FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of the	)	
	)	**MUR 4741**
Mary Bono Committee and	)	
Kathie L. Parish, as treasurer	)	

STATEMENT OF REASONS
OF COMMISSIONER DAVID M. MASON

On January 12, 1999, the Commission, by a vote of 6-0, approved the recommendation of its Office of General Counsel (OGC) to find reason to believe that the Respondents, the Mary Bono Committee and Kathie L. Parish, as treasurer, violated 2 U.S.C. § 441d(a) for not including a disclaimer on a door hanger and a letter-mailing the Committee had prepared for the April 7, 1998 Special Election in California's 44th Congressional District. I voted for modified findings, and the subsequent conciliation agreement incorporating a $3,500 civil penalty, because they approximate the proper resolution of this matter. I now write to discuss what I feel the ideal resolution should have been.

Title 2, United States Code, Section 441d(a), "Publication and distribution of statements and solicitations," requires disclaimers on all express advocacy communications and all communications that solicit contributions.[1] As compelled political speech, I have concerns about the statute's constitutionality in light of *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995) (holding unconstitutional state-

[1] "(a) Whenever a person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contributions through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee."
2 U.S.C. § 441d.

mandated disclaimer provision on all election-related writings), and its progeny.[2] *See also Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) (state statute that prohibited anonymous distribution of campaign literature was facially unconstitutional); *New York v. Duryea*, 76 Misc.2d 948, 351 N.Y.S.2d 978 (1974) (cited in *McIntyre*, 514 U.S. at 348, n.11) (striking down as overbroad state statute prohibiting anonymous distribution of campaign literature).[3]

Nevertheless, the Supreme Court has not yet held that there is a right to speak anonymously in candidate elections (*McIntrye* concerned a ballot referendum). And the Respondents here--albeit, on what appears to have been two, isolated occasions--did not include a disclaimer on a letter-mailing and a door-hanger. (The Respondents explained that not including a disclaimer on the letter was an oversight, *Response* at 1, while omitting one from the door-hanger was due to their belief that a door-hanger was small enough to fall within the regulatory exception, 11 C.F.R. § 110.11(a)(6)(i),[4] *Response* at 1-2.) Therefore--and to facilitate a resolution of this matter--I voted to find reason to believe that they had violated 2 U.S.C. § 441d(a). But, to be more consistent with past Commission decisions in two roughly analogous matters, the Commission, rather than seek a civil penalty, should have admonished the Respondents for their violation, secured their promise to comply with 2 U.S.C. § 441d(a), and closed the file.

The letter-mailing in MUR 4842 (Napolitano)

In MUR 4842 (In the Matter of Napolitano for Congress and Yolanda Dyer, as treasurer), the Commission received a *sua sponte* submission from a campaign consultant. *See Statement of Reasons* in MUR 4842 at 1. The consultant reported that it had failed to include a disclaimer on a mailing it had recently prepared for the Napolitano for Congress Committee. *Id.* The OGC recommended that the Commission find reason

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[2] *See Griset v. Fair Political Practices Commission*, 69 Cal. App. 4th 818, 82 Cal. Rptr.2d 25 (1999) (state statute prohibiting anonymous distribution of campaign literature is unconstitutional); *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D. Ind. 1997) (same); *West Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (S.D.W. Va. 1996) (same); *Shrink Missouri Government PAC v. Maupin*, 892 F. Supp. 1246 (E.D. Mo. 1995) (state statute requiring candidates' campaign ads to contain disclaimers is unconstitutional); *cf. Arkansas Right to Life State Political Action Committee v. Butler*, 29 F. Supp.2d 540 (W.D. Ark. 1998) (no evidence that state statute requiring "not authorized by candidate" disclaimer on independent expenditure literature was narrowly tailored to advance state's interest in advising electorate of candidate's sources of support). *But see Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997) (state statute that required "paid for by" disclaimer on independent expenditure literature was narrowly tailored to advance state's interest in advising electorate of sources of support and prevented actual and perceived corruption).

[3] Assuming 2 U.S.C. § 441d(a) is constitutional, I have additional constitutional concerns--not implicated in this matter--about the manner in which the Commission has required compliance with it.

[4] "(6) *Exceptions*. The requirements of paragraph (a)(1) of this section [the regulatory implementation of 2 U.S.C. § 441d(a)] do not apply to:

(i) Bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed; . . ."

