Perkins Coie

Brian G. Svoboda
PHONE: (202) 434-1654
FAX: (202) 434-1690
EMAIL: BSvoboda@perkinscoie.com

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

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SENSITIVE

BY HAND

Donald F. McGahn II
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5835 – Democratic Congressional Campaign Committee

Dear Mr. Chairman:

On behalf of our clients, the Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer (collectively, "the DCCC"), we write to oppose the General Counsel's recommendation that the Commission find probable cause to believe that a violation has occurred in the above-referenced matter. The Commission should close this matter, and take no further action.

We request the opportunity for an oral hearing before the Commission to discuss why bona fide public opinion polls are not a form of "general public political advertising" under 2 U.S.C. § 441d, and why Commission disclaimer requirements cannot be applied to such polls. We also would like to discuss the consequences that adopting the General Counsel's position would have for the conduct of campaigns.

This matter involves scientific surveys taken by a reputable pollster on behalf of a Democratic Congressional candidate. It seems to be undisputed that the polls were taken for bona fide survey research purposes. The poll questionnaires and results show that to be true, although the General Counsel has repeatedly emphasized the fact that the questionnaire conveyed negative information about the Republican candidate in the race. *See, e.g.*, General Counsel's Brief, MUR 5835, at 2 n.1, 3.

The DCCC paid for these polls as coordinated expenditures under 2 U.S.C. § 441a(d). Because the sample sizes exceeded 500 respondents, the General Counsel claims that the polls were "public communications" under 11 C.F.R. §§ 100.26 and 110.11, and thus "general public political advertising" under 2 U.S.C. § 441d, for which a disclaimer would be required. When the polls were taken, the interviewees were not told that the DCCC had paid for them, thus giving rise to the supposed violation.

The DCCC was not initially a respondent in this matter. It had no opportunity to answer any complaint. But in an investigation, commenced for reasons not disclosed to the DCCC, the Commission determined that the DCCC had paid for the polls. On December 17, 2007, it found reason to believe that the DCCC violated the law.

On February 12, 2008, the DCCC provided the Commission with a detailed legal memorandum, explaining why § 441d's disclaimer requirements cannot be extended to public opinion polls, and asking the Commission to reconsider its finding. On July 1, 2008, the Office of General Counsel notified the DCCC that it was recommending a finding of probable cause and provided its brief. The brief acknowledged the DCCC's memorandum, but only to note that the DCCC admitted paying for the polls, and that the number of calls exceeded 500. *See* General Counsel's Brief at 1, 3. The brief did not directly engage any of the legal arguments presented by the DCCC.

To respond to the General Counsel's probable cause recommendation, we provide the Commission again with a copy of our February 12, 2008, memorandum. It sets forth fully the DCCC's legal position in this matter. Also, to help the Commission evaluate this matter, we provide a declaration by Al Quinlan, a prominent pollster in the corporate and political communities.

In his declaration, Mr. Quinlan explains why public opinion polls are not themselves crafted or distributed to influence elections, but rather seek to elicit information from individual respondents to inform strategic decision-making. He tells how the sample sizes of bona fide polls are far too small to influence or persuade effectively. He explains the critical difference between bona fide public opinion polls, and so-called "push polls" that are distributed to vastly larger numbers of voters and are intended to influence their voting decisions. Finally, he explains how grafting a "paid for by" disclaimer onto a poll would degrade the quality of the data, and deprive campaigns of a valuable tool to

understand public opinion. These observations are obvious to pollsters like Mr. Quinlan, to the regulated community, and – we would respectfully submit – to Congress. In the General Counsel's analysis, they are entirely irrelevant.

This matter involves a relatively small amount of money. But it is hugely significant to the regulated community. Without providing public notice or seeking comment, the General Counsel is asking the Commission to take a legal position that would significantly change the way campaigns are conducted across the nation. We respectfully submit that the Commission should reject the General Counsel's recommendation, dismiss the matter, and take no further action.

We look forward to the opportunity to present the DCCC's position to the Commission in oral hearing, and appreciate the Commission's attention to this matter.

