Republican
National
Committee

Thomas J. Josefiak
Counsel

November 23, 1998

Mr. F. Andrew Turley
General Counsel's Office
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4820

Dear Mr. Turley:

Please find attached the response of the Republican National Committee, the National Republican Congressional Committee, and the Idaho Republican State Central Committee to the complaint filed by the Idaho State Democratic Party in the above captioned Matter Under Review.

Please note that Mr. Andrew Arulananadum's signature, on behalf of the Idaho Republican State Central Committee, is a facsimile. Mr. Arulanandum's original signature will be filed shortly.

If you have any questions regarding this matter, please do not hesitate to call me at (202) 863-8638.

Sincerely,

Thomas J. Josefiak

attachment

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Mr. F. Andrew Turley
General Counsel's Office
Federal Election Commission
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Washington, D.C. 20463

Re: MUR 4820

Dear Mr. Turley:

This letter constitutes the response of the Republican National Committee, the National Republican Congressional Committee and the Idaho Republican State Central Committee (collectively "Respondents") to the complaint filed by the Idaho State Democratic Party ("ISDP") in the above captioned Matter Under Review. The airing of the advertisement at issue complied fully with the Federal Election Campaign Act of 1971, as amended ("FECA"), as well as with Federal Election Commission ("Commission") regulations. Accordingly, the Commission should dismiss the complaint and take no further action.

FACTUAL BACKGROUND

During the fall of 1998, the Idaho Republican State Central Committee ("Idaho Party") aired a television advertisement entitled "Schools." The audio portion of the advertisement was as follows:

> The best way to help schools?
>
> Dan Williams supports a program called Goals 2000. It spends millions to hire more federal bureaucrats.

Helen Chenoweth co-sponsored a measure to spend less on bureaucrats and more on local schools. She supports competency tests for teachers, smaller class sizes and more local control.

Dan Williams? His plan lets federal bureaucrats decide what's best.

Call Helen Chenoweth. Tell her to keep working for smaller class sizes and better schools.

See audio and visual script of "Schools" (attached hereto as Ex. 1). The Idaho Party, pursuant to 11 C.F.R. § 106.5(d), reported the costs associated with the advertisement as an operating expense and allocated the costs of the advertisement between its federal and non-federal accounts pursuant to the ballot composition method. See 11 C.F.R. § 106.5(d); FEC Advisory Opinion 1995-25, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 6162 (1995).

As the Idaho Party's advertisement did not expressly advocate the election or defeat of a clearly identified federal candidate, none of the costs associated with it are allocable to any federal candidate. Even if the Commission's electioneering message standard were constitutional, and it is not, the Idaho Party's advertisement did not contain an electioneering message. Accordingly, the Respondents respectfully request that the Commission dismiss the complaint and take no further action in this matter.

ARGUMENT

I. Because The Idaho Party's Issue Advertisement Did Not Contain Express Advocacy, The Costs Associated With It Are Not Allocable To Any Federal Candidate.

The Idaho Party's advertisement at issue in this MUR, which discusses the Republican legislative agenda and does not contain express advocacy, is not allocable to any federal candidate and therefore does not constitute either an in-kind contribution under 2 U.S.C. § 441a(a)(2)(A) or a coordinated expenditure under 2 U.S.C. § 441a(d)(3).

A. Communications by party committees are not allocable to any federal candidate – and therefore are not subject to FECA's contribution and coordinated expenditure limits – unless the communications contain express advocacy.

In Buckley v. Valeo, the Supreme Court held that the express advocacy standard could be applied consistent with the First Amendment only if it is limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44 (1976); see also FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("MCFL") (affirming that a communication must contain express advocacy in order to be subject to the FECA). "This construction [restricts] the application of [FECA] to communications containing express words of advocacy of election or defeat such as 'vote for,' 'elect,' 'support,' cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject.'" Id. at 44 n. 52. Accordingly, "the Court held that the [FECA] could be applied consistently with the First Amendment only if it were limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate." FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1996) ("CAN") (emphasis added); see also MCFL, 479 U.S. 238 (1986); Clifton v. FEC, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998); Maine Right to Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996).[1]

In adopting the strict express advocacy test, the Supreme Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make

[1] See also FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987) ("We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act").

informed choices among candidates for office is essential . . . Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Buckley, 424 U.S. at 14-15. By seeking to preserve the guarantee of freedom of speech under the First Amendment, free from regulation and possible government reprisal, the Court preserved the ability of participants in the political arena to engage in a robust discussion of important public issues. As the court noted in Buckley,

> For 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 government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 43. Therefore, under the Court's First Amendment jurisprudence, the robust discussion of important public issues, including candidates' positions on such issues, is fundamental political speech that is not allocable to any federal candidate under the FECA or Commission regulations.

