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VIA COURIER

Thomas Andersen, Esq.
Mark Shonkwiler, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 4736
Dr. Brian Babin
Brian Babin for Congress
and Thomas E. Freeman, as Treasurer

Dear Messrs. Andersen and Shonkwiler:

Attached is the reply brief of our clients, Dr. Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as treasurer, to the Office of the General Counsel's brief in the above referenced matter.

Please do not hesitate to call with any questions.

Respectfully submitted,

Benjamin L. Ginsberg
William J. McGinley

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4736
Dr. Brian Babin	)	
Brian Babin for Congress	)	
and Thomas E. Freeman, as Treasurer	)	

REPLY BRIEF OF DR. BRIAN BABIN AND BRIAN BABIN FOR CONGRESS, AND THOMAS E. FREEMAN, AS TREASURER

I. INTRODUCTION.

Repeating a now familiar pattern, the Office of the General Counsel ("OGC") has once again placed the Members of the Federal Election Commission ("Commission") in an untenable (and unenviable) position by failing to find in a multi-year investigation the evidence it wishes it had, yet nonetheless recommending a finding of probable cause. This proposed finding ignores the Commission's own precedents, established case law and, most significantly, the evidence in this case.

As this brief shows, the OGC's submission concerning our clients, Dr. Brian Babin and Brian Babin for Congress and Thomas E. Freeman, as Treasurer ("Babin Committee") (collectively "Respondents") is rife with inaccurate characterizations of the evidence, as well as legally unfounded conclusions of our clients' motives and actions. The legal standard the OGC advocates blazes new ground where the Commission has not ventured, and, in fact, the OGC contradicts the very rule adopted by the Commission at 11 C.F.R. § 100.23. The Commission should dismiss this matter and take no further action.

Furthermore, the OGC's brief, to reach its preordained conclusion, disregards the basic legal principle that the burdens of production and persuasion lie with the OGC, not the Respondents. Inaccurate characterizations and inferences are no substitute for actual evidence. Nor is regret that neither the federal courts or the Commission has interpreted the statutes and regulations at issue in this matter as staff would prefer grounds for a probable cause finding.

Part of the much broader Triad investigation, the probable cause recommendation against the Respondents rests not on any facts developed during the OGC investigation but rather upon the uncorroborated and self-serving allegations of the complainant, Peter Cloeren, a convicted felon whose motive for revenge is self-evident but ignored by the OGC. For support, the OGC's brief must actually cite the very same materials produced by Mr. Cloeren and rejected by this same OGC as misleading and false in MUR 4783. OGC RTB Brief MUR 4783 at 10 n. 7.

As described more fully in this brief, the OGC's brief is characterized by its mischaracterization of the factual record by partial citations that omit exculpatory evidence. As a result, the OGC's brief fails to meet its burden since it does not:

- Acknowledge and analyze the evidence and testimony that directly contradicts Mr. Cloeren's complaint and the inferences upon which the OGC's brief rests.

- Acknowledge to the Commission that the factual section of the conciliation agreement in MUR 4783, which the OGC invokes to provide "context", explicitly states that the Babin Committee did not receive notice of Peter Cloeren's nefarious activities until he pled guilty to election law offenses in 1998. Dr. Babin and Walter Whetsell were dismissed from the MUR and the Commission took no further action against them. Yet the OGC here contradicts the Commission's earlier finding, which negates the OGC's findings in this MUR.

- Disclose that Mr. Cloeren directly contradicted his own complaint (and the OGC's brief) by admitting that Rep. Tom Delay and his aide solicited his contribution to Citizens for Reform ("CR") during a 1998 phone call allegedly recorded by the FBI and cited by the OGC. The phone call transcript (based only on a Cloeren attorney's notes but cited by the OGC as authoritative) also shows a veiled threat of revenge against Respondents – a portion omitted by the OGC.

- Meet its burden in presenting any evidence that Dr. Babin or the Babin Committee played any role in Mr. Cloeren's contribution to Citizens United Political Victory Fund ("CUPVF"), that the Respondents played an indirect role through Triad in CUPVF's decision to contribute to the Babin Committee, or that Dr. Babin or the Babin Committee had any knowledge that Mr. Cloeren had made a contribution to CUPVF when the Babin Committee received the contribution from the organization.

- Meet its burden in presenting any evidence that Dr. Babin or the Babin Committee solicited the contribution from Peter Cloeren and his wife to CR or that Dr. Babin or the Babin Committee engaged in any activity rising to the level of coordination under existing case law or Commission precedents.

Accordingly, for these reasons and those set forth below, the Commission should find no probable cause to believe that Dr. Babin violated 2 U.S.C. §§ 441a(f) and 441b and the Babin Committee violated 2 U.S.C. §§ 434, 441a(a)(8), 441a(f) and 441b, dismiss these matters and take no further action.

II. STATEMENT OF THE CASE.

A. The OGC's reliance on assumptions and innuendoes wrongly shifts the burden of proof and the burden of persuasion to the Respondents.

As a matter of law, the burden of proof lies with the OGC to support its recommendation. However, the OGC shifts the burdens of proof, production and persuasion to Dr. Babin and the Babin Committee. A thorough review of the 36-page brief shows that it rests only on inferences and assumptions, rather than the factual record.[1] A careful reading of the OGC's brief shows that its assertions are qualified by such statements as "it is entirely credible that [they]... would have discussed...", OGC Brief at 28, "extremely unlikely", id. at 29, "it can be no mere coincidence...", id., "the transcript of the conversation suggests... some level of knowledge...", id. at 31, "it makes sense that he would have favorably entertained requests...", id. at 31-32, "the most logical conclusion...", id. at 32, "should be considered a request by the Babin Committee...", id. at 33, and "it is extremely unlikely...", id. at 34. This cannot substitute for the actual evidence that the OGC is required to present to meets its burden.

[1] For example, the OGC's brief provides that "[t]his office does not regard the assertion that Dr. Babin had a speaking engagement 150 miles from Mr. Cloeren's office on the same day (at either 8 am or 8 pm, depending on [sic] interpretation of the scheduling record produced by Dr. Babin) as dispositive proof that Dr. Babin could not have picked up the check from Mr. Cloeren at some other point 'on or about' October 7, 1996." OGC Brief at 28 n. 19 (emphasis added). The burden is not on the Respondents to prove their innocence; the burden lies with the OGC to satisfy the burden necessary for a probable cause finding. The OGC has not produced or cited any evidence that Dr. Babin picked up the check "on or about" October 7, 1996. Dr. Babin and Mr. Whetsell's testimony has been consistent throughout this investigation and the campaign's scheduling records demonstrate that Dr. Babin was at an event 150 miles away from Mr. Cloeren's business on October 7, 1996.