Very truly yours,

Brian G. Svoboda
Kate Sawyer Keane
Counsel to the DCCC and Brian Wolff, in his official capacity as treasurer

cc: Vice Chairman Walther
Commissioner Bauerly
Commissioner Hunter
Commissioner Petersen
Commissioner Weintraub
Mary Dove, Commission Secretary
Thomasenia Duncan, General Counsel

Enclosures

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:

DEMOCRATIC CONGRESSIONAL
CAMPAIGN COMMITTEE and
BRIAN L. WOLFF, as Treasurer

MUR 5835

MEMORANDUM OF THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN RESPONSE TO THE REASON-TO-BELIEVE FINDING IN MUR 5835

Brian G. Svoboda
Kate Sawyer Keane
PERKINS COIE LLP
607 Fourteenth St., NW
Washington, DC 20005-2011
(202) 628-6600

Attorneys for Respondents

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE and BRIAN L. WOLFF, as Treasurer

MUR 5835

MEMORANDUM OF THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN RESPONSE TO THE REASON-TO-BELIEVE FINDING IN MUR 5835

INTRODUCTION

Respondents ask that the Federal Election Commission ("Commission") reconsider its finding that there is reason to believe that Respondent violated 2 U.S.C. § 441d, by failing to include disclaimers in polls for which it paid. The polls described in the Commission's Factual and Legal Analysis were legitimate public opinion polls. They were not general public political advertising. To require bona fide public opinion polls to include disclaimers contravenes the unambiguously expressed intent of Congress. It represents an impermissible construction of section 441d and Commission rules. It would change campaigning in ways that Congress never imagined, and that the Commission never saw fit to present forthrightly through rulemaking. Finally, to apply disclaimer requirements to bona fide survey research polls would infringe the First Amendment speech and association rights of the Democratic Congressional Campaign Committee, its candidates, and the countless political committees on both side of the aisle that conduct such polls.

I. FACTUAL BACKGROUND

A. Analysis of Public Opinion Polls Paid for by Respondents

In the first paragraph of the Factual and Legal Analysis, the General Counsel says that the "activity at issue" in this matter "consists of alleged telephone 'push polls'". Factual and Legal Analysis at 1, MUR 5835 (Dec. 21, 2007). It does not disclose the

source or basis of this allegation, and says nothing further to contradict this characterization.

But this characterization is false. The three polls described in the Commission's reason-to-believe finding were legitimate public opinion surveys paid for by the DCCC as coordinated party expenditures for Leonard Boswell, the Democratic incumbent in Iowa's 3rd District Congressional race in 2004.[1] Each of the polls surveyed a relatively small sample of voters in Iowa's 3rd District; at the most, according to the Commission's figures, 500 voters were called in the August poll, 550 voters were called in the first October poll, and 800 voters were called in the second October poll. *See* Factual and Legal Analysis at 2-3. At the beginning of each call, the interviewer provided his or her name and the name of the calling center.

In each of the three polls, respondents were asked a series of questions related to "general demographic information, the likelihood the voter would choose a major party candidate, and impressions of the Presidential and Congressional candidates." Factual and Legal Analysis at 3. Respondents were asked to rate the job that George W. Bush was doing as President and to rate the job that Leonard Boswell was doing as a U.S. Congressman. All three polls asked whether Leonard Boswell or Stan Thompson would do a better job on improving education, keeping America safe, representing the respondents' values, jobs and the economy, reforming health care, and keeping taxes low. The August Poll also asked respondents for their views on issues including an increase in the minimum wage and school vouchers. In addition, the polls sought voter reaction to various statements about the Republican candidate, Stan Thompson. The data was then analyzed to determine trends in issue preferences and candidate support.

Given the number and length of questions asked, each call would have lasted at least ten minutes, and calls for the August Poll would have lasted even longer. Consistent with widely accepted scientific polling practices, the statements about Mr.

[1] Citing policy regarding disclosure of investigative materials, the General Counsel declined to provide the DCCC with copies of the poll questionnaires – despite the fact that the DCCC had paid for them. The Office did, however, allow DCCC counsel to inspect them.