11 C.F.R. § 110.11, "Communications, advertising" (2 U.S.C. § 441d).

to believe that the Committee had thus violated 2 U.S.C. § 441d(a)(1). *Id.* The OGC's report "noted that the [consultant] had indicated that the disclaimer had been inadvertently left off by the printer after the consultants had 'signed off' on the mailer." *Id.* The Commission voted to find reason to believe that the Committee had violated 2 U.S.C. § 441d(a)(1). *Id.* But, taking the consultant's word as to the circumstances behind the omission, the Commission rejected the OGC's recommendation to "request documentation from the [consultant] and the Committee in order to ascertain the source of the failure to include a disclaimer." *Id.* Moreover, the Commission did not seek a civil penalty for the Committee's failure; it simply dismissed the matter in the exercise of its prosecutorial discretion. *Id.* at 1-2.

The door-hanger in MUR 2692 (Ben Jones)

In researching the Commission's "door-hanger jurisprudence," MUR 2692 (In the Matter of Ben Jones for Congress Committee and Joseph L. Schulman, as treasurer) is the only occasion I could find where the Commission enforced 2 U.S.C. § 441d(a) for the failure of a door-hanger to include a disclaimer. Mr. Jones' campaign committee, which paid all costs associated with the project (about $300), failed to include a disclaimer on "2,000 door-hangers which expressly advocated the election of Jones to Congress in the Fourth Congressional District of Georgia . . . ." *General Counsel's Report,* MUR 2692, 6/12/89 at 3. "The Committee . . . stated that the omission . . . was an unintentional oversight and that a disclaimer was later affixed to the remaining 4,000 door-hangers." *Id.* The Committee explained that "[t]ime constraints had led to the initial printing without the disclaimer." *Id.* Following this incident, the Committee advised the Commission that it had instituted "a policy of more careful review of campaign literature." *Id.* "In light of the information provided by the Committee regarding . . . the relatively small amount spent by the Committee for the door-hangers, and [its] efforts to insure future campaign materials would contain a disclaimer," the OGC "recommended that the Commission take no further action . . . ." *Id.* The Commission accepted this recommendation, foregoing a civil penalty against the Committee.

The proper resolution of the present matter

Like the Napolitano Committee (MUR 4842), the Bono Committee explained that its omission of a disclaimer from the letter was unintentional. *First General Counsel's Report*, MUR 4741, 12/18/98 at 3 (citing *Response* at 1). In this regard, it appears that all the other mailings of the Bono Committee contained proper disclaimers. The Bono Committee states that "it produced seven mailings at or about the same time, all prepared and printed by the same vendor. The mailing in question was printed by a different vendor. Seven of the eight mailings contained the . . . disclaimer." *Id.* Like the Napolitano Committee, then, it appears that the Bono Committee was, as it asserts, the victim of a printer error. *Response* at 1 ("The omission was a printer's error."). Given that the Committee complied with 2 U.S.C. § 441d(a) for every other mailing, it is difficult to believe that it purposefully failed to include a disclaimer on the letter in question, or that this failure was part of a larger pattern of indifference to the statute.

Rather, it appears that the Bono Committee, as it asserts, did not intend to "avoid disclosure," *Response* at 1, and its omission was, as it explained, simply an oversight. *Id.*

And while the Bono Committee's explanation for omitting a disclaimer from its door-hangers (they fell within the regulatory exception, note 4 *supra*) differs from that the Ben Jones Committee offered to explain its "door-hanger disclaimer" failure (an oversight), both explanations are equally plausible. (With respect to the Bono Committee's belief that disclaimers were not required for door-hangers, it is unlikely that it would be aware of the Jones' Committee matter--an obscure, ten-year old MUR.) Having to remind campaign committees once every ten years that door hangers, too, require disclaimers, does not undermine the Federal Election Campaign Act. Admonishing the Bono Committee for its omission coupled with securing its promise to comply with 2 U.S.C. § 441d(a) in preparing future door-hangers—the very manner in which the Commission chose to resolve the door-hanger matter with the Jones Committee—would similarly ensure its compliance. A civil penalty, in my mind, was both unprecedented and unnecessary.

Commissioner David M. Mason

April 7, 1999