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December 14, 2000

Lawrence M. Noble, General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
6th Floor
Washington, DC 20463

Re: MUR 5158, Gore/Lieberman, Inc. and Jose Villarreal, as Treasurer

Dear Mr. Noble:

This is the response of our clients, Gore/Lieberman, Inc. and Jose Villarreal, as treasurer, (the "Committee" or "respondents") to the complaint in the above-captioned matter under review ("MUR"). For the reasons stated below, this complaint is completely without merit, and there is absolutely no basis for the Commission to find reason to believe that the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") has been violated by the Committee. Accordingly, the respondents respectfully request that the Commission dismiss this complaint and close the file, as it pertains to the Committee.

I. FACTUAL BACKGROUND

The crux of the complainant's charges is that certain information placed on one or more websites maintained and sponsored by the advocacy group, Handgun Control, Inc. ("Handgun" or "sponsor") – albeit without the knowledge of the Committee -- contained express advocacy under the meaning of the Act and resulted in a contribution to respondents.[1] This information may be summarized as follows: (1) a "pop-up" screen responding to press coverage of an National Rifle Association ("NRA") event, (2) a link to a page within the Handgun site listing certain public officials and their record on gun control issues, (3) a link to a related site

[1] The complaint also contains allegations that Handgun and its separate segregated fund may have made impermissible contributions to several Senate and House candidates. Those are inapplicable to the Committee and, for that reason, are not addressed herein.

discussing the George W. Bush record on guns and gun control, and (4) an advertisement that discussed guns, gun control and George W. Bush's record on those topics.[2]

Respondents had no connection with these activities undertaken by Handgun. The Committee had no control or decision-making authority and did not request or suggest that these activities occur. It had no discussions with Handgun over them. Given the state of political activity on the Internet – and its explosive expansion in the last election cycle – it would be patently unfair for the Commission to penalize the Committee for these activities with which it had no connection, until such time as the Commission sets forth for the regulated community the requirements with respect to Internet political activity.

II. DISCUSSION

A. Under the Commission's regulations and established case law, the activities in question do not contain express advocacy and thus cannot be considered prohibited contributions to the Committee.

Under the applicable provisions of the FECA, the determination of whether a communication paid for by a third party constitutes a contribution to a candidate depends solely upon the communication's content. The appropriate analysis of the content is an examination for express advocacy – and in its absence, such a communication qualifies as issue advocacy. This content-based standard requiring a communication to contain words of express advocacy in order for it to be subject to the provisions of the FECA dates back twenty years to the landmark Supreme Court case of *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission codified this standard in 11 C.F.R. §100.22(a). If the communication does not contain words of express advocacy within the meaning of 11 C.F.R §100.22(a), it is not considered a candidate-communication and thus, is not subject to the limitations and prohibitions of the Act.

In the instant matter, the complainant alleges that the activities in question constitute express advocacy under 11 C.F.R. §100.22, without specifying between subsection (a) or (b), leaving the implication that either subsection is applicable to the activities complained of. However, the only appropriate analysis is under subsection (a), and complainant's failure to distinguish that analysis from the unconstitutional portion of subsection (b) is disingenuous, at best. Section 100.22(b) no longer provides an enforceable standard for defining express advocacy, because it broadly sweeps constitutionally protected language under its definition. Nearly every court which has reviewed FEC actions in this area has applied a narrow "express advocacy" standard – unless a communication contains words such as "elect" or "defeat" when referring to a clearly identified candidate, the communication is constitutionally protected issue advocacy and is not subject to the contribution or spending limits of the FECA. See, e.g., *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). Cf. *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) ("*CAN*") (awarding fees and costs requested under Equal

[2] For purposes of rebutting the specious allegations in the complaint, respondents have accepted the facts as described therein. However, because of the changes made to the website at issue, respondents have not independently verified the website information, and reserve the right to challenge that, as well as the veracity of the advertisement, at a later date, if the Commission fails to dismiss this complaint.

Access to Justice Act), rev'g on other grounds, 894 F.Supp. 946 (W.D. Va. 1995) aff'd per curiam, 92 F.3d 1178 (4th Cir. 1996).

In fact, two federal Courts of Appeal have specifically declared that section 100.22(b) is invalid – a fact which complainant conveniently disregards. See *FEC v. Christian Action Network*, 100 F.3d 1049, 151-57 (4th Cir. 1997); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), affirming 914 F. Supp. 8 (D.Me. 1996), cert. denied, 522 U.S. 810 (1997); *Virginia Society for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000); *Right to Life of Duchess County v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). Most importantly, in *Virginia Society for Human Life, Inc.*, the District Court issued a nationwide injunction precluding the Commission from "enforcing 11 C.F.R. §100.22(b) against the [Virginia Society for Human Life] or against any other party in the United States of America." 83 F. Supp. 2d at 677. To date, that injunction is in effect, and consequently, the Commission should reject complainant's argument.