B. **The record as presented by the OGC's brief is fatally flawed by omissions and inaccuracies.**

1. **Citizens United Political Victory Fund charge.**

The OGC charge that Respondents knowingly accepted excessive contributions from Cloeren through CUPVF and that the Babin Committee failed to report the true source of the contribution as well as not properly reporting an earmarked contribution rests on inferences and characterizations of evidence rendered inaccurate because they are taken out of context. Even more troubling, the OGC brief omits exculpatory evidence demonstrating the Respondents' compliance with the law and corroborating their version of events. For example:

- OGC Brief: "Telephone records produced by the Babin Committee show at least twelve phone calls being placed from the campaign headquarters to Mr. Cloeren's office at Cloeren, Inc. between September 13 and October 8, 1996, lasting between three and eight minutes." OGC Brief at 19. The OGC brief cites these phone calls in the analysis section as "records of phone calls from the Babin Committee to Mr. Cloeren's business during the period in late September and early October 1996 in which the CUPVF contribution was allegedly solicited." Id. at 28. Actual Record: However, what the OGC's brief fails to produce is any evidence that the contribution was actually solicited in any of those telephone calls. The OGC's brief fails to include the fact that Peter Cloeren hosted an in-home fundraiser for the campaign on September 14, 1996, see Brian Babin for Congress Campaign Schedule September 1996 and W. Whetsell Depo. Tr. at 117, and that on October 8, 1996, a "Rally/Campaign Pledge" was held at the Cloeren Corp. in Orange, Texas, see October 6, 1996 Dr. Brian Babin Republican for Congress News Advisory at 2. Moreover, Mr. Whetsell directly testified that he and Dr. Babin did not ask Cloeren to make a contribution to CUPVF. W. Whetsell Depo. Tr. at 158-59. Dr. Babin directly testified that he did not even learn of Cloren's CUPVF contribution until 1998. B. Babin Depo. Tr. at 231. Therefore, there is no evidence contradicting that the phone calls from the Babin Committee to Peter Cloeren's office are the logistics and planning of the in-home fundraiser and campaign rally event, neither of which are part of this matter. Again, the burden is on the OGC and a mere listing of phone calls without any evidence of the content of the calls cannot be a substitute for the OGC's evidentiary burden.

- OGC Brief: "As mentioned, CUPVF vice president Michael Boos testified that he spoke with Triad finance director Meredith O'Rourke (to whom Peter Cloeren had been referred by Babin consultant Whetsell, according to Ms. O'Rourke's testimony) in late October 1996, at which time she encouraged him to make further PAC contributions to the Babin campaign." OGC Brief at 29. Actual Record: However, Ms. O'Rourke actually testified that the only information Mr. Whetsell provided to Triad concerning Mr. Cloeren was "his name, address and telephone number and suggested that we call

him and send him the information." M. O'Rourke Depo. Tr. at 371. Ms. O'Rourke also testified that she and Mr. Whetsell never discussed a contribution swap for the Babin Committee, id. at 374, and that no one at Triad ever talked to Mr. Cloeren, id. at 372 & 385-86. She also testified that she never discussed Mr. Cloeren with Michael Boos. Id. at 389-90. Mr. Boos testified that he called Ms. O'Rourke (although Ms. O'Rourke does not recall discussing the Babin Committee with Mr. Boos) to ask about conservative challenger candidates who may need contributions and that the phone call occurred after CUPVF had made a contribution to the Babin Committee. M. Boos Depo. Tr. at 187-88 & 193. Therefore, any conversation that may have occurred between Ms. O'Rourke and Mr. Boos had no bearing on CUPVF's decision to contribute to the Babin Committee.

- OGC Brief: "Moreover, CUPVF was part of Triad's 'coalition' of PACs that received individual contributions through Triad during the 1996 election cycle. . . ." OGC Brief at 29. Actual Record: However, Mr. Boos actually testified that he told Triad that they were not authorized to solicit contributions to CUPVF and that they could not represent to anyone that they worked for CUPVF. M. Boos Depo. Tr. at 59-60 & 105-06. Mr. Brown testified that he and Triad never discussed having "maxed-out" donors contribute to CUPVF so that the PAC could, in turn, contribute to the maxed-out campaigns. F. Brown Depo. Tr. at 113-14. Mr. Brown also testified that no third-party intermediaries urged CUPVF to make a contribution to the Babin Committee. F. Brown Depo. Tr. at 169 & 175.

- OGC Brief: The OGC's brief states that "Triad had made specific contribution recommendations to CUPVF, including a recommendation that it support Dr. Babin during the general election." Id. at 29. It also states: "Mr. Boos testified that Triad occasionally recommended candidates that it viewed as deserving CUPVF's support . . . ." OGC Brief at 20. Actual Record: However, a review of the transcript shows Mr. Boos actually testified under oath that the decision to contribute to candidates was based upon CUPVF's general criteria which focussed on conservative challenger candidates. M. Boos Depo. Tr. at 55-56. He also testified under oath that the 1996 Babin race was being watched closely by conservative activists across the country, id. at 191, and that the decision to make contributions was made by Floyd Brown, Citizens United's president. Id. at 183-84. Mr. Brown testified under oath that he made contribution decisions based upon reading conservative periodicals and discussions with other conservative friends and colleagues. F. Brown Depo. Tr. at 63-64 & 69-70. He also testified under oath that Triad's recommendations did not play a role in any contribution made by CUPVF and that he did not even "receive the faxes and the information from Triad." Id. at 173. Therefore, there is no evidence that Dr. Babin or the Babin Committee had an indirect role through Triad in CUPVF's decision to make the contribution.

- OGC Brief: "Mr. Brown, however, testified that he specifically remembers meeting Dr. Babin during the 1996 election cycle, when Dr. Babin visited his Fairfax, Virginia office. Brown Depo. Tr. at 151-59. Mr. Brown also testified that Dr. Babin also sent him 'repeated solicitations'. Id. at 175." OGC Brief at 20 & 29 ("Floyd Brown, president of Citizens United, testified that Dr. Babin personally met with him and repeatedly solicited contributions from CUPVF."). Actual Record: However, Mr. Brown actually testified as to his belief that he met Dr. Babin during the 1994 election cycle, but after prodding

from the Commission's attorneys, he believes that the meeting may have occurred sometime in 1995, or possibly 1993 or 1994. F. Brown Depo. Tr. at 157-58. He also testified that he was not in "touch" with Dr. Babin on a regular basis during his 1996 election campaign, id. at 159, and that the "repeated solicitations" he received from Dr. Babin were no different than those he received from other candidates. Id. at 175 ("Yes, Mr. Babin. He sent me repeated solicitations, like a lot of candidates.") (emphasis added). The Act and Commission regulations permit a federal candidate to solicit a contribution from a federal PAC. The record shows that any solicitation of CUPVF was similar to those the PAC received from other federal candidates.

Accordingly, the evidence in this matter actually demonstrates that Dr. Babin and the Babin Committee did not solicit the contribution from Peter Cloeren to CUPVF, that Triad played no role in CUPVF's decision to contribute to the Babin Committee, and that Dr. Babin and the Babin Committee had no knowledge of Peter Cloeren's CUPVF contribution when they received the contribution from CUPVF.

