Perkins Coie

Marc E. Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

29044250438

January 27, 2009

Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5575

Dear Ms. Duncan:

On behalf of our clients, Tony Knowles for U.S. Senate Committee and Leslie Ridle, in her official capacity as treasurer, and Alaska Democratic Party ("ADP"), and Rolando Rivas, in his official capacity as treasurer (collectively referred to as "Respondents"), we write in response to the Office of General Counsel's Brief recommending that the Commission find probable cause to believe that violations occurred in the above-referenced matter.

The OGC Brief alleges that Respondents violated 2 U.S.C. §§ 441a(a)(2)(A), 441a(d), 441a(f) and 441d(a) by making excessive coordinated expenditures and "knowingly accepting" contributions from the ADP in excess of the contribution limits of the Federal Election Campaign Act. These allegedly excessive expenditures were made in the form of mail pieces that were addressed and sorted by volunteers and were distributed using non-commercial lists.

The OGC Brief hinges on the allegation that the mail pieces do not qualify as "exempt activities" as defined by 2 U.S.C. § 431(8)(b)(ix) because they were purchased with funds donated by the Democratic Senatorial Campaign Committee. The Brief, however, fails to show probable cause to believe that the DSCC provided funds to the ADP for the purpose that they be used in the Knowles U.S. Senate race. Furthermore, this "transfer down" restriction in 11 CFR § 100.87(g) is unconstitutional under the First and Fifth Amendments. Finally, the "transfer down" restriction is arbitrary and capricious. We respectfully request that the Commission close this matter and take no further action.

I. FACTUAL AND LEGAL ANALYSIS

A. The FEC has Not Shown Probable Cause to Believe that the DSCC Earmarked Funds for the Knowles Campaign

For the Commission to find probable cause to believe that a violation occurred, the General Counsel must set forth sufficient specific facts which, if proven true, would actually constitute a violation. *See* Commissioners Mason, McDonald, Sandstrom, Smith, Thomas and Wold, Statement of Reasons, MUR 5141; Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960. The General Counsel has failed to meet that burden here.

The Act limits the amount that a state party committee may contribute to or spend on behalf of a federal candidate. 2 U.S.C. §§ 441a(a)(2)(A), 441a(d). However, the Act defines the terms "contribution" and "expenditure" to exclude the payment by a State political party committee "of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party. 2 U.S.C. §§ 431(8)(B)(ix), (9)(B)(viii). To qualify under this exception, the payments must, *inter alia*, be made from contributions subject to the limits and prohibitions of the Act, and must not be made "from contributions designated to be spent on behalf of a particular candidate or particular candidates." *Id.*

Under the Act, the mailers paid for by the ADP were not contributions to Respondents. They were labeled by volunteers, sorted by volunteers, and they were distributed using non-commercial lists.[1] *Cf.* 11 C.F.R. § 100.87(a) (excluding from the exemption mailings made from commercial lists). Further, they were paid for with hard money from the ADP's federal account.

The OGC Brief alleges only that the volunteer materials exception does not apply here because the materials "were actually paid for with national party funds." OGC Br. at 3. This assertion misstates the law.

To qualify under the volunteer materials exception, the Commission's regulations state that "[c]ampaign materials purchased by the national committee of a political party and delivered to a State or local party committee, or materials purchased with funds donated by the national committee to such State or local committee *for the purchase of such materials*, shall not qualify

[1] The OCG Brief notes that a non-volunteer may have driven the mail to the post office. OGC Br. at 4 n3. In MUR 5824/5825 (Pennsylvania Democratic State Committee), cited in the Brief, the Commission noted that this factor was not dispositive and, on very similar facts, found sufficient volunteer activity to trigger the exception. In any event, the Brief notes that the Commission was "unable to qualify the amount of non-volunteer activity" and does not rely on this in recommending that the Commission find probable cause to believe Respondents violated the Act.

under this exemption." 11 C.F.R. § 100.87(g) (emphasis added).[2] The plain language of this provision is clear. The statute and regulation do not deny the exemption merely because a state party purchases volunteer materials with funds contributed by a national party committee. The regulation only denies the exemption if the national party contributed the funds for the express purpose of funding the purchase of volunteer materials.

It is not enough for the General Counsel to allege that the ADP purchased the volunteer materials with national party funds. She must show that the DSCC contributed funds to the ADP with the express purpose that these funds be used to purchase volunteer materials. This it has not done. Nothing in the OGC Brief indicates that the DSCC made contributions to the ADP with the intent that they be spent on volunteer materials in the Knowles race.

Because the Brief fails to set forth sufficient specific facts which, if proven true, would actually constitute a violation, the Commission should dismiss the allegation that the Respondents violated sections 441a(a)(2)(A), 441a(d), 441a(f) and 441d(a)

B. The "Transfer Down" Restriction of Section 100.87(g) is Unconstitutional

The Commission should dismiss this matter for a second reason. As described above, the allegation that Respondents accepted an excessive contribution is premised on the General Counsel's conclusion that the ADP paid for the volunteer mailings with funds provided by the DSCC and, thus, it was an excessive coordinated expenditure under section 100.87(g). Even if the Commission did conclude that Respondents exceeded the coordinated expenditure limit, it cannot find a violation here because section 100.87(g) is unconstitutional. It functions as an impermissible expenditure restriction; it burdens State and national parties' associational rights; and, even if it is analyzed as a contribution limit, it is not tailored to meet an important, let alone a compelling, government interest. It also violates the Fifth Amendment because it discriminates between national and state party committees without a rational basis.

