only are such meetings not prohibited by the Act or Commission regulations, as a matter of law they do not meet the court's guidance on what constitutes coordination. Ultimately, the Commission's theory hinges on the activities of Triad, an entity not under the direction or control of Brownback for Senate. Thus, with respect to Brownback for Senate, the Commission's coordination theory fails on the facts and the law.

For all the reasons discussed above, the Commission should dismiss this matter as it pertains to Brownback for Senate and take no further action.

Respectfully submitted,

  
Benjamin L. Ginsberg

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