2. **Citizens for Reform charge.**

A similar lack of evidence or legal support characterizes the OGC allegations concerning Dr. Babin and the Babin Committee knowingly accepting excessive contributions from the Cloerens through CR, and failing to report them or, in the alternative, knowingly accepting a corporate contribution from CR and failing to report it. Again, selective citations to the record omitting exculpatory evidence about the allegations of the Cloerens' donation to CR and CR's issue advocacy advertising characterizes the recommendation. For example:

- OGC Brief: "Mr. Whetsell specifically acknowledges that Mr. Cloeren contributed to Triad and that Triad provided a service to the campaign, and he 'thought it was TV'". OGC Brief at 31. "The transcript of Mr. Whetsell's conversation with Mr. Cloeren, which contains simultaneous references by Mr. Whetsell to both the Cloeren contribution and what Triad 'did . . . for us' shows that, in his mind, the Cloeren contribution was being used for Triad's advertising effort to support the Babin campaign." Id. at 33-34 (emphasis added). Actual Record: This statement, again based only on the notes of Mr. Cloeren's lawyer, mischaracterizes the exchange between Messrs. Whetsell and Cloeren. Mr. Whetsell actually stated, as transcribed by Mr. Cloeren's attorney, that he could not be involved in independent activities by Triad, that he does not remember what activities Triad engaged in but that he thought it was "TV", and that someone else thought it was mail. Cloeren's Atty's Notes at 3. Contrary to the OGC's Brief, this does not support the assumption that in Mr. Whetsell's mind there was a connection between any two events. Further, although omitted from the OGC's brief, Ms. O'Rourke testified that the only information received from Mr. Whetsell by Triad about Mr. Cloeren was "his name, address and telephone number and [a suggestion] that we call him and send him the information." M. O'Rourke Depo. Tr. at 371. Ms. O'Rourke also testified that no one at Triad ever talked to Mr. Cloeren. Id. at 372 & 385-86.

- OGC Brief: "Further, although CR avoided using express advocacy, the efforts of Triad to coordinate the CR advertisement with the Babin campaign demonstrate that the purpose of the advertisement was to influence federal elections. Triad's interaction with the Babin campaign insured that the CR advertisement would have the maximum effectiveness garnering support against Brian Babin's opponent." OGC Brief at 35. Actual Record: The full record tells the opposite story. Ms. O'Rourke testified under oath that she and Dr. Babin did not speak to each other during the 1996 election cycle. M. O'Rourke Depo. Tr. at 372-373 & 374. She further testified that she and Mr. Whetsell did not discuss any polling information about the Babin Committee. Id. at 374. Jason Oliver, who worked for Mr. Rodriquez in 1996, testified that he was instructed by Carlos Rodriquez and Carolyn Malenick to collect basic, public information (e.g., positions on issues, whether the candidate was married and has children, etc.) during his phone calls with campaigns. J. Oliver Depo. Tr. at 29-30. He also testified that Triad was never asked by a campaign for assistance with any issues and that Triad was never asked to run issue ads by a campaign. Id. at 115-16 ("We were never asked to run issue ads to my knowledge.") (emphasis added). He also testified that he never told any campaign what type of issue ads might be aired by Triad. Id. at 123-24. Carlos Rodriquez testified under oath that the issue information developed during the Babin

Committee political audit was all a matter of public record (e.g., votes on crime, drug dealing, homosexual rights, etc.). C. Rodriquez Depo. Tr. at 365. He also testified that he did not ask campaigns during political audits whether issue ads would be helpful. Id. at 303 & 368 (testifying that there was no polling information in Babin Committee political audit).

- OGC Brief: "Dr. Babin's August 1996 note to Mr. Cloeren emphasized the need for "dollars for television ads" to counteract his opponents' support from outside "lawyer and union money." OGC Brief at 31. Actual Record: However, the OGC brief fails to disclose that the Babin Committee itself ran a series of advertisements on the issues of the state jail felony law and lowering taxes in addition to biographical advertisements designed to introduce the candidate to the voters. B. Babin Depo Tr. at 216 & 220-21. The OGC's Factual and Legal Analysis in MUR 4783 actually confirms this by stating that the letters from Dr. Babin to Mr. Cloeren in May and August 1996 "do not suggest complicity" in Mr. Cloeren's nefarious activities. OGC RTB Brief MUR 4783 at 10 n. 7. Therefore, since the OGC had earlier rejected Mr. Cloeren's version of events, it cannot now reverse course in a different matter and use them as support for unsupportable inferences. It is not a violation for a candidate to tell his fundraisers that he or she needs money for campaign television advertisements.

Accordingly, the OGC has failed to develop any evidence to corroborate the Cloeren allegations. The actual record shows that Dr. Babin and the Babin Committee did not solicit the contribution from Peter Cloeren to CR, Dr. Babin and the Babin Committee did not request or suggest that Triad run issue advocacy advertisements, and Dr. Babin and the Babin Committee did not discuss issue advocacy advertisements or any non-public information about the campaign with anyone at Triad or CR. Therefore, the issue advocacy advertisements aired by CR were not coordinated with Dr. Babin or the Babin Committee either directly or indirectly through Triad.

3. The OGC wrongly uses the allegations the Commission rejected in MUR 4783 to mislead the Commission.

The OGC misleadingly uses the allegations at issue in MUR 4783, a now-closed MUR. The Conciliation Agreement in MUR 4783 and correspondence from the OGC demonstrate that Dr. Babin, Mr. Whetsell and the Babin Committee did not have any knowledge of Cloeren's nefarious

activities until 1998, two years after the alleged transactions, when he and his company pled guilty to election law offenses in federal court.[3] The OGC's brief admits:

> Concerning Dr. Babin's and Mr. Whetsell's alleged complicity in the reimbursement scheme, the Commission took no further action in MUR 4783 regarding all related RTB findings made against them.

Id. at 15. However, while the OGC cites a closed MUR for its interpretive "contextual background," OGC Brief at 12 n. 6, it fails to even mention in the body of the brief the significant fact that MUR 4783 Conciliation Agreement's factual section explicitly states that Babin for Congress did not receive notice of Peter Cloeren's acts until June 1998, almost two years after the 1996 election.

> 10. On June 24, 1998, Peter Cloeren and Cloeren, Inc. pled guilty in U.S. District Court for the Eastern District of Texas to misdemeanor violations in connection with having made $37,000 in corporation contributions in the name of others to Babin for Congress. On or around the same date, Brian Babin for Congress received notice of Mr. Cloeren and Cloeren, Inc.'s guilty plea, including the fact that it possessed $37,000 in illegal corporate contributions made in the name of others.
>
> 11. On or around August 17, 1998, Brian Babin for Congress disgorged $37,000 to the Bureau of Public Debt, approximately 54 days after first learning that it possessed the illegal funds. By not refunding or disgorging the funds within 30 days of learning they were illegal, Brian Babin for Congress accepted prohibited contributions.

MUR 4783 Conciliation Agreement at ¶¶ IV.10 & 11 (emphasis added). In addition, the December 4, 2000 letter from the Commission to Dr. Babin and the Babin Committee's attorneys concerning MUR 4783 states:

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[3] The OGC's RTB Brief in MUR 4783 also eliminated Dr. Babin's letters to Cloeren as credible evidence of wrongdoing, noting in a footnote "these letters do not suggest complicity in the employee contribution scheme." OGC RTB Brief MUR 4783 at 11 n. 8. (emphasis added). The OGC came to this conclusion with full knowledge that Mr. Cloeren's allegations relied significantly on these letters in his case against Dr. Babin. Interestingly, later in the same footnote the OGC's RTB Brief characterized as wrong Mr. Cloeren's unfounded characterization of a letter written by Dr. Babin in July 1998, as a letter intended to muzzle Mr. Cloeren and obstruct a federal investigation. The Brief itself recognized the letter for what it truly was – a simple letter of sympathy. Id. The OGC correctly identified the fatal disconnect between Mr. Cloeren's grossly distorted interpretation of the three Babin letters and the reality of what those letters represented. The OGC quite properly rejected Mr. Cloeren's representations regarding those letters. Therefore, the letters from Dr. Babin to Peter Cloeren cannot provide any support for the allegations contained in his complaint. After rejecting the letters as credible evidence in MUR 4783, it is wrong for the OGC to even refer to them in its brief in this matter.