Thompson were designed to gauge voter reaction to potential campaign themes. If the purpose of the calls had been to change public opinion, then the campaign or Respondents could have done so more efficiently, at greater volume, and for far less money. Instead, a reputable polling firm was contracted to spend a significant amount of time on the telephone with a relatively small number of potential voters. The voters' responses were analyzed extensively, and used to track the campaign's success and to guide campaign strategy in the final weeks before the election.

The number of people surveyed, the length of the questionnaire, and the nature of the questions asked are consistent with industry guidelines for bona fide public opinion polls. *See, e.g.*, American Association of Political Consultants Statement of Push Polling ("AAPC Statement"), *available at* http://www.theaapc.org/content/resources/statement.asp; *see infra* pp. 5-7. Respondents did not attempt to "canvas vast numbers of potential voters"; nor was the intent to deceive or persuade potential voters. *See* A Press WARNING from the National Council on Public Polls ("NCPP Warning") (May 22, 1995), *available at* http://www.ncpp.org/?q=node/41. On the contrary, a sample of potential voters was interviewed on issues ranging from the economy and health care to their assessment of Presidential and congressional candidates.

B. Background on Polling Techniques in Political Campaigns

Scientific polls and surveys have long been regarded as a "fundamental data collection method for the social sciences." Henry E. Brady, *Contributions of Survey Research to Political Science*, PS: POLITICAL SCIENCE AND POLITICS, Mar. 31, 2000, at 47. "Rather than having to rely upon anecdote or personal acquaintances to tell us about a group, [researchers] can use the survey method and random sampling to ensure that we have a truly representative and unbiased picture of it." *Id.* Candidates and political committees use scientific surveys to "learn about and measure voters' opinions and test possible campaign messages." Stuart Rothenberg, *For the Thousandth Time: Don't Call Them Push Polls*, ROLL CALL, Mar. 8, 2007. Public opinion polls are critical to a

campaign's efforts to collect accurate and unbiased data that can be used to shape campaign strategy.

Most candidates and political committees utilize several types of public opinion polls, including benchmark polls and tracking polls. Benchmark polls, for example, provide an in-depth analysis of the political environment. The goal is to gather data on issue preferences and candidate support, and to assess the intensity of such preferences. Michael D. Cohen, *Polls as the Key to Victory: When to Use Vulnerability, Benchmark, and Tracking Polls*, CAMPAIGNS AND ELECTIONS, July 2004. Interviews with respondents may last several minutes. Tracking polls generally are not as detailed, but provide an important means for the campaign to assess how its strategy is working. The purpose here is to "test for knowledge and acceptance of campaign themes and detect any movement within key constituencies." *Id.*

Critical to the success and accuracy of such polls is that they are conducted anonymously. If the respondent knows whose campaign is paying for the poll, that knowledge is likely to influence his or her response. For that reason, some polling companies do not even tell the people conducting the calls which candidate or committee has sponsored the poll. Although interviewers conducting public opinion surveys "clearly identif[y] the call center actually making the calls, ... legitimate political polling firms will often choose not to identify the client who is sponsoring the research, be it a candidate or a political party, since that could bias the survey results." American Association of Public Opinion Research Statement on Push Polls ("AAPOR Statement"), (June 2007), *available at* http://www.aapor.org/aaporstatementonpushpolls.

C. Distinction Between Legitimate Public Opinion Polls and So-Called Push Polls

So-called "push polls" are entirely different from the legitimate public opinion polls described above, and serve a drastically different purpose. While benchmark polls and tracking polls are legitimate forms of survey research, "[t]he push-poll operates under the guise of legitimate survey research to spread lies, rumors, and innuendo about

candidates." LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS ("SECRETS") 245 (1996). "A push-poll is a survey instrument containing questions which attempt to change the opinion of contacted voters, generally by divulging negative information about the candidate which is designed to push the voter away from him or her and pull the voter toward the candidate paying for the polling." *Id.*; *see also* NCPP Warning (defining a push poll as "a telemarketing technique in which telephone calls are used to canvass vast numbers of potential voters, feeding them false and damaging 'information' about a candidate under the guise of taking a poll to see how this 'information' affects voter preferences").

