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August 4, 2000

Mr. Jeff S. Jordan
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: MUR 5031

Dear Mr. Jordan:

On behalf of the Democratic Party of Illinois, Michael J. Madigan, its chair, and myself, as treasurer (collectively "DPI"), I hereby submit, pursuant to 11 CFR 111.6, this response to the above referenced Complaint.

I. Introduction.

The Complaint in this matter raises two allegations against DPI. First, that DPI is affiliated with the Rock Island Democratic Central Committee and the 17th District Victory Fund. This affiliation, the Complaint goes on to allege, caused DPI to have accepted contributions in calendar year 1998 exceeding the limits imposed by the Federal Election Campaign Act ("Act"). The second allegation asserts that DPI failed to report an expenditure for a television advertisement as an independent expenditure, an in-kind contribution, or a coordinated expenditure. For the reasons set forth in greater detail below, each of these allegations is

completely without merit. Accordingly, the Commission should decline to take any further action regarding this Complaint and dismiss all allegations relating to DPI.

II. The Democratic Party of Illinois is Not Affiliated With Any Other Political Committee.

1. DPI is Not Affiliated with the Rock Island Democratic Central Committee or the 17th District Victory Fund.

The Complaint begins with the baseless allegation that DPI is affiliated with the 17th District Victory Fund. To get to this conclusion, Complainant plays a game of "connect the dots" as follows:

(a) DPI is a federal committee;
(b) DPI gave one nonfederal contribution to the Rock Island Democratic Central Committee;
(c) the Rock Island Democratic Central Committee, which is not a federal committee, is chaired by John Gianulis;
(d) John Gianulis, who has no position with DPI, chairs the 17th District Victory Fund;
(e) Therefore, DPI and the 17th District Victory Fund are affiliated.

This purported logic defies both common sense and the specific provisions of the Act relating to affiliated committees.

According to FEC regulations, contributions made by "the political committees established, financed, maintained, or controlled by a State party committee and subordinate State party committees shall be presumed to be made by one political committee." 11 CFR 110.3(b)(3). First, the only committee to which DPI is alleged to have any direct connection is

the Rock Island Democratic Central Committee, which as the Complainant admits, is not a "political committee" as defined in 11 CFR 100.5. Thus, Complainant makes the curious allegation that DPI is affiliated, for purposes of the Act, with an entity that is not a political committee as defined by the Act. Second, even if DPI is somehow affiliated with the Rock Island Democratic Central Committee, the single non-federal transfer referenced in the Complaint would be specifically permitted by 11 CFR 110.3(c).

Complainant next asserts that DPI is affiliated with the 17th District Victory Fund. Complainant offers no basis to support this allegation. The presumption referenced in 110.3(b)(3) does not apply if: (a) the party committee in question has not received funds from any other political committee established by the party unit, and (b) the committee does not make contributions in cooperation, consultation or concert with any other committee established by the party unit. 11 CFR 110.3.

Here there is no allegation that DPI transferred funds to or received any funds from the 17th District Victory Fund. In addition, there is no allegation that DPI makes contributions in cooperation, consultation or concert with the 17th District Victory Fund or any of its officers.

2. DPI Did Not Accept Any Excessive Contributions.

The Complaint goes on to make a blanket, unsubstantiated assertion that "the committees received contributions exceeding the total combined contribution limit, $1000 per individual and

$5000 per PAC, from numerous contributors."[1] This allegation is completely baseless for several reasons. First, because DPI is not affiliated with any other committee, there was no "combined contribution limit" applicable. Second, because the Rock Island Democratic Central Committee is not a political committee for purposes of the Act, it could not have accepted any contributions subject to the Act's limitations, and any non-federal contributions it received would have no impact on DPI's federal limitations. Finally, the Complaint does not even allege that DPI and the 17th District Victory Fund have any shared contributors, much less any excessive contributions.

The allegations contained in this section of the Complaint should be stricken for failure to meet the requirements of 11 CFR 111.4. Specifically, the Complaint fails to contain the necessary "clear and concise recitation of the facts which describe a violation." 11 CFR 111.4(b)(3). Moreover, the Complaint fails to "be accompanied by any documentation supporting the facts alleged. . ." as required by Section 111.4(b)(4).