(Letter from Thomas J. Andersen, Federal Election Commission, to Benjamin L. Ginsberg & William J. McGinley of 12/4/2000 at 1.) (emphasis added). As the Commission's Conciliation Agreement and December 4, 2000 letter demonstrate (but the OGC's brief fails to disclose), Dr. Babin and Mr. Whetsell were dropped from MUR 4783 and did not have any knowledge about Mr. Cloeren's activities until June 1998, two years after the alleged transactions, when Peter Cloeren and Cloeren, Inc. pled guilty in federal court to misdemeanor election law offenses. Therefore, the Commission's findings in MUR 4783 contradict the OGC contention here that Dr. Babin and the Babin Committee had any knowledge or involvement with Peter Cloeren's alleged activities at issue in this matter.

C. The OGC's own evidence shows that Peter Cloeren was set on seeking revenge if he was prosecuted for his illegal acts and the complaint upon which the OGC rests is the undeniable fruits of this motive.

If Mr. Cloeren's attorney's notes are to be given any credibility, during the 1998 telephone call between Mr. Cloeren and Mr. Whetsell, Mr. Cloeren made a veiled threat of reprisal against Dr. Babin and the campaign. Mr. Cloeren stated "[w]hat I'm worried about is I don't want to be the only one hanging on the tree." Cloeren Atty's Notes at 5 (emphasis added). Mr. Cloeren and his company pled guilty and the complaint filed with the Commission upon which the OGC relies is the product of that revenge. Yet, in order to bolster its non-existent case, the OGC wrongly gives the Cloeren complaint unfettered credibility.

Mr. Cloeren's bitterness toward the Dr. Babin and the Babin Committee apparently flows from the fact that his actions became the subject of a grand jury investigation, that he pled guilty to

election law violations and that the Respondents were cleared of any wrongdoing by the U.S. Attorney's Office. Significantly, the U.S. Attorney's Office which prosecuted Cloeren, headed by U.S. Attorney Michael Bradford, cleared Respondents of any wrongdoing, and issued a public statement that "[Respondent] Babin was no longer the subject of any investigation and no charges against him were anticipated." *Beaumont Enterprise* at 8A (August 6, 1998), a point Mr. Cloeren's complaint concedes (Complaint at 6), but the OGC never mentions. Bradford himself has indicated that "Federal agents investigated Babin's role and will bring no charges against him." *Houston Chronicle* at 21-22A (June 25, 1998). Ultimately, "FBI investigators concluded neither Babin nor his campaign staff knew that contributors from Cloeren employees were illegal." *Orange Leader* (August 8, 1998). "Federal prosecutors say they have no evidence that Babin participated in any schemes." *The Hill* at 1 (August 5, 1998) (emphasis added).[4] Rather than recognize the Cloeren complaint for what it is -- a vindictive attempt to shift blame to others – the OGC rests upon it.

[4] Mr. Cloeren's failure to shift blame for his own actions to others has apparently angered him, with the *Houston Chronicle* reporting that Cloeren "is irked that the U.S. [A]ttorney in Beaumont has said that he is not pursuing a case against Babin." *Houston Chronicle* at 21A (August 6. 1998). Once the U.S. Attorney cleared Babin and his campaign, Cloeren vetted the details of the complaint with the press, giving "extensive interviews" to *The Hill* regarding what he apparently characterized as a "confidential filing," notwithstanding that *The Hill* explicitly referenced his complaint. *The Hill* at 13 (August 5, 1998); *see also Houston Chronicle* at 37A (August 7, 1998) (referencing the complaint); *Orange Leader* at 1A (August 8, 1998).

Apparently miffed with the findings of the U.S. Attorney and not satisfied with the Commission's investigative abilities, "Cloeren and his attorneys [met] in Houston to outline their allegations to Democratic staff members of the GOP-run House committee that has been investigating 1996 election financing . . . ." *Houston Chronicle* at 21A (August 6, 1998) (Exhibit B). A member of that committee is Democrat Congressman Jim Turner, who narrowly defeated Babin for the congressional seat in Texas' second District in 1996 and was being challenged by Babin in the 1998 general election when the complaint was filed. *See* Complaint at 2; *Orange Leader* at 1A (August 8, 1998) ("The timing of Cloeren's charges could have serious political consequences for Babin two months before his second showdown with U.S. Rep. Jim Turner."). Moreover, Cloeren, a former supporter of Respondent Babin, has been characterized as a "bitter man" with a "personal vendetta" against Respondents, and has said that "his view of [Respondent] Babin changed . . .," and that his "view of [Respondent] Babin took an 180-degree spin." *Beaumont Enterprise* at 6A (June 25, 1998).

II. LEGAL ANALYSIS

A. Applicable Law.

1. **Under the Act and Commission regulations, an individual may contribute no more than $1,000 per election to a campaign committee and $5,000 per calendar year to a PAC.**

The Act limits the amount that individuals may contribute to political committees to $1,000 per election to any federal candidate or his or her authorized campaign committee, and $5,000 per calendar year to any PAC. 2 U.S.C. §§ 441a(a)(1)(A) & (C); 11 C.F.R. §§ 110.1 (b) & (d). There is also a $25,000 aggregate annual limit applicable to individuals. 2 U.S.C. § 441a(a)(3); 11 C.F.R. § 110.5.

a. **The three part test under 11 C.F.R. § 110.1(h).**

In drafting the Act, Congress foresaw the situation presented here of a person contributing to a candidate and then contributing to a PAC which also gives to the same candidate. Congress determined that this did not require the aggregation of contributions and was not a violation of the Act, so long as the criteria set forth in 11 C.F.R. § 110.1(h) were satisfied. The burden is on the Commission (not the recipient committee) to demonstrate a violation of section 110.1(h) which provides:

> A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political action committee which has supported, or anticipates supporting, the same candidate in the same election, as long as –
>
> (1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;
>
> (2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and

(3) The contributor does not retain control over the funds.[5]

b. Commission Enforcement Actions.

The Commission's precedents hold that a violation can only occur when the contributor to a candidate donates to a PAC "with the knowledge that a substantial portion [of that contribution] will be contributed to ... that candidate." MUR 2898, General Counsel's Report at 10. The complaint in MUR 2898 involved three individuals charged with using a PAC as a conduit to evade their individual contribution limits to a candidate. The three individuals contributed to a candidate and then to a multi-candidate PAC at the recommendation of the candidate which also contributed to that candidate. The complaint further noted that the contributions from the individuals to the PAC came in close proximity to the PAC's contributions to the candidate, and that the PAC gave a disproportionate amount of its support to that candidate.

The Office of General Counsel in that case recommended a finding of no reason to believe because there was no evidence of any discussion, either directly or indirectly, by the PAC with its donors about which candidates would receive its contributions. In addition, the General Counsel's report noted that the candidate urged the individuals to contribute to the PAC on the grounds it was an "organization sharing his political philosophy". General Counsel's Report at 12-13.

In MUR 3313, the complaint charged that a PAC was an "alter ego" of a candidate's campaign committee so that any contribution to the PAC was also a contribution to that candidate. The General Counsel recommended the finding of a violation on the grounds that the contributors gave with the knowledge that a substantial portion of their contribution would aid the candidate

[5] The Commission's initial policy statement on this regulation, issued as part of MUR 150 (1976) in the context of independent expenditures, confirms that "a person may contribute $1,000 to a candidate, and also contribute to a political committee which has supported, or anticipates supporting that candidate without violating the $1,000 per election limitations, so long as the contributor does not give to the committee with the knowledge that a substantial portion of the contributor's funds will be contributed by the committee to that candidate."

since the solicitations themselves were allegedly made with the involvement of the candidate's committee. General Counsel's Report at 28. As a factual matter, this level of coordination existed because the PAC operated exclusively with contributions arranged by the candidate and all the PAC's expenses were devoted entirely to that candidate's race.