In general, legitimate public opinion surveys require polling firms to conduct interviews that are between 5 and 30 minutes in length. In contrast, push polls require only 20 to 60 seconds. *See, e.g.*, AAPC Statement; Karl G. Feld, *What are Push Polls, Anyway*, CAMPAIGNS AND ELECTIONS, May 2000. Push polls are generally conducted by campaign workers or telemarketers rather than research interviewers, and the data from push polls is rarely saved or analyzed. *See* Feld, *supra* p.5. As Republican pollster Ed Goeas of the Tarrance Group explains, "When political researchers put a survey into the field, they do so using recognized scientific techniques to find out what the public is thinking or feeling. 'Push polls' on the other hand, are meant to inform the electorate with no accountability." *Id.*; *see also* Sheldon R. Gawiser & G. Evans Witt, 20 Questions a Journalist Should Ask About Poll Results, 3d ed., National Council on Public Polls, *available at* http://www.ncpp.org/?q=node/4 ("The focus [with push polls] is on making certain the respondent hears and understands the accusation in the question, not in gathering the respondent's opinions.").

Political scientists have condemned push polls as "fundamentally unethical and blatantly demeaning", SABATO & SIMPSON, *supra* p.5, at 273, and their use is a violation of the code of ethics adopted throughout the political polling industry. The American Association of Public Opinion Research (AAPOR), the American Association of Political Consultants (AAPC), and the Council of Marketing and Opinion Research (CMOR) have all condemned the practice of push polling, while the National Council on Public Polls

(NCPP) does not recognize push polls as legitimate research. In particular, NCPP likens push polls to political telemarketing: "[T]he intent is to 'push' the voters away from one candidate and toward the opposing candidate. This is clearly political telemarketing, using innuendo and, in many cases, clearly false information to influence voters; there is no intent to conduct research." NCCP Warning; *see also* AAPOR Statement ("A so-called 'push poll' is an insidious form of negative campaigning disguised as a political poll. 'Push polls' are not surveys at all, but rather unethical political telemarketing – telephone calls disguised as research that aim to persuade large numbers of voters and affect election outcomes, rather than measure opinions."). Still others have rejected the notion that push polls are even polls at all. Stuart Rothenberg, for example, argues that so-called push polls should be referred to as "advocacy telephone calls." Rothenberg, *supra* p.3. While "[p]olls are methodologically rigorous public opinion surveys of generally 500 to 1,000 people", advocacy telephone calls "are made to tens of thousands of people and are intended to create or change opinion." *Id.*

Although legitimate public opinion poll may include questions that contain negative information about a candidate, the purpose in a legitimate public opinion poll is never to advertise or otherwise communicate negative information. As Rothenberg wrote:

> Serious polls can include push questions that contain some explosive or even incorrect information, but that doesn't make them advocacy calls. Testing possible messages is a legitimate survey research function, and as long as the question is asked of a small sample and seeks to get a response to know whether the issue is useful in an election, it really doesn't matter how negative the message is.

Id. The difference between legitimate public opinion polls and so-called push polls lies in whether the negative information is used to gather data to inform campaign strategy, or whether the negative information is used to advertise information about a candidate with the intent to influence the result of an election. *See* NCPP Warning ("Legitimate polls may seek out weaknesses of candidates and attempt to ascertain the impact on voters of knowledge of these weaknesses, as well as issues and other facets of a political campaign.

'Push polls' attack selected candidates. The intent of legitimate polls in each case is research; a sample is interviewed, not a canvass, and the survey is not designed to deceive."); *see also* AAPC Statement ("While real pollsters do sometimes give interviewees new information about a candidate, the intent of this process is not to shift public opinion but to simulate political campaign debate and to assess how the voter might respond. So-called 'push polls' are designed specifically to persuade.").