1. Section 100.87(g) is an Impermissible Expenditure Limit

By regulating the manner in which national and state parties may make expenditures in connection with federal elections, section 100.87(g) burdens what the Supreme Court has described as "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams*

[2] This requirement is not in the text of the Act. *See* 2 U.S.C. §§ 431(8)(B)(ix), (9)(B)(viii). Rather, it was added because language in the House Report indicated that "Campaign materials purchased by the national committee of a political party and delivered to a State or local party committee would not come within the exemption." H.R. Rep. No. 96-422, at 9 (1979). *See* Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,082 (Mar. 7, 1980).

v. Rhodes, 393 U.S. 23, 32 (1968)). In *Buckley v. Valeo*, the Supreme Court sharply distinguished expenditure limits from contribution limits. The Court found that spending limits directly "constrain campaigning by candidates" and thus must be analyzed under strict scrutiny. *Id.* at 20. In contrast, the Court found that limits on a contributor's ability to a candidate imposed only a marginal restriction on the contributor's ability to engage in free communication." *Id.* The Court reasoned that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. But contribution limits are still subject to "closest scrutiny," and must be "closely drawn" to meet an "important" state interest. *Id.* at 25. Since *Buckley*, the Court has followed this framework, applying strict scrutiny to limits that restrict a committee's expenditures, and evaluating contribution limits under the "closely drawn" standard. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

The "transfer down" prohibition burdens a state party's ability to make expenditures to support federal candidates in its state. This is particularly so in a state like Alaska that is small and is dominated by a single political party. In a small state, a minority party can have difficulty raising the funds necessary to engage in effective advocacy.[3] In order to be effective, it may require contributions from its national party committee. *See Randall*, 126 S. Ct. at 2492. Section 100.87(g) makes a small party decide between accepting contributions from the national party money and making expenditures on volunteer materials consistent with the volunteer materials exception. This is constitutionally impermissible.

The provision prohibits a national party from directly spending money on volunteer materials, while still receiving the benefit of the volunteer materials exception. This, too, is an impermissible expenditure limit.

2. Section 100.87(g) Burdens the Associational Rights of State and National Parties

"The right to associate with the political party of one's choice is an integral part" of the First Amendment freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The "transfer down" prohibition interferes directly with the ability of different committees within a single political party to associate freely with each other. The provision burdens a national party's ability to contribute to state parties and a state party's ability to receive contributions from a national party. If a national party contributes to a state party around the time that the state party purchases volunteer materials, the party may fall subject to a complaint and investigation by the Commission, and incur massive civil fines. That is precisely what is recommended here. And,

[3] Indeed, as of November 24, 2008, the Alaska Democratic Party only had $251,009 on hand and owed $47,512 in debts. As the facts demonstrate in this matter, the ADP had significant difficulty raising funds from non-party sources in 2004, even though it was participating in a highly contested Senate election.

as described above, the provision imposes a special burden on minority parties in small states. Section 100.87(g) imposes an impermissible burden on the parties' associational rights.

3. Section 100.87(g) is Not Narrowly Tailored to Achieve a Compelling Government Interest

Because section 100.87(g) burdens a party's ability to make expenditures, it can only stand if it is narrowly tailored to serve a compelling government interest. *Wisconsin Right to Life, Inc. v. FEC*, 127 S. Ct. 2654, 2664 (2007) ("*WRTL*"). And, even if it is analyzed as a contribution limit it is still subject to the "closest scrutiny" and can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. The Commission cannot meet this burden under either test.

The Court has recognized only one constitutionally permissible purpose that can justify campaign finance reform measures: "'preventing corruption and the appearance of corruption' in election campaigns." *WRTL*, 127 S. Ct. at 2672 (citing *Buckley*, 424 U.S. at 45). In *Buckley*, the Court recognized Congress's interest in preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. The Court has only upheld restrictions when the government can demonstrate that the restriction furthers this anti-corruption rationale. *See, e.g.*, *WRTL*, 127 S. Ct. at 2672; *McConnell v. FEC*, 540 U.S. 93, 144-146 (2001); *Buckley*, 424 U.S. at 27 & n.28. This the Commission cannot do.

There is no indication in the legislative history or in the Commission's rulemaking that the "transfer down" prohibition was designed to prevent candidate corruption. *See* H.R. Rep. No. 96-422 (1979); 45 Fed. Reg. at 15080. Nor does it serve any interest in preventing circumvention of the Act's candidate contribution limits. *Id.* To the contrary, the 1979 amendments to FECA were enacted to increase the role of state and local parties in federal elections. 45 Fed. Reg. at 15080.