In addition, the Supreme Court has made clear that the content of a communication is the sole factor in determining whether express advocacy is present, and that it is impermissible for the government, including the Commission, to inquire into extra-textual factors such as the intent of the speaker, the possible effect of the speech on the listener, or the timing or context of the speech. See Buckley, 424 U.S. at 43-44. The Court has held that the intent of the speaker cannot be considered because to do so would chill the fundamental First Amendment rights of participants in the robust discussion of important public issues. Id. at 43. Similarly, the possible effect of the speech on the listener or viewer is not relevant because participants who choose to speak out on matters of public interest should not be subject to government reprisal merely because a listener, such as the ISDP, misunderstands or imports its own mischaracterization upon

the words of the speaker. Id. Further, the timing or context of the speech are not relevant considerations because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions." Buckley, 424 U.S. at 43; see also Maine Right to Life, Inc. v. FEC, 914 F. Supp. 8, 12 (D. Maine 1996), aff'd, 98 F.3d 1 (1st Cir. 1996) ("Specifically, the Supreme Court has been concerned not to permit intrusions upon 'issue' advocacy – discussion of issues on the public's mind from time to time or of the candidate's positions on such issues – that the Supreme Court has considered a special concern of the First Amendment"). In short, the content of a political communication – and content alone – is the only relevant constitutional consideration when determining whether a communication contains express advocacy and therefore is allocable to a federal candidate.[2]

The bright-line test for express advocacy is constitutionally necessary to provide speakers with clear notice as to which speech will subject them to government regulation and possible government reprisals. As the Fourth Circuit noted in Christian Action Network:

> The Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights of political speech burdened by apprehension that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result.

110 F.3d at 1051.

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[2] A disbursement must qualify as an "expenditure," as defined by FECA, in order to be subject to the coordinated expenditure limitations provided for under section 441a(d). FECA defines "expenditure" as limited to anything of value "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(9). As construed by the courts, a disbursement for a communication must "in express terms advocate the election or defeat of a clearly identified candidate for federal office" to qualify as an expenditure. Otherwise, the disbursement is not allocable to a federal candidate under the FECA.

The Commission must follow this bright-line approach when determining whether a political communication contains express advocacy and is allocable. To do otherwise would be contrary to the frequent admonitions of the federal courts that only communications containing express advocacy are subject to FECA and Commission regulations. See, e.g., CAN, 110 F.3d at 1051 ("[A]bsent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of government reprisal would be intolerably chilled"); Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991) ("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in Buckley").

It is important to note that the Commission has applied the express advocacy test in determining whether costs incurred by party committees are allocable to a federal candidate and, therefore, must be treated as either in-kind contributions under 2 U.S.C. § 441a(a)(2)(A) or coordinated expenditures under 2 U.S.C. § 441a(d)(3). For example, in FEC Advisory Opinion 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (1978), the Commission considered whether the expenses incurred by the Texas Republican Party to publish a newspaper were allocable to any federal candidate. The Commission concluded that the party's costs were allocable only if the newspaper "includes communications expressly advocating the election or defeat of a clearly identified candidate for Federal office." Id.

B. Under the express advocacy test established by the courts, the Idaho Party's issue advertisement did not contain express advocacy and, therefore, cannot be classified as an in-kind contribution to or a coordinated expenditure on behalf of the Chenoweth Campaign or any other federal candidate.

The Idaho Party's advertisement did not contain express advocacy. The subject of the Idaho Party's advertisement was the Republican education agenda. It used two public figures, Dan Williams and Helen Chenoweth, as a vehicle for the discussion of alternative legislative plans to improve education. At the conclusion, the advertisement urged viewers to "call Helen Chenoweth. Tell her to keep fighting for smaller class sizes and better schools." The advertisement did not expressly advocate the election or defeat of Mr. Williams or Ms. Chenoweth. It did not use literal and express words that advocate the election or defeat of either candidate. The video and graphics used in the issue advertisement did not advocate the election or defeat of either candidate. Therefore, the Idaho Party properly paid the cost of the advertisement out of a mixture of federal and nonfederal funds pursuant to the allocation rules of 11 C.F.R. § 106.5, and properly reported the advertisement as an operating expense. Thus, the complaint has no merit.