Federal legislation also has been introduced in each of the past three Congresses to increase the disclosure requirements for telephone push polls.[2] The Push Poll Disclosure Act of 2007 requires federal election polls that survey more than 1,200 households to disclose the identity of the survey's sponsor. *See* H.R. 1298, 110th Cong. § 2 (2007). Further disclosure is required when the survey's results are not introduced to the public. *Id.* For purposes of the introduced bill, a "federal election poll" is defined as a survey in which the respondent is asked to state opinions or views regarding a future election for federal office. *Id.* When Representative Thomas E. Petri of Wisconsin introduced the bill on March 1, 2007, he emphasized the difference between scientific survey research and push polls: "Legitimate polls are designed to gather information helping candidates to focus their campaigns and refine their messages. Smear polls, on the other hand, are intended to spread information damaging the reputation of one's opponent without public debate or discussion." 153 Cong. Rec. E440-05 (Mar. 1, 2007) (statement of Rep. Petri); *see also* 149 Cong. Rec. E15-02 (Jan. 8, 2003) (statement of Rep. Petri) ("As many candidates for public office have learned through personal

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[2] In addition, several states have adopted provisions that require the sponsors of push polls to disclose who paid for the poll at the end of each telephone call, but do not impose such requirements on legitimate public opinion polls. In Florida, for example, the disclosure requirements do not apply to political polls that are made to fewer than 1,000 recipients, with an average length of call of more than 2 minutes. *See* FLA. STAT. § 106.147 (2008). For purposes of Maine's mandatory disclosure and registration provisions, a "push poll" is characterized as a survey in which the pollster does not collect or tabulate results, the calls are made primarily for the purpose of suppressing or changing the voting position of the call recipient, and the survey prefaces a question regarding support for a candidate on the basis of an untrue statement. ME. REV. STAT. tit. 21-A, § 1014-B (2008) The Maine statute does not purport to prohibit or otherwise restrict legitimate campaign practices, including "generally accepted scientific polling research." *Id.* § 1014-B(4). *See also* IDAHO CODE § 67-6629 (2008) (applying disclaimer requirements only to "persuasive polls" that do no use an "established method of scientific sampling" and ask questions concerning candidates that are "designed to advocate the election, approval or defeat of a candidate"); NEV. REV. STAT. § 294A.341 (2008); *see also* N.H. REV. STAT. 664:2(XVII) (2008).

experience, these push polls are not legitimate telephone surveys, but campaign devices designed to smear a candidate under the guise of a standard opinion poll."); 143 Cong. Rec. E8-02 (Jan. 7, 1997) (statement of Rep. Pitts) ("This bill will discourage the practice of slandering a candidate in a Federal election under the guise of a legitimate poll.").

II. LEGAL ARGUMENT

A. To Apply a Disclaimer Requirement to Public Opinion Polls Exceeds the Commission's Statutory Authority

As amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Federal Election Campaign Act of 1971 ("FECA") requires the sponsors of certain communications to clearly state who paid for the communication and whether the communication was authorized by any candidate or candidate's committee. *See* 2 U.S.C. § 441d(a). Section 441d requires a disclaimer:

> (a) "[w]henever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, *or any other type of general public political advertising*";
>
> (b) "whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, *or any other type of general public political advertising*"; or
>
> (c) "whenever any person makes a disbursement for an electioneering communication".

Id. (emphasis added).

Regulations adopted in 2002 further require that all public communications made by a political committee must include disclaimers. *See* 11 C.F.R. § 110.11(a)(1). A "public communication" is defined both in the regulations and in the Act as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising*." 2 U.S.C. § 431(22) (emphasis added); 11 C.F.R. § 100.26. A "telephone bank" is defined as "more than 500

telephone calls of an identical or substantially similar nature within any 30-day period."[3] 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

In its Factual and Legal Analysis, the General Counsel bases its assertion that Respondents violated 2 U.S.C. § 441d on the fact that Respondents made a disbursement for telephone bank calls without including a disclaimer. *See* Factual and Legal Analysis at 4. But to reach this conclusion, the Commission relies on an impermissible construction of the statute. Commission policies are invalid when they cannot withstand the familiar two-step analysis set forth by the Supreme Court in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). First, Congress must not have spoken directly to the precise question at issue. Second, if Congress has not directly spoken, the agency's interpretation must be reasonable, and must be based on a permissible construction of the statute. *Id.* at 842-43; *see also, e.g., Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005). The interpretation of section 441d advanced by the Factual and Legal Analysis fails on both counts.