In MUR 2668, the Office of General Counsel's report recommended that the Commission find a violation because the PAC in question was formed exclusively by members of a family who owned a corporation that was also accused of making illegal contributions to a Senate race. The corporation was the PAC's connected organization, one family's contributions amounted to 99 percent of the money raised by the PAC and 47 percent of the PAC's contributions were to the one candidate. Under these circumstances, the General Counsel found a violation of 11 C.F.R. § 110.1(h) since the "individuals may have contributed to [the PAC] knowing that a substantial portion of their contributions would go to" the specific candidate. General Counsel's Report at 10-11.

2. Under the Act and First Amendment jurisprudence, a communication is not subject to the limitations and prohibitions of the Act unless it contains express advocacy.

In Buckley v. Valeo, 424 U.S. 1 (1976), the United States 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." Id. at 44. This construction limits the application of the Act to communications containing express words of advocacy or defeat, "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n. 52. Communications that do not contain express advocacy are not subject to the prohibitions and limitations of the Act. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("We therefore hold that an expenditure must constitute express advocacy . . . .").

Buckley, the lower federal courts have consistently held that only communications containing express advocacy are subject to the Act. See, e.g., FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1997) ("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 process 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."). Accordingly, issue advocacy advertisements that do not expressly advocate the election or defeat of a clearly identified federal candidate do not constitute expenditures under the Act and Commission regulations. See Commissioner Darryl R. Wold, et al., Statement of Reasons for the Audits of Clinton/Gore '96 and Dole/Kemp '96 (1999).

3. Case law and other recent Commission rulings hold that "coordination" involving a campaign and a third party issue advocacy group must be based upon more than knowledge or opportunity.

The case law is clear that with respect to third party issue advocacy advertisements "knowledge" cannot be substituted for the "coordination" standard. In Christian Coalition v. FEC, 52 F. Supp. 45 (D.D.C. 1999) ("Christian Coalition"), the Commission attempted to recast voter guides by a non-profit group as impermissible expenditures on the grounds that the outside group and some campaigns improperly shared information about the campaigns. Id. at 49-54. These contacts included numerous political and strategic conversations with a candidate, his re-election campaign, official staff and the Republican National Committee and the National Republican Senatorial Committee. In that case, the head of the non-profit organization publicly endorsed the candidate's election and signed direct mail pieces on his behalf. Throughout the campaign, the non-profit group and the campaign traded strategic and other campaign-related advice. Members of the outside group served as co-chairs of the campaign. Officials of the campaign were aware that the

non-profit group was preparing to distribute a large number of guides which the Commission argued "would have the effect of causing a greater number of voters to go to the polls and vote for the [candidate] than would have gone in absence of the guides." Id. at 66-81.

In Christian Coalition the Commission argued that the communications by the non-profit groups were tainted by the amount of contact (whether "coordination" or "knowledge") between the group and the campaign. Significantly, while the Commission conceded that none of the communications contained "express advocacy", it still argued that the communications were produced in conjunction with the candidates and should therefore be treated as prohibited contributions. Id. at 89-91. The specific types of contacts included allegations that staff members of the non-profit knew of the campaign's plans. In Christian Coalition, the charges also included the sharing of lists between the non-profit and the campaign, as well as jointly conducted strategy sessions.

In recognizing that there could be an amount of contact between a non-profit group and a campaign so great that it would taint the expenditure, the court ruled that the standard for limiting contacts must be restrictive. Accordingly, the universe of cases triggering potential enforcement actions is reduced to those situations in which the coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable, without chilling protected contact between candidates and other entities. Id. at 91-92. The General Counsel's Brief here does not come close to meeting this judicially established standard.

In setting out what sorts of conversations between the entities would render subsequent communications impermissible, the Christian Coalition court laid out a standard of activities which are neither alleged nor present in MUR 4538. "In the absence of a request or suggestion from the campaign, an expressive expenditure becomes 'coordinated' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the

campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." Id. No such evidence exists here.

The court also discussed the "insider trading" or "conspiracy standard" of coordination. Specifically, the court addressed to what extent contacts of ties between a spender and a campaign, such as the fact that an individual worked for the spender and the campaign and was privy to non-public information, gives rise to an inference that there was coordination with respect to the expressive expenditures by the expender. Id. at 89-97. The court found that such contacts or ties alone would not be sufficient to establish coordination unless there was also evidence of "discussion or negotiation" regarding the disbursements. The court also found that coordination might be established if an individual had a certain level of decision-making authority for both the spender and the campaign and the spender made the disbursements to assist the campaign. Id. at 96-97. None of these factors are present in this matter.

Moreover, the *Christian Coalition* court looked at a range of behavior and found none of it to render the communications the improper contribution the FEC alleged. Those specific acts raised by the FEC and rejected by the court included: repeated reminders by the group that it would distribute many voter guides and make GOTV calls; and attendance by a candidate at a fundraising event of the group that may have been designed to raise the funds to pay for the very activities the Commission alleged helped the candidate. Id. at 93 & 95 ("The mere fact that the Coalition was singing from the same page as the Bush campaign on certain issues does not establish

coordination"). Crucial to the court was that the campaign did not request or suggest that the non-profit group make certain expressive expenditures. The same factual pattern is true here.

The court also consistently rejected a "knowledge" standard (such as the one suggested by the OGC's Brief in MUR 4736) based upon the outside group's knowledge of a campaign's private opinion polls, or private strategic information, or insider knowledge about a campaign because of a staffer's dual position. Id. at 92-97; see also FEC v. Public Citizen, Inc., Civ. Action No. 1:97-cv-358-RWS (N.D.GA Sept. 15, 1999).

In MURs 4291, 4307, 4328, 4338, 4463, 4500, 4501, 4513, 4555, 4573 and 4578 ("MURs 4291 et al."), the Commission approved the OGC's recommendation to dismiss a series of enforcement actions involving extensive contact/negotiations and common vendors between an outside group and Democratic party and candidate committees. The Commission developed evidence that the state and national AFL-CIO federations had access to and authority to approve or disapprove the plans, projects and needs of the DNC and its state parties and federal candidates. "Moreover, it appeared that if the AFL-CIO participated in the Coordinated Campaign approval at both the state and national levels to the degree described in the documents, it could not help but learn the plans, projects and needs of some Democratic nominees for federal office, the [DSCC] and the [DCCC]." Id. at 8-9.

For example, the Indiana Democratic Party ("IDP") memorialized a conversation it had with the AFL-CIO's Political Department. In the memorandum, the IDP wrote that all the parties in the coordinated campaign, "including the O'Bannon campaign, the Weinapfel [sic] campaign, and the Carson campaign agree that a voter contact program in central and southwestern Indiana would be a vital element in helping all Democratic candidates win." Id. at 14. Attached to the memorandum were documents detailing the IDP's spending plan for direct mail and phone banks. Id. The AFL-CIO ran ten flights of broadcast advertisements between June 27 and election day in Weinzapfel's

congressional district. Id. Despite this evidence, and evidence concerning many other similar relationships between the AFL-CIO, Democratic party and candidate committees, the OGC recommended dismissing the matters because the level of contact and the information shared between the parties did not rise to the level of coordination necessary to find a violation under Christian Coalition.