In this case, the Complaint merely alleges that DPI received excessive contributions and references "Democratic Party of Illinois FEC reports." The Complaint does not indicate which contributions are excessive, who made the alleged excessive contributions, when they were allegedly received, the amount of the allegedly excessive contributions, or any other information. This is hardly the "clear and concise" statement required by the Commission's procedures.

[1] The Complaint also incorrectly enumerates the contribution limitations applicable to DPI. See 2 USC 441a(a)

Commission regulations require a clear statement of allegations and supporting documentation in order to provide respondent committees an opportunity to prepare an adequate response. In this case, Complainant has neither made a specific allegation nor provided any supporting documentation. Accordingly, the Commission should take no further action regarding this portion of the Complaint.

III. The Democratic Party of Illinois Did not Produce or Pay for Any Communications Containing Express Advocacy.

Part Two of the Complaint alleges that DPI failed to report expenditures for a television commercial, quoted in the Complaint, as an independent expenditure, an in-kind contribution or a coordinated expenditure on behalf of Lane Evans. In this regard, Complainant is correct: DPI did not report this expenditure as independent, in-kind or coordinated because DPI did not, as is plain from the text of the advertisement in question, produce any advertisement containing express advocacy.

The advertisement referenced in the Complaint did not contain any electioneering message, but rather contained only a simple statement focusing on national legislative activity. The advertisement seeks only to "gain popular support for the [party's] position on given legislative measures." AO 1995-25. In this case, the advertisement specifically references the Republican Party positions on Medicare, taxes, minimum wage and social security. Moreover, the "call to action" contained in the advertisement is to "call your Congressman." The

advertisement does not contain any electioneering message and does not advocate the election or defeat of any candidate for federal office. The advertisement in this case, because it contains discussion of federal legislative issues and a specific non-electioneering call to action, is much more clearly an "issue ad" than those ads which the Commission considered, and found to be in compliance, in MURs 4553, 4671, 4713, 4407, and 4544. The Commission has previously considered, and resolved, the precise question presented here, and should take no further action on this portion of the Complaint.

1. 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 qualifications of candidates, enjoys extensive First Amendment protection. FEC v. Christian Action Network, 894 F. Supp. 946, 952 (W. D. Va. 1995); Maine Right to Life Comm. v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff d, 98 F.3d 1, 1996 U.S. App. LEXIS 27224 (1st Cir. 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. FCC, 512 U.S. 622, 114 S. Ct. 2445, 2459 (1994). "Exacting scrutiny" requires that restrictions 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 communications 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 communications address widely debated campaign issues and draw in a discussion of candidates' positions on particular issues, courts have held that these communications 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 and election advocacy at all:

> [T]he 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 difficulty 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. Discussions 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.

Maine Right to Life, 914 F. Supp. at 12.

Thus, 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 issues 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, the candidate." 1996 U.S. App. LEXIS 19047 at *4. Thus, consistent with Buckley, the Fourth Circuit concluded that even the exercise of evaluating whether a given issue ad 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 a 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:

> [T]here 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]").

In this case, the only DPI sponsored advertisement mentioned in the Complaint clearly related to issues advocacy and did not contain any explicit electioneering message.

2. 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. 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 that the Act's expenditure limitations "must be construed to apply only to expenditures for communications that in express terms advocate 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 by this Complaint -- that the Act's expenditure limitations might inhibit the free discussion and debate of issues and candidates. 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 for 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 here. There is no question that in the advertisements DPI stated clearly expressed an opinion with respect to the Republican Party's position on certain issues. However, "[i]n 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 adoption of the bright-line express advocacy test in lieu of a vague, free-floating "electioneering" test that is vulnerable to subjective application reflects the fundamental rule that First Amendment rights cannot be burdened by the prospect that the government may later determine that certain political speech was in fact unlawful. A standard that empowers the government to make post hoc judgments about the lawfulness of political speech violates the Fifth Amendment's guarantee of due process. "Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the

boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (notes, internal quotations and citations omitted).