1. Congress Plainly Spoke to Bar the Application of Section 441d to Bona Fide Polls

The Commission's disclaimer regulation "runs counter to the 'unambiguously expressed intent of Congress.'" *Shays*, 414 F.3d at 96; *see Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The judiciary "must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is

[3] In 1995, the Commission considered the option of including phone banks in a "listing of types of activities that constitute general public political advertising." Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures, Explanation and Justification, 60 Fed. Reg. 52,069, 52,070 (Oct. 5, 1995). The proposed regulations would have required disclaimers "whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate or that solicits any contribution, through any broadcast station, phone bank, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or other form of general public political advertising". Communications Disclaimer Requirements, Notice of Proposed Rulemaking, 59 Fed. Reg. 50,708, 50,710 (Oct. 5, 1994). The proposed regulations were adopted – but the reference to phone banks was omitted, because the Commission could not reach a decision by four affirmative votes. 60 Fed. Reg. at 52,070.

the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (citations omitted).

There are two fatal problems with the General Counsel's application of section 441d to bona fide scientific polling. First, section 441d on its face applies only to "general public political advertising." 2 U.S.C. § 441d(a). A scientific poll is not a form of "general public political advertising." It involves unique dialogues with randomly selected individuals. Its sole purpose is to *elicit* information, not to disseminate it.

Second, the General Counsel treats the definition of "public communication" in section 431(22) as identical to the scope of section 441d. And yet section 431(22) includes the phrase "telephone bank", while section 441d omits it. When two statutes differ in such a way, a court – or an agency – can only assume that the difference was purposeful. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally or purposely in the disparate inclusion or exclusion.'" (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Thus, if Congress had intended the disclaimer requirement to apply to bona fide survey research polls, it would not have limited the statute to "general public political advertising." It also would have included the phrase, "telephone bank", in section 441d. Instead, Congress specified a subset of public communications to which the disclaimer requirement would apply; telephone banks were not on the list. There is simply no statutory basis to apply section 441d to survey research polls conducted by phone.

In determining whether Congress has directly spoken to the question at issue, a court need not "confine itself to examining a particular provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *FDA. v. Brown & Williamson Tobacco Corp, et al.*, 529 U.S. 120, 132 (2000) (holding that Congress had directly spoken to issue and therefore precluded FDA's jurisdiction to regulate tobacco products). Here, the intent of Congress with respect to the disclaimer provision at issue is further illustrated in Senator Feingold's section-by-section analysis of BCRA. According to the analysis, the section amending

the disclaimer provision "applies the requirement to any disbursement for public political advertising." 148 Cong. Rec. S1994 (Mar. 18, 2002). Notably, the heading for the section that describes the amendments to the disclaimer provision refers to "Standards for Identification of Sponsors of Election-Related Advertising." *Id.* Nothing in the statute or the legislative history suggests that Congress intended to apply the disclaimer requirement beyond political advertising -- and there is certainly no evidence of any intent to extend the requirement to bona fide polls.[4]

Congress spoke unambiguously through section 441d. The disclaimer requirement applies only to general public political advertising; it specifically omits phone banks. Thus, the statute precludes application to a bona fide public opinion poll. To find otherwise would be to ignore the unambiguously expressed intent of Congress.

2. Even if Section 441d were Ambiguous, the General Counsel's Interpretation Would Be Unreasonable

Even if the Respondents were to concede that Congress's intent with respect to telephone banks was silent or ambiguous, the General Counsel's application of section 441d to polls would be unreasonable. *See Chevron*, 467 U.S. at 843-44; *see also Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005). If an agency "has relied on factors which Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem", the decision or regulation is generally considered to be arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Commission relied on a definition of "public communication" that did not apply to the disclaimer requirement and failed to consider the consequences of applying the requirement to telephone banks that were not forms of political advertising. *See* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, Explanation and Justification, 67 Fed. Reg. 76,962, 76,963 (Dec. 13, 2002). The effect was to arbitrarily expand the list of communications so that it included a form of communication that Congress had not intended to include.

[4] Further evidence of Congress's intent and continued expectation that the disclaimer requirement does not apply to all telephone banks is apparent in the introduction of the Push Poll Disclosure Act of 2007. *See supra* pp.7-8. If all telephone banks sponsored by political committees were already required to include disclaimers, then it would not be necessary to further amend FECA to require disclosure for federal election polls in which more than 1,200 households are surveyed. *See* H.R. 1298, 110th Cong. (2007).