The Commission's ruling also provides that coordination of an "expressive" disbursement through a common vendor can occur only if (1) the common vendor or agent has decision making authority for both the purported contributor and recipient, or (2) where the common vendor acts as an intermediary between the outside organization and the recipient committee by either transmitting to the spender a request or suggestion by the committee that an expenditure be made or by acting as a go-between for exchanges of information that amount to substantial discussion or negotiation between the two parties. See General Counsel's Report MUR 4291, et al. at 44.

The OGC recommended dismissal despite the fact that the AFL-CIO shared a common vendor with specific Democratic campaign committees. When the AFL-CIO wanted to run a series of advertisements, the media vendor would prepare a planning budget and transmit it to the AFL-CIO with a request for approval. The planning budgets would describe each targeted Member, the media markets in which the advertisement would air, the gross ratings points to be bought, the target audience and the estimated cost. Id. at 45. On some occasions, the AFL-CIO would have comments. Id. Although the media vendor created the planning budgets, had the authority to negotiate with the television stations on the AFL-CIO's behalf, determine on which stations to air the advertisements and at what times during the day, the General Counsel recommended no probable cause because the request for input on the planning budget indicated that the AFL-CIO, not the media vendor, retained authority over the content, timing and placement of the

advertisements. See id. "Therefore, it does not appear that [the media vendor] had sufficient autonomy to trigger 'veil-piercing' coordination." Id. at 46.

In addition, the General Counsel also found that there was not sufficient evidence that the media vendor acted as a go-between for the exchange of information between the AFL-CIO and any candidate committee. The AFL-CIO representative stated in her response to the complaints that she did not know that the media vendor also worked for specific campaign committees.

> If [she] did not know at times when it would have made a difference that [the media vendor] was a common vendor, she could not have used [the media vendor] as a conduit of information to or from the candidate committees. Moreover, none of the documents obtained in the investigation that contained communications between [the media vendor] and the AFL-CIO mentioned [the campaign committees], and none of the documents obtained in the investigation that contained communications between [the media vendor] and the candidate committees mentioned the AFL-CIO.

Id. Based upon this information, the General Counsel recommended no further action against these respondents. The Commission adopted the OGC's recommendation and closed the file.

B. Analysis.

1. **Respondents did not solicit contributions to CUPVF and had no knowledge that any moneys contributed to CUPVF would be contributed to the campaign.**

The OGC's brief cites no evidence that Dr. Babin or anyone at the Babin Committee solicited the contribution from Peter Cloeren to CUPVF. There is no evidence that anyone at Triad pressured CUPVF into making its contribution to the Babin Committee or that the Respondents had any knowledge of Cloeren's CUPVF contribution. Mr. Cloeren's statements and assertions concerning this allegation are directly contradicted by the evidence developed during the investigation of this matter. For example, the OGC's brief cites a series of telephone calls between the campaign and Peter Cloeren's office as incriminating. Without citing any actual testimony or evidence to support its position, the OGC's brief also overlooks the obvious (and corroborated) explanation that they were planning and logistical discussions concerning the in-home fundraiser he

hosted for the campaign on September 14, 1996, and the campaign rally at Cloeren, Inc. on October 8, 1996. See Brian Babin for Congress Campaign Schedule September 1996; W. Whetsell Depo. Tr. at 117 (Tom Andersen, Esq. (FEC) representing to Walter Whetsell that Peter Cloeren hosted an in-home fundraiser for the campaign on September 14, 1996); October 6, 1996 Dr. Brian Babin Republican for Congress News Advisory at 2. It is significant (and omitted in the OGC's brief) that October 8, 1996, is the date of the last phone call from the Babin Committee to Peter Cloeren's office. Nor does the OGC's brief present any other "evidence" that Dr. Babin or the Babin Committee had any knowledge of Peter Cloeren's contribution to CUPVF or that CUPVF was going to make a contribution to the Babin Committee. Accordingly, there is no basis for finding probable cause to believe that Dr. Babin violated 2 U.S.C. § 441a(f) and that the Babin Committee and Thomas E. Freeman, as treasurer, violated 2 U.S.C. §§ 434, 441a(a)(8) and 41a(f).

a. Dr. Babin and the Babin Campaign did not solicit any contributions to CUPVF.

The evidence in this matter corroborates Dr. Babin's testimony and statements that he did not solicit any contributions to CUPVF during the 1996 election cycle. The OGC brief misrepresents the evidence in this matter by stating that there was an interrelationship between the Babin Committee, CUPVF and Triad.[6] OGC Brief at 28-29. The OGC's brief includes no evidence to support this assertion. In fact, the testimonial evidence directly contradicts the OGC brief's analysis section of the CUPVF allegation.

[6] Although not in the OGC's brief, the record shows that Michael Boos and Floyd Brown testified that Triad was not authorized to solicit contributions to CUPVF because the PAC is a separate segregated fund that may only solicit contributions from the members of its connected organization, Citizens United. Mr. Boos testified under oath that he explicitly told Ms. Malenick that she and Triad were not authorized to solicit contributions to CUPVF and that she and Triad could not represent that they worked for CUPVF. M. Boos Depo. Tr. at 59-60 & 105-06. Mr. Boos also testified under oath that contributions received from Triad clients included a cover letter that the contribution was for the general use of the PAC, it was not earmarked in any way, and that the PAC should use the contribution as it sees fit. Id. at 61. Floyd Brown testified that he and Carolyn Malencik never discussed "maxed-out donors" contributing to CUPVF, F. Brown Depo. Tr. at 113-14, and Ms. Malenick did not give him any indication concerning how she expected contributions from Triad donors to be used by CUPVF, id. at 120-21.

Floyd Brown and Michael Boos of CUPVF both testified that Dr. Babin and the Babin Committee did not solicit any contributions to CUPVF. Michael Boos stated that any assertion that Dr. Babin solicited contributions to CUPVF was patently false.

F. Brown Depo. Tr. at 195. Moreover, Michael Boos also testified that he does not know Walter Whetsell, a consultant to the Babin Committee during the 1996 election cycle.

Dr. Babin and Mr. Whetsell both testified that Dr. Babin and the Babin Committee did not solicit the contribution from Peter Cloeren to CUPVF. Mr. Whetsell testified that he and Dr. Babin never asked Mr. Cloeren to make a contribution to CUPVF. W. Whetsell Depo. TR. at 158-59. Dr. Babin testified that he did not learn of Peter Cloeren's contribution to CUPVF until 1998 when the complaint was filed with the Commission. B. Babin Depo. Tr. at 231. Accordingly, Dr. Babin and the Babin Committee did not solicit Peter Cloeren for a contribution to CUPVF and were not aware that he did so until 1998 when the complaint was filed with the Commission.

b. The evidence shows that Dr. Babin played no role in CUPVF's decision to contribute to the Babin Committee.