Thus, the vague express advocacy standard relied upon by the complainant in making its allegations is inapplicable here. Under the applicable standard of section 100.22(a) and as more fully demonstrated below, it is clear that there is no express advocacy in the activities in question.[3]

B. The complaint fails to meet even the minimum standards required by the Commission for further consideration of the issue of coordination between the Committee and Handgun Control.

Complainant – without support of any kind – alleges that coordination sufficient under the Commission's apparent new coordination standard occurred to transform some of the activities into a contribution to the Committee. This claim is specious and warrants no further review, as explained below.

Under the Act and the Commission's regulations, a complaint to be sufficient, valid and appropriate for filing and consideration by the Commission must "conform" to certain provisions. Included in those provisions under 11 C.F.R. §111.4(d) are the following:

> (3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

[3] Even if the Commission were to pursue this matter under the constitutionally invalid standard of 11 C.F.R. §100.22(b), there is no doubt that the communications in question contain no express advocacy. Section 100.22(b) was the Commission's overbroad attempt to codify its "electioneering message" standard. See FEC Advisory Opinion 1985-14, Fed. Election Campaign Fin. Guide (CCH) ¶5189 (1985); FEC Advisory Opinion 1995-25, Fed. Election Campaign Fin. Guide (CCH) ¶6162 (1995). While we do not believe it is necessary to undertake a detailed analysis of this ad under the electioneering standard, it is clear that even a cursory reading of the communications at issue reveals that its content consists predominantly of the expression of the issue positions of its sponsors on gun control policy. Given this significant issue content, it cannot be reasonably concluded that the communications meet either of the prongs of section 100.22(b).

(4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available, to the complainant.

The complaint does contain any "documentation" of coordination between Handgun Control and the Committee. Its only recitation pertaining to coordination between Handgun and the Gore/Lieberman, Inc. is one reference to an appearance by Jim Brady in a paid broadcast advertisement from which complainant asks the Commission to "infer" coordination. In actuality, complainant provides no evidence of any contacts – let alone actual coordination – with this Committee in this election cycle.[4]

Complainant's allegations of facts do not under any conceivable reading describe activities by the Committee that could be used to describe actual coordination that could lead to a violation of a statute or regulation under the Commission's jurisdiction. Something more is required for the Commission to consider the facts as giving rise to coordination between Handgun and the Committee that could give rise to a possible violation. Respondents should not be required to respond to this gross speculation of coordination.

In addition, complainant completely disregards the standard of coordination drawn from *FEC v. Christian Coalition, Inc.*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999)("*Christian Coalition*"), in which that court defined coordination in the case of an "expressive expenditure" to include an expenditure for a communication where there has been substantial discussion or negotiation between the campaign and the sponsor over the content, timing, type of advertisement or intended audience, or volume of the communication. Substantial discussion is further defined as where the candidate and sponsor operate as partners or "joint venturers" in the expressive expenditure. Id. Clearly, nothing of the sort has occurred with respect to the activities complained of. Complainant does not suggest otherwise; it simply makes unsubstantiated allegations.

Moreover, assuming *arguendo*, that the standard contemplated by the Commission in proposed regulation 11 C.F.R. §100.23 is applied – albeit not in effect at the time of these activities – none of the alternate prongs of that standard would be satisfied here.[5] Specifically, a public communication paid for by a third party must be created, produced or distributed (1) at the request or suggestion of the Committee (or the candidate), (2) after the Committee (or the candidate) exercises control or decision-making authority over any of the communication's characteristics as listed in the proposed regulation, or (3) after substantial – in this case any – discussion or negotiation with the Committee (or the candidate) over any of the communication's characteristics as listed in the proposed regulation, for the Commission to find that the communication is a coordinated public communication. As explained below, such a finding simply cannot be made on the facts herein.

[4] Appearance in a broadcast advertisement is insufficient to establish coordination. See MUR 4553, *In the Matter of Dole for President, et al.*

[5] Section 100.23 is the Commission's attempt to codify the *Christian Coalition* standard and does not go into effect until 2001.

Accordingly, and as more fully demonstrated below, complainant provides no basis for the Commission to either investigate or conclude that any coordination regarding the activities in question occurred.

C. When the applicable standard is applied to the activities in question, it is clear that no violation of the FECA occurred.

1. The "pop-up" screen is not a contribution to the Committee.

First, complainant erroneously concludes that the Handgun "pop-up" screen or home page contains express advocacy on behalf of Al Gore. It does not. Under the standard described above and as contained in section 100.22(a) of the Commission's regulations, there are no words of express advocacy in the language cited by complainant. No words such as "elect", "defeat", "stop", "support, "vote for (or against)" or any other variation thereof appears. None of the language can be called an exhortation – by its express terms, it does not ask, solicit, seek or request the reader of the screen to take any action at all. Therefore, the plain language is simply absent the requirements of express advocacy, and to conclude otherwise is to add words to the screen that are simply not part of it.