II. The Idaho Party's Advertisement Likewise Did Not Contain An Electioneering Message.

Although the Commission initially followed the strict, constitutionally mandated express advocacy test in determining whether expenses incurred by party committees are allocable (see FEC Advisory Opinion 1978-46), in more recent years it has applied a broader electioneering message standard. Specifically, the Commission has looked to whether a party committee's communication "(1) depicted a clearly identified candidate and (2) conveyed an electioneering message." FEC Advisory Opinion 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (1985). The Commission has stated that "[e]lectioneering messages include statements 'designed

to urge the public to elect a certain candidate or party.'" FEC Advisory Opinion 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (1985) (citation omitted).

Although the scope of the electioneering message standard is uncertain and constitutionally infirm, the Commission has made clear that merely referring to or depicting a federal candidate does not make a communication allocable. See FEC Advisory Opinion 1995-25, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 6162 (1995) (concluding that a party committee advertisement that references or depicts a federal candidate, but does not contain an electioneering message, is not allocable).[3]

Even if the Commission's electioneering message standard were constitutionally permissible - and it is not - the Idaho Party's advertisement did not contain an electioneering message. The advertisement refers to Congresswoman Helen Chenoweth and Dan Williams, two leading public figures who were candidates for the U.S. House of Representatives in Idaho's First Congressional district. Merely referring to or depicting a federal candidate does not create an electioneering message. See FEC Advisory Opinion 1995-25. In addition, the communication does not make a direct or even an indirect reference to an election. Rather, the advertisement discusses Goals 2000, the Clinton Administration's widely publicized and highly controversial education plan, and urges viewers to contact Ms. Chenoweth to "tell her to keep working for smaller class sizes and better schools." In light of the foregoing, the Idaho Party's advertisement does not contain an electioneering message and, therefore, the costs associated with the communication are not allocable to any federal candidate, including to Ms. Chenoweth.

[3] When the Commission issued FEC Advisory Opinion 1995-25, the Commission had created an irrebuttable presumption that all party committee expenditures were coordinated with their candidates. See 11 C.F.R. § 110.7(b)(4) (1995). Therefore, in rendering Advisory Opinion 1995-25, the Commission necessarily presumed that the proposed party committee issue advocacy communications would be coordinated with candidates. The Supreme Court struck down the Commission's irrebuttable presumption of party coordination in Colorado Republican Fed. Camp. Comm. v. FEC, 116 S. Ct. 2309 (1996).

Conclusion

For all of the foregoing reasons, the Respondents respectfully request that the Commission dismiss MUR 4820 and take no further action.

Respectfully submitted,

Thomas J. Josefiak
Republican National Committee

Bruce Mehlman
National Republican Congressional Committee

Andrew Arulanandum
Idaho Republican State Central Committee

Exhibit 1

"Schools"

Audio	Images
Announcer VO: The best way to help schools? Dan Williams supports a program called Goals 2000. It spends millions to hire more federal bureaucrats. Helen Chenoweth co-sponsored a measure to spend less on bureaucrats and more on local schools. She supports competency tests for teachers, smaller class sizes and more local control. Dan Williams? His plan let's federal bureaucrats decide. ~~What's best.~~ Call Helen Chenoweth. Tell her to keep working for smaller class sizes and better schools.	Text: The best way to help schools? Photo of Dan Williams fades up. Super: Dan Williams. Text: Supports Goals 2000. Millions for federal bureaucrats. Photo of Williams fades down. Photo of Chenoweth fades up. Super: Helen Chenoweth. Text: Less on bureaucrats. More on schools. Xfades to text: Competency tests. Smaller Class sizes. More local control. Photo of Chenoweth fades down. Williams fades up. Super: Dan Williams. Let's the bureaucrats decide. Chenoweth's photo fades up. Phone number fades up. Text: Smaller class sizes. Better schools. (Disclaimer) Paid for by the Idaho Republican State Central Committee.