Respondents played no role in the CUPVF contribution and the OGC's brief cites no evidence to the contrary. The evidence indicates that the only mention of the Babin Committee during a contact between Triad and CUPVF, if it happened at all, occurred after CUPVF made its

contribution to the Babin Committee.[7] Meredith O'Rourke testified that she and Michael Boos never discussed the Babin Committee during any conversation. M. O'Rourke Depo. Tr. at 389-90. Michael Boos testified that his conversation with Meredith O'Rourke in which the Babin Committee was mentioned occurred after CUPVF made its contribution to the Babin Committee. M. Boos Depo. Tr. at 193. Mr. Boos testified that he called Ms. O'Rourke for a list of recommended candidates. Id. at 187-88. During the larger discussion of conservative candidates, Ms. O'Rourke suggested contributing to the Babin Committee. Id. However, since CUPVF had already made the

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[7] The evidence in this matter also shows that Triad played no role in CUPVF's contribution decisions. This refutes the OGC insinuation that the Babin Committee played an indirect role through Triad in CUPVF's decision to make a contribution to the Babin Committee. Floyd Brown and Michael Boos both testified under oath that CUPVF used a general criteria to select which candidates would receive contributions. CUPVF's philosophy is to support conservative challenger candidates, it typically does not support incumbents. M. Boos Depo. Tr. at 55-56; F. Brown Depo. Tr. at 52. Floyd Brown, president of the organization, was the individual who made the decisions concerning which candidates would receive support from CUPVF during the 1996 election cycle. F. Brown Depo. Tr. at 63-64 & 69-70; M. Boos Depo. Tr. at 183-84.

maximum contribution to the campaign for the general election, CUPVF did not contribute any more moneys to the Babin Committee. Id. at 193.

Ms. O'Rourke testified under oath that she and Dr. Babin never had a conversation during the 1996 election cycle, M. O'Rourke Depo. Tr. at 372-74, and that no one at Triad spoke to Mr. Cloeren about contributing to CUPVF or any other organization,[8] id. at 372 & 385-86. Rather, she simply sent Mr. Cloeren written information about Triad. Id. at 390.

c. Floyd Brown and Michael Boos both testified that the Babin Committee did not receive any special attention or efforts from CUPVF.

Floyd Brown and Michael Boos both testified that the Babin Committee did not receive any special attention or efforts from CUPVF. Michael Boos testified under oath that he does not know Walter Whetsell. M. Boos Depo. Tr. at 74-75. He also testified that Floyd Brown is the individual who instructed him to make the contribution to the Babin Committee and that the Babin race was being closely watched by conservatives across the country. Id. at 183-84 & 191. Moreover, as opposed to misleading statements made in the OGC brief, Floyd Brown testified that his meeting with Dr. Babin in the Citizens United Virginia offices occurred in 1993, 1994 or 1995, at least one to three years before the CUPVF contribution to the Babin Committee. F. Brown Depo. Tr. at 157-58. He also testified that he was not in touch with Dr. Babin during his 1996 election campaign:

Id. at 120-21.

[8] Specifically, Ms. O'Rourke testified:

M. O'Rourke Depo. Tr. at 385.

Significantly, the OGC's brief does not present any evidence that Dr. Babin or the Babin Committee solicited the contribution from Peter Cloeren to CUPVF or that Dr. Babin or the Babin Committee had any knowledge of Peter Cloeren's contribution to CUPVF before the 1998 filing of his complaint. In fact, the evidence developed during this matter demonstrates that Respondents did not play any role in Mr. Cloeren's contribution to CUPVF and that Dr. Babin and the Babin Committee did not play any direct, or indirect through Triad, role in CUPVF's contributions. There is no evidence that anyone at Triad pressured CUPVF to make a contribution to the Babin Committee or that Triad played any role in CUPVF's decision to contribute to the Babin Committee. Mr. Cloeren's allegations are directly contradicted by the actual record in this matter and are without merit. Therefore, there is no basis for the Commission to find probable cause to believe that Dr. Babin violated 2 U.S.C. § 441a(f) and that the Babin Committee violated 2 U.S.C. §§ 434, 441a(a)(8) and 441a(f).

2. Respondents did not solicit a contribution from Peter Cloeren to Citizens for Reform or engage in any activity that rises to the level of coordination under Christian Coalition or Commission precedents.

The OGC's brief fails to present sufficient evidence of coordination to find a violation under Christian Coalition and Commission precedents, including a series of recent MURs. The OGC's investigation and brief have not produced any evidence that Dr. Babin or anyone working for the Babin Committee had any input regarding the content, timing, placement or volume of CR's issue

advocacy advertisements. Each deponent associated with Triad or CR testified that no campaigns requested or suggested that Triad or CR air issue advocacy advertisements. The information gathered during Jason Oliver's telephone calls and Carlos Rodriquez's political audits was available in the public domain. Campaigns air advertisements during elections promoting their candidate's views and attacking the views of their opponents. The media covers the issues that define an election. Readers and viewers across the country learn of these events and issues through national publications, including publications dedicated to a specific political ideology.

With respect to Dr. Babin and the Babin Committee, the campaign aired television advertisements concerning the candidate's biographical information, the state felony jail laws and lower taxes. The contest between Dr. Babin's conservative views on social issues and Jim Turner's liberal views was covered by the media. There is no evidence that any non-public information was exchanged between the Respondents and Triad or CR. In fact, as discussed below, the evidence demonstrates that no non-public information was exchanged. Accordingly, there is no basis for finding that Dr. Babin violated 2 U.S.C. § 441b and that the Babin Committee violated 2 U.S.C. §§ 434 and 441b.

a. The CR advertisement cited in the OGC's brief does not expressly advocate the election or defeat of a clearly identified federal candidate and, therefore, does not constitute an expenditure under the Act or Commission regulations.

The CR[9] advertisement cited in the OGC brief does not contain express advocacy and, therefore, does not constitute an expenditure under the Act, Commission regulations or First Amendment jurisprudence. The advertisement discusses Jim Turner's legislative record and public policy positions. OGC Brief at 22. The advertisement also contains a call to action exhorting the viewer to call Jim Turner and express his or her desire for him to "protect Texas values." Id. The

[9] CR does not appear to be a political committee under the Act. 2 U.S.C. § 431(4)(A); Buckley v. Valeo, 424 U.S. 1, 79 (1976); FEC v. GOPAC, 917 F. Supp. 851 (D.D.C. 1996).

advertisement does not advocate the election or defeat of a clearly identified federal candidate. See Buckley, 242 U.S. at 44; Christian Action Network, 110 F.3d at 1051. Accordingly, since the CR advertisement does not contain express advocacy, it does not constitute an expenditure under the Act, Commission regulations or First Amendment jurisprudence.

b. Respondents did not solicit Peter Cloeren for a donation to CR and Cloeren contradicts his own sworn statements by admitting that Rep. Tom Delay and his aide solicited his donation to CR.

The OGC brief's analysis section contains statements concerning the circumstances surrounding Peter Cloeren's donation to CR that are contradicted elsewhere in the OGC's own evidence (although the OGC is careful not to share that evidence with the Commission in its brief). The OGC's brief states that Mr. Cloeren made his donation to "CR at the request of Carolyn Malenick, as well as Dr. Babin and the Babin Committee, which had referred him to Triad, with the understanding that the funds would be used to assist Dr. Babin's campaign." OGC Brief at 30-31. The brief continues with the unsupported assertion that it is "extremely unlikely" that Mr. Cloeren and his wife would contribute CR "unless he received firm assurances from Dr. Babin and others that the funds would benefit his favored candidate." Id. at 34.

Evidence developled by the OGC in this matter, however, directly contradicts the OGC's own suppositions.

This quote attributed to Mr. Cloeren himself, in his attorney's notes (but omitted in the OGC's brief), directly contradicts the OGC brief's factual and analysis sections and, most importantly, Mr. Cloeren's own sworn statements that form the basis of the OGC's arguments.