That the "transfer down" prohibition serves no conceivable corruption rationale is made clear by Congress's passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In passing BCRA, Congress addressed the perceived problem of parties spending unregulated soft money to influence federal elections. To address this problem, the "core" provisions of BCRA banned national party committees from raising or spending soft money, and prevented state parties from using soft money to engage in "federal election activity." *McConnell*, 540 U.S. at 142. Notably, Congress left untouched the provision allowing unlimited transfers of contributions between national, State, district and local committees of the same political party. 2 U.S.C. § 441a(a)(4).

BCRA makes clear that, in Congress's judgment, such transfers of hard money pose no risk of corruption or circumvention.

In light of BCRA, the "transfer down" prohibition is an anomaly, unsupported by any valid government interest. It burdens national parties' ability to transfer *hard money* – money that is regulated by FECA's contribution limits, source restrictions, and that is reported to the Commission – to state parties. And it does this even after Congress made the judgment that the unlimited transfer of hard money between national and state parties poses no threat of corruption.

Indeed, the "transfer down" prohibition singles out and burdens a small area of First Amendment activity based on the projected use of the funds. Such discrimination is content-based and cannot withstand constitutional scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

Because this provision serves no rational basis – let alone an important or compelling government interest – it violates the First Amendment.

4. Section 100.87(g) Violates the Equal Protection Clause

Finally, section 100.87(g) is impermissible under the Equal Protection component of the Fifth Amendment. The provision permits state party committees, but not national party committees, to receive the benefit of the volunteer materials exception. As described above, neither Congress nor the Commission has provided a rational basis for this distinction. It is therefore unconstitutional.

C. Section 100.87(g) is Arbitrary, Capricious and Contrary to Law

Finally, section 100.87(g) is arbitrary, capricious and contrary to law. The Administrative Procedure Act forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Further, an agency's rulemaking must be vacated if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). "[A]n agency's action is arbitrary and capricious [if] the agency has not considered certain relevant factors or articulated any rationale for its choice." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (internal quotation marks and citations).

The "transfer down" prohibition is not in the text of the Act itself. *See* 2 U.S.C. §§ 431(8)(B)(ix), (9)(B)(viii). As explained above, it was added because language in the House Report indicated that "Campaign materials purchased by the national committee of a political party and delivered to a State or local party committee would not come within the exemption."

H.R. Rep. No. 96-422, at 9 (1979); *see* 45 Fed. Reg. at 15,082. In passing section 100.87(g), the Commission went well beyond the text of the Act and the legislative history, and added an additional prohibition – that, in order to qualify under the volunteer materials exception, the materials could not be purchased with "funds donated by the national committee to such State or local committee for the purchase of such materials." 11 C.F.R. § 100.87(g). The Commission exceeded its authority in adding this additional prohibition.

Furthermore, the Commission did not provide any rationale for why it added this additional prohibition. 45 Fed. Reg. at 15,082. And it made no attempt to justify the regulation in accordance with the only legitimate state interests that can sustain limits on campaign spending – preventing corruption and the circumvention of corruption. *See Shays v. FEC*, 337 F. Supp. 2d 28, 87 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The rulemaking was arbitrary and capricious.

29044250444

it appears that OGC is now including in its totals, payments for communications that are not "public communications" as defined by 11 C.F.R. § 100.26, including payment for canvassed campaign materials and lawn signs. OCG Brief at p.3. This approach is inconsistent with Commission regulations, Commission precedent, as well as the disposition of related MUR 5564. First, the

Commission's regulations explicitly require attribution against § 441a(d) limits if a communication is a "public communication." 11 C.F.R. § 109.37(a). Second, in a recent Matter Under Review, MUR 5604, a discussion of the categories of communications of what is a "public communication" explicitly excluded canvassed materials, and also would appear to exclude grassroots materials such as lawn signs. *See* MUR 5604, Statement of Reasons of Chairman Michael E. Toner, and Commissioners David M. Mason and Hans A. von Spakovsky, (December 11, 2006). Thus, in a related matter, MUR 5564, the Commission did not take any action against Respondents based, in part, upon a legal theory that communications that were not "public communications" are not allocable against section 441a(d) limitations. *See* MUR 5564, Statement of Reasons of Commissioner Robert D. Lenhard (December 31, 2007)[4].

II. CONCLUSION

For the foregoing reasons, Respondents respectfully request the Commission to close this matter and take no further action. Because this case involves important issues of statutory construction and constitutional law, Respondents also request an oral hearing before the Commission.[5]

[4] The OGC Brief, at p.5 incorrectly cites to a now discredited section of the Commission's disclaimer rules that includes "flyers" and "signs" to cite the proposition that these types of activities would convert canvassing and lawn signs into "public communications" for purposes of sections 100.26 and 100.37(a). *See* MUR 5604. *Thus, the handbills or yard signs were not subject to the disclaimer requirements of 2 U.S.C. § 441d.*

[5] It should also be noted that pending litigation may also impact the disposition of this matter. *See Cao vs. FEC*, No. 08-4887 (E.D. La, filed Nov. 13, 2008).

Very truly yours,

Marc E. Elias

Marc E. Elias
Counsel to Tony Knowles for U.S. Senate Committee

Neil Reiff
Stephen Hershkowitz
Counsel to the Alaska Democratic Party