The vague standard urged by Complainant 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:

> [I]n 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 "[w]hat 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 stated that "[b]y 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, DPI had a right to rely upon a bright line test to determine with certainty -- before they financed the advertisement -- whether its conduct was lawful. Only a closely drawn, and well-delineated standard of express advocacy can provide the requisite certainty. Any lesser standard would leave political parties in the untenable and unconstitutional position of having to guess whether their speech was lawful prior to engaging in political speech.

3. The Advertisements did not Expressly Advocate the Election or Defeat of a Clearly Identified Candidate.

There can be no doubt that the present advertisements 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 of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements do not constitute "express advocacy" as that term is defined in Buckley and its progeny." 894 F. Supp. at 953. While the advertisement might have associated the Republican Party and its candidate with unpopular legislative proposals in an effort to cause them to reverse direction, "nowhere in the commercial were viewers asked to vote against [them]." 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 their Congressman directly to voice their opposition to the proposed legislative actions mentioned in the advertisement.

Nor is it relevant that the advertisement clearly expressed a negative opinion about those politicians who supported cutting funding for Medicare, giving tax breaks to the rich, eliminating the minimum wage, or privatizing social security. "There is no requirement that issue advocacy be congenial or non-inflammatory. Quite to the contrary, the ability to present controversial viewpoints on election issues has long been recognized as a fundamental First Amendment right." Id. at 955. In sum, as the Court stated in Christian Action Network, "even if one views the advertisement's [call to action] as dubious or juvenile baiting, it cannot reasonably be said that the import of the ads was to instruct the public on how they should vote." Id. at 954.

The plain fact is that the advertisement did not expressly advocate the election or defeat of a clearly identified candidate for federal office. Nowhere in the ads 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" their Congressman and express their opposition to legislative position they had previously taken on specific issues of enduring national importance. Issue advocacy such as this is clearly protected by the First Amendment and outside the scope of the FECA.

4. Party Building Advertisements Without Express Advocacy Do Implicate the Coordinated Expenditure Provisions of Section 441a(d).

The Complaint incorrectly alleges that the advertisement at issue was somehow "coordinated activities." This is a patent misstatement of the provisions of the Act. Section

441a(d) permits State party committees to make expenditures "in connection with the general election campaign of candidates for Federal office . . ." 2 USC 441a(d)(1). As demonstrated above, the DPI advertisement referenced in the Complaint was for party building purposes. Because the advertisement was not made in connection with the general election campaign of a candidate for federal office, the Act's coordinated expenditure provisions are not applicable. Moreover, to the extent that the coordinated expenditure provisions are applicable, they are unconstitutional. FEC v. Colorado Republican Campaign Committee, No. 99-1211 (10th Cir. May, 5, 2000).

IV. The Commission Should Decline to Take Any Further Action On this Complaint on the Basis of Fairness and Laches.

This Complaint is obviously politically motivated. The Complainant signed this Complaint on June 12, 2000 and the Commission received it on June 14, 2000. All of the allegations contained in the Complaint, without a single exception, relate to events that occurred at least twenty months prior to its being filed. The meritless allegations relating to DPI, the purported affiliation of committees and the television advertising, have all been in the public domain since no later that January 31, 1999 (the last day to file non-federal disclosure reports with the Illinois State Board of Elections). Complainant, like everyone else in the nation, thus had all of the information necessary to produce and file this Complaint at least a year and a half prior to doing so.

Complainant offers no explanation as to why the Complaint comes so long after the alleged violations. Indeed, only one explanation is plausible: politics. The Complaint references activities in Illinois' 17th Congressional District election in 1998, in which Lane Evans defeated Mark Baker. The Complaint comes precisely as the 2000 election campaign approaches, a campaign in which Mark Baker will once again challenge Lane Evans. The timing of this Complaint clearly demonstrates that this is merely a case of sore losers trying gain an advantage in the upcoming political rematch by sullying the incumbant's name. The Commission should decline to allow its enforcement procedures to be used in such politically motivated way.

V. Conclusion.

For the reasons enumerated above, DPI respectfully requests that the Commission take no further action on this Complaint.

Sincerely,

Michael J. Kasper

MJK/vgm