An agency's construction of a statute will be upheld if the agency provides adequate reasons to support the interpretation. *See Nat'l Cable & Telecommunications Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). But the courts will not defer to an agency's interpretation if the rule is not adopted through a process of reasoned decisionmaking or if the agency has not "exercised its reasoned judgment." *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 818 (D.C. Cir. 2002); *see also Chamber of Commerce v. SEC*, 412 F.3d 133, 140 (D.C. Cir. 2005) ("Although the 'scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency,' we must nonetheless be sure the Commission has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" (citing *State Farm*, 463 U.S. at 43)). The courts also look to whether the rule is the product of standard rulemaking procedures and whether there was an adequate and informed opportunity for notice and comment. *See, e.g., Republican Nat'l Committee v. FEC*, 76 F.3d 400, 407-08 (D.C. Cir. 1996).

The General Counsel's application of section 441b to bona fide opinion polls is not the result of reasoned decisionmaking. It takes two different statutes – section 431(22)'s definition of "public communication" and section 441d's disclaimer requirement – and treats them as the same, even though they are different. It also uses tautological reasoning to place bona fide opinion polls within the scope of both statutes. The General Counsel suggests that an opinion poll is "general public political advertising" because it is a "public communication", even though an opinion poll would have to be "general public political advertising" in order to be a "public communication". *See* 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. Neither of these "methods" of statutory interpretation is lawful.

Moreover, while the Commission appeared to follow standard rulemaking procedures and allowed for an opportunity to comment on the proposed disclaimer rules, the Notice of Proposed Rulemaking did not provide any indication that legitimate public opinion polls would be implicated in those rules. *See* Notice of Proposed Rulemaking,

Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 55,348, 55,349 (Aug. 29, 2002). Because public opinion polls are a constant presence in federal campaigns, there would have been widespread interest within the regulated community in any proposed restriction on their use. Yet the rule's application to public opinion polls was not addressed in the rulemaking.

The advantage of adopting a standard rulemaking procedure is that it gives affected parties "advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved." *Shays v. FEC*, 424 F.Supp.2d 100, 114 (D.D.C. 2006) (citing *Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980)). The General Counsel's interpretation would completely change the way campaigns are conducted, requiring them either to cut the sample sizes of their polls or include information that would skew the results. Adhering to a standard rulemaking procedure is of no use or benefit if it provides no advance notice of how the rule's proposed application will affect existing practices. Certainly no uniformity of result can be achieved if there is no common understanding throughout the regulated community of the rule's far-reaching and unprecedented application.

By extending the disclaimer requirement to legitimate public opinion surveys, the Commission has ignored the unambiguously expressed intent of Congress to apply its disclaimer requirements only to clearly specified forms of communication and other types of general public political advertising. Its construction of the statute is not reasonable, nor has the Commission provided the proper notice of its interpretation to the regulated community.

B. To Apply Section 441d to Legitimate Public Opinion Polls Violates the First Amendment

By its very nature, requiring legitimate public opinion polls to disclose their sponsors infringes on the First Amendment's guarantee of free speech and association. Under *Buckley v. Valeo*, the Supreme Court subjects any regulation that burdens First Amendment activities to "exacting scrutiny." 424 U.S. 1 (1976). Thus, a regulation must

be struck down unless it is narrowly tailored to serve a compelling governmental interest. *See id.*; *FEC v. Public Citizen*, 268 F.3d 1283, 1287 (11th Cir. 2001) ("Discussing candidates' qualifications and advocating their election or defeat is pure political speech that occupies the core of the First Amendment's protection. When a law burdens core political speech, we apply 'exacting scrutiny' to determine whether the law is narrowly tailored to serve an 'overriding' state interest." (citations omitted)). In *McIntyre v. Ohio Elections Commission*, the Court held that a section of the Ohio Code that prohibited the distribution of anonymous campaign literature abridges freedom of speech in violation of the First Amendment. 514 U.S. 334 (1995). Despite Ohio's acknowledged interest in preventing the distribution of fraudulent statements and in providing voters with information on which to evaluate the communication, the regulation was not narrowly tailored to serve Ohio's interests. *Id.* at 357 ("The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.").