Moreover, the mere fact that the screen poses a question for the viewer to think about does not transform the plain language into express advocacy. Exhortation to take action requires more than asking the viewer to think about an issue, as this language does. While complainant would wrongly have the Commission conclude that the only response to the question asked is a vote one way or another, that is not a reasonable interpretation. Certainly, it is equally reasonable to assume that a response to the question posed might be to contact George W. Bush and Al Gore and ask them not to support violence or a mob mentality – it is indisputable that many Bush supporter do not themselves support the NRA, and they may be moved to take this very action. The website has not exhorted them to vote, but it may make them think hard enough to take a position on the issue of gun violence.

Clearly, the language posed on this website is the very heart of issue speech. It is not changed by mentioning the candidates by name or their supporters, by posing a question, or by referencing the "White House". In the absence of the words of express advocacy, there is no contribution to the Committee. Further, complainant makes no allegation of coordination over this screen – though the Committee states unequivocably that there was none – and, therefore, that should not enter into the Commission's analysis. In short, this exercise of constitutionally-protected issue-oriented speech should be left uninhibited by the Commission, and the Commission should find no reason to believe that the Committee committed any violation of the Act as it pertains to this activity.

2. The "Dangerous Dozen" is not a contribution to the Committee.

Second, complainant complains about a page of the Handgun website called the "Dangerous Dozen" referring to members of Congress, but that also includes a discussion of the

records of George W. Bush and Dick Cheney. This page includes specific information about Mr. Bush's record while Governor of Texas and Mr. Cheney's record while a Member of Congress. Again, this is precisely the type of issue-related speech that is constitutionally protected and must remain outside the coverage of the Commission's express advocacy regulation.

Complainant concludes, in a cursory analysis, that the language constitutes express advocacy. Under the applicable standard of 11 C.F.R. §100.22(a), it does not. Contrary to complainant's misleading reading, the plain language at issue does not urge or exhort the viewer to vote for or against any particular candidate. The only exhortation is to "vote for common sense gun laws." The language urges the viewer to "[k]now the issues. Know the candidates." This is a clearly issue-oriented appeal for the public to vote on an issue-basis, rather than on a partisan or candidate-related basis.

In addition, this web page fits squarely within the "voting record" provision of the Commission's regulations at 11 C.F.R. §114.4, permitting the publication of a voting record to the general public without a corporate contribution occurring.[6] Where, as here, a voting record lacks express advocacy on behalf of a particular candidate, it need not also be devoid of a generic issue-related get-out-the-vote message. Alternatively, this communication may clearly qualify as a get-out-the-vote communication under 11 C.F.R. §114.4, since, again, it does not express advocate the election or defeat of a particular candidate, but, rather, contains a generic issue-related get-out-the-vote message. In fact, the only reasonable interpretation of the plain language of this web page is that the viewer (1) should educate himself on the issue of gun control and the candidates' records thereon and (2) should vote – as opposed to not voting at all – in accordance with those issues.

Clearly, the language posed on this website is the very heart of issue speech. It is not changed by mentioning the candidates or the date of the election, or by containing a generic issue-related exhortation. In the absence of the words of express advocacy, there is no contribution to the Committee. Further, complainant makes no allegation of coordination over this web page – though the Committee states unequivocably that there was none – and, therefore, that should not enter into the Commission's analysis. In short, this exercise of constitutionally-protected issue-oriented speech should be left uninhibited by the Commission, and the Commission should find no reason to believe that the Committee committed any violation of the Act as it pertains to this activity.

3. The web page "bushandguns.com" is not a contribution to the Committee.

Third, complainant complains about a separate part of the Handgun website (bushandguns.com) that provides issue information on the record of George Bush and guns. Complainant does not allege that there is any express advocacy here, and there is not. Under the standards long accepted by the Commission, the language of this part of the website stops far

[6] The Committee takes no position as to whether Handgun Control, Inc. is a qualified non-profit under 11 C.F.R. §110.10, though certainly on its face, it appears to be.

short of express advocacy and is absent any of the so-called magic words or any other language that could conceivably meet the requirements of an express exhortation.

Instead, complainant erroneously alleges coordination between Handgun and the Committee, based not on the activity at issue, but based merely on one advertisement in which Jim Brady appeared on behalf of the Committee's predecessor, Gore 2000, Inc. Not only are the facts of this allegation irrelevant to the appropriate analysis, but complainant is employing the wrong legal standard as well. Complainant provides nothing to support this allegation under the *Christian Coalition* standard, as discussed above.