The testimonial evidence also corroborates Dr. Babin and Mr. Whetsell's statements that they did not solicit Mr. Cloeren for a donation to CR. Mr. Oliver testified under oath that Dr. Babin was not asked to solicit contributions to either CR or Citizens for the Republic. J. Oliver Depo. Tr. at 181. Ms. O'Rourke testified that no one at Triad ever spoke to Mr. Cloeren and that they were surprised when Mr. Cloeren and his wife's donations to CR arrived at Triad. M. O'Rourke Depo. Tr. at 372 & 385-86. Ms. O'Rourke did testify as to her belief that the Triad informational packet sent to Mr. Cloeren may have included information on CR, which, coupled with Mr. Cloeren's statements concerning Rep. Delay, may explain why Mr. Cloeren sent the donation to Triad. Id. at 390.

c. The CR issue advocacy advertisements were not aired at the request or suggestion of the Respondents and there were no discussions between them and either Triad or CR concerning the content, timing or placement of the issue advocacy advertisements nor does the OGC brief cite any evidence to the contrary.

The OGC's brief posits, without citing any evidence, that the Babin Committee requested or suggested that Triad and/or CR air issue advocacy advertisements. For example, the OGC brief maintains that the Babin Committee and Triad discussed the CR issue advocacy advertisements

because it is "the most logical conclusion." OGC Brief at 32. The brief does not cite any evidence to support that conclusion and, in fact, the evidence demonstrates the opposite. The OGC's brief can only cite Jason Oliver's telephone inquiries asking about the major issues in a campaign, id. at 32-33, and the standard contacts between Mr. Whetsell and Ms. O'Rourke as evidence of a request by the Babin Committee to air advertisements. Id. at 33.

However, the testimonial evidence developed during the course of the OGC's investigation shows that the Babin Committee did not suggest to or request that either Triad or CR air issue advocacy advertisements during the fall of 1996. Each of the deponents cited in the OGC brief testified that no campaign contacted by Triad suggested or requested that issue advocacy advertisements be aired. Mr. Oliver testified under oath that he did not discuss issue advocacy advertisements with Dr. Babin. J. Oliver Depo. Tr. at 181. He also testified under oath that no campaigns ever asked Triad to air issue advocacy advertisements.

Id. at 115-16 (emphasis added). He testified further that he never told campaigns about what type of ads would be aired (e.g., television, radio or print). Id. at 123-24.

In addition, Mr. Rodriquez testified that he did not discuss issue advocacy advertisements with any campaign, even during his political audits. During his political audits, Mr. Rodriquez did not ask a campaign if issue advocacy advertisements would be helpful to its election efforts. C. Rodriquez Depo. Tr. at 303. He also did not receive any polling information from the Babin Committee during its political audit. Id. at 368. Mr. Rodriquez testified under oath that he did not

have any conversations with Dr. Babin or members of his campaign about the possibility of Citizens for Reform airing advertisements.

Therefore, Messrs. Oliver and Rodriquez did not receive any requests or suggestions from Dr. Babin or anyone on his campaign staff that Triad or CR should air issue advocacy advertisement. The evidence discussed above, which the OGC omitted from its brief, clearly demonstrates that Respondents did not request or suggest that issue advocacy advertisements be aired.

Further, Peter Flaherty, CR's president in 1996, testified that he did not receive any requests or suggestions from campaigns or anyone else to air issue advocacy advertisements. He testified under oath that he was never informed that any Triad donors requested that issue advocacy advertisements be aired in their states. P. Flaherty Depo. Tr. at 229. He also testified under oath that he and Ms. O'Rourke did not discuss the 1996 CR advertising efforts. Id. at 71.

The OGC's investigation and brief have not produced any evidence the Respondents had any input regarding the content, timing, placement or volume of CR's issue advocacy advertisements. The record shows that each deponent associated with Triad or CR testified that no campaigns requested or suggested that Triad or CR air issue advocacy advertisements. The information gathered by Triad through Jason Oliver's telephone calls and Carlos Rodriquez's visits was in the public domain. Mr. Cloeren's allegations concerning this matter are directly contradicted

by the evidence. Accordingly, there is no basis under Christian Coalition or Commission precedents to find that Dr. Babin violated § 441b or that the Babin Committee violated 2 U.S.C. §§ 434 and 441b.

d. Mr. Flaherty testified that he reviewed the CR issue advocacy scripts and, therefore, retained control over the CR advertising effort.

There is no evidence that the Respondents had any input or control over the CR advertisements. Mr. Flaherty reviewed the CR advertising scripts and, because the content met with his approval, there was no reason for him to engage in extensive editing. P. Flaherty Depo. Tr. at 221-24; see also General Counsel's Report MUR 4291 et al. at 45. Mr. Flaherty testified that he discussed with Carolyn Malenick the media markets in which the CR issue advocacy advertisements should be broadcast. P. Flaherty Depo. Tr. at 228. He stated that his intent was to air the advertisements "[w]here we could underscore the themes we were trying to promote as effectively as possible." Id. He also testified under oath that he reviewed scripts, offered edits which were enacted, and received tapes of the commercials after they were produced. Id. at 221-24; 235-36 & 272-73.

The evidence indicates that the review procedures employed by CR in this matter are similar to those in MUR 4291 et al. The OGC recommended dismissing MUR 4291 et al. and taking no further action, in part, because the review procedures at issue in that series of MURs served as evidence that the AFL-CIO, not the media vendor or anyone else, exercised decision making authority over the advertisements. See General Counsel's Report MUR 4291 et al. at 45-46. Accordingly, the review procedures employed by CR, Triad and the media vendor for the CR advertisements demonstrate that CR retained decision making authority over its own advertisements.

III. CONCLUSION.

The OGC's investigation and brief have not produced any evidence that Dr. Babin or anyone at the Babin Committee solicited Peter Cloeren for a contribution to CUPVF or knew of Mr. Cloeren's contribution when the Babin Committee received the CUPVF contribution. There is no evidence that anyone at Triad pressured CUPVF to make a contribution to the Babin Committee or that Triad played any role in CUPVF's decision to contribute to the Babin Committee. Mr. Cloeren's allegations are directly contradicted by the evidence in this matter. Therefore, there is no basis for the Commission to find probable cause to believe that Dr. Babin violated 2 U.S.C. § 441a(f) and that the Babin Committee violated 2 U.S.C. §§ 434, 441a(a)(8) and 441a(f) and this matter should be dismissed.

In addition, the OGC's investigation and brief have not produced any evidence that Dr. Babin or anyone working for the Babin Committee had any input regarding the content, timing, placement or volume of CR's issue advocacy advertisements. Each deponent associated with Triad or CR testified that no campaigns requested or suggested that Triad or CR air issue advocacy advertisements. The information gathered by Triad through Jason Oliver's telephone calls and Carlos Rodriquez's visits was in the public domain. Mr. Cloeren's allegations concerning this matter

are directly contradicted by the evidence. Accordingly, there is no basis under Christian Coalition or Commission precedents to find that Dr. Babin violated § 441b and that the Babin Committee violated 2 U.S.C. §§ 434 and 441b. This matter should be dismissed and no further action taken by the Commission.

For the foregoing reasons, the Respondents request that the Commission find no probable cause to believe that the Respondents violated the Act of Commission regulations and dismiss this matter and take no further action.

Respectfully submitted,

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