The disclaimer requirement set forth in 2 U.S.C. § 441d cannot constitutionally be applied to legitimate public opinion polls. If, as the General Counsel suggests, the requirement is to apply beyond phone banks, beyond push polls, and even to bona fide opinion polls, then the regulation is not narrowly tailored to serve an overriding state interest. The regulation cannot be defended when it is applied to telephone surveys that do not "expressly advocate a particular election result", do not support or oppose a candidate, and are not otherwise intended to influence an election. *Id.*; *see also McConnell v. FEC*, 540 U.S. 93, 231 (2003); *Public Citizen*, 268 F.3d at 1289 (upholding disclosure statute that is narrowly tailored to reach only "those communications which expressly advocate the election or defeat of a clearly identified candidate"); *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) (interpreting federal disclosure requirement to apply only to "solicitations of contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate'" (citing *Buckley*, 424 U.S. at 80)).

Because the regulation cannot withstand the exacting scrutiny required of any infringement on the First Amendment's guarantee of free speech, the application of the disclaimer requirement to legitimate public opinion polls is unconstitutional.

C. The Reason-to-Believe Finding in this Matter is Unprecedented

The Commission's reason-to-believe finding represents a radical, unprecedented interpretation of the disclaimer requirements. Federal election law has never before required scientific polling to disclose information pertaining to sponsorship and authorization. Imposing such a requirement would greatly diminish the utility of such surveys. By definition, legitimate public opinion surveys are not forms of advocacy or political advertisement. Thus, it cannot be argued that imposing a disclaimer requirement on public opinion surveys serves the same or equivalent purpose as requiring disclaimers for communications that are made with the intent to advertise, advocate, or otherwise influence an election.

The Factual and Legal Analysis relies on the conciliated resolution of MUR 5587. In MUR 5587, the Commission found reason to believe that the David Vitter for U.S. Senate committee violated 2 U.S.C. § 441d by sponsoring telephone calls that did not include disclaimers. But the calls at issue in the Vitter MUR differed substantially from the public opinion polls paid for by the Respondents.

In the first set of Vitter calls, the interviewer began each call by stating that he or she worked with the David Vitter for U.S. Senate campaign. *See id.* at Exhibit A. If voters indicated that they planned to vote for Mr. Vitter, then no further questions were asked. *See id.* If voters were undecided, they were asked what issue they considered to be the most important issue facing the nation and who they were supporting in the Presidential race. *See id.* In the second set of Vitter calls, the interviewer did not identify himself or herself as working with the Vitter campaign and voters were asked which of four candidates they would support for the U.S. Senate race. *See id.* at Exhibit B. No further questions were asked. *See id.*

In contrast, the public opinion surveys paid for by the Respondents were much more detailed. Interviewers asked potential voters for their opinions on a range of issues as well as a series of demographic questions pertaining to gender, age, and income. In addition to the length of each call being much longer in the case of the polls paid for by the Respondents, a much smaller pool of voters was contacted in the Respondents' polls. While 3,289 potential voters were contacted in one day by the Vitter campaign polling company, each of the three polls paid for by the Respondents involved no more than 800 potential voters. *See* Factual and Legal Analysis at 3, MUR 5587 (Mar. 13, 2006); *see also supra* p.2.

The public opinion polls paid for by the Respondents were not push polls or "persuasion" calls. On the contrary, they meet each of the polling industry's standards for legitimate scientific research. *See supra* pp.5-7. To require bona fide public opinion polls to include disclaimers is an unprecedented reversal of policy that will wreak havoc within the regulated community and diminish the accuracy and utility of legitimate polling.

CONCLUSION

The Commission should reconsider its finding that there is reason to believe that Respondents violated 2 U.S.C. § 441d, and MUR 5835 should be dismissed.

Respectfully submitted,

Brian G. Svoboda
Kate Sawyer Keane
PERKINS COIE LLP
607 Fourteenth St., NW
Washington, DC 20005-2011
(202) 628-6600

Attorneys for Respondents