In fact, the Committee engaged in no discussions or negotiations over this website.[7] The Committee had no control or decision-making authority over the website. The Committee was not even aware of the website's contents, or when or where it was going to appear. No measure of speculation by the complainant can transform this simple non-involvement by the Committee into coordination, and complainant fails to meet even the threshold showing necessary for the Commission to review these facts. Certainly, the presentation of the website alone, with nothing more alleged cannot meet any conceivable standard, let alone the one cited from *Christian Coalition*.

In addition, even under a broader analysis, there is simply no basis in complainant's allegations for the Commission to examine this activity any further. An appearance by Jim Brady in an advertisement for Gore 2000 cannot logically support a claim of coordination by Gore/Lieberman and Handgun Control over the latter's website. Moreover, as discussed in subsection (2) above, this web page too qualifies either as a permissible voting record or get-out-the-vote communication under 11 C.F.R. §114.4, and as such – given its lack of express advocacy on behalf of a particular candidate – constitutes an allowable issue-oriented communication to the public.

Clearly, the language posed on this website is the very heart of issue speech. In short, this exercise of constitutionally-protected issue-oriented speech should be left uninhibited by the Commission, and the Commission should find no reason to believe that the Committee committed any violation of the Act as it pertains to this activity.

4. The Handgun ad is not a contribution to the Committee.

Finally, complainant alleges that a certain advertisement by Handgun expressly advocates the defeat of George W. Bush. A clear reading of its language reveals that it does not. Under the standard described above and as contained in section 100.22(a) of the Commission's regulations, there are no words of express advocacy in the language cited by complainant. No words such as "elect", "defeat", "stop", "support, "vote for (or against)" or any other variation thereof appears. None of the language can be called an exhortation – by its express terms, it does not ask, solicit,

[7] Under the standard proposed by the complainant, the Committee would be required to prove a negative, i.e., that no one on its behalf discussed this ad. The Committee strongly asserts that no such discussions occurred.

seek or request the viewer to take any action at all. Therefore, the plain language is simply absent the requirements of express advocacy, and to conclude otherwise is to add words to the ad that are simply not part of it.

Moreover, the mere fact that the ad poses a question for the viewer to think about does not transform the plain language into express advocacy. Exhortation to take action requires more than asking the viewer to think about an issue, as this language does. While complainant would wrongly have the Commission conclude that the only response to the question asked is a vote one way or another, that is not a reasonable interpretation. Certainly, it is equally reasonable to assume that a response to the question posed might be to contact George W. Bush and Al Gore and ask them to oppose the NRA and support gun control – it is indisputable that many Bush supporters do not themselves support the NRA, and they may be moved to take this very action. The ad has not exhorted them to vote, but it has made them think hard enough to take a position on the issue of gun violence.

Clearly, the language posed in this ad is the very heart of issue speech. It is not changed by mentioning the election, by posing a question, or by referencing the "President" or "oval office". In the absence of the words of express advocacy, there is no contribution to the Committee. Further, complainant makes the same allegation of coordination over this ad as it does with respect to the web page above. Although the Committee states unequivocably that there was none, it incorporates the arguments made above. The *Christian Coalition* standard is not met by complainant's specious charge, and nothing about Jim Brady's appearance in an ad for Gore 2000, has any relevance or bearing on this ad by Handgun Control.

In fact, the Committee engaged in no discussions or negotiations over this ad. The Committee had no control or decision-making authority over the ad. The Committee was not even aware of the ad's contents or its intended audience, when or where it was going to appear, or how often. No measure of speculation by the complainant can transform this simple non-involvement by the Committee into coordination, and complainant fails to meet even the threshold showing necessary for the Commission to review these facts. Certainly, the broadcast of the ad alone, with nothing more alleged cannot meet any conceivable standard, let alone the one cited from *Christian Coalition*.

In short, this exercise of constitutionally-protected issue-oriented speech should be left uninhibited by the Commission, and the Commission should find no reason to believe that the Committee committed any violation of the Act as it pertains to this activity.

III. CONCLUSION

Under the reasoning and analysis stated above, the Committee has clearly demonstrated that it did not violate the Act in connection with any of these activities. However, there is one additional reason as to why the Commission should take no further action in connection with this complaint: the rapid acceleration and expansion of political activities on the Internet and the concurrent lack of clear guidance from the Commission as to what steps the regulated community must take to comply with the Act. Clearly, the Commission is aware that candidates

do not have the resources to monitor and police all web sites for activities that may affect those candidates' compliance with the law. Nor is there any requirement for the candidates to do so. Until such time as there is a clear understanding from the Commission as to the burden on candidate committees as to how to achieve full compliance with electronic and Internet political activities of others, it would be patently unfair to penalize the candidates for activities such as those described herein. For that reason alone, we urge the Commission to take no further action on this matter and close the file as it pertains to the Committee.

Respectfully submitted,

Eric Kleinfeld

Lyn Utrecht