BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	
	MUR 5835
Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer	

SENSITIVE

GENERAL COUNSEL'S REPORT # 3

I. ACTIONS RECOMMENDED

Find probable cause to believe that the Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer ("DCCC"), violated 2 U.S.C. § 441d [redacted]

II. BACKGROUND

[redacted] this matter to the Federal Election Commission to address possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act") in connection with telephone calls made to voters in Iowa's 3rd Congressional District in August and twice in October 2004. The calls contained negative statements regarding Stan Thompson, a candidate in the 3rd District Congressional race, but did not identify the entity that paid for the calls and did not state whether any candidate authorized them. [redacted], Thompson's campaign manager stated that the calls "spread completely false information." [redacted] some call recipients were shocked to hear the statement about Thompson from the second set of October calls. [redacted]

[redacted] the calls originated from a call center in Canada that was subcontracted by Quest Global Research Group, Inc. ("Quest"), also of Canada. [redacted] Quest refused to identify its client absent compulsory process. *See* First General Counsel's Report ("FGCR") at 1-2. [redacted] the Commission found reason to believe that an unknown respondent, also known as the unidentified client of Quest, violated 2 U.S.C. § 441d of the Act by failing to include disclaimers in two sets of phone banks, and authorized an investigation.

As part of our investigation, we interviewed Joseph Farrell, co-owner of Quest, who confirmed that [redacted] Quest would only identify its client if subpoenaed by the Commission. When asked if the polls in question were unusual in comparison to other political polls Quest has conducted in the United States, Farrell stated that they were in the sense that there was "a bit more push than normal." *See* Report of Investigation ("ROI"), dated October 18, 2006.

Following Quest's receipt of a Commission subpoena, Farrell requested an extension for responding to the subpoena, per instructions from Quests' client's attorney, Brian Svoboda of the Perkins Coie law firm (who also represents the DCCC in this matter). During our conversations with him, Farrell was informed that the focus of the Commission's investigation was the apparent lack of a disclaimer on the telephone polls. ROI, dated November 2, 2006.

Subsequently, in response to the subpoena, Quest identified its client as polling research company Anzalone Liszt Research, Inc. ("Anzalone"). In response to a Commission subpoena, Anzalone identified its clients as the DCCC and Boswell for Congress ("BFC"), and produced documents relating to three telephone polls, one in August 2004 and two in October 2004, the first and third subcontracted to Quest, and the second subcontracted to Communications Center, Inc. ("CCI"). General Counsel's Report # 2 ("GCR # 2") dated December 11, 2007, at 2-3. Through his representation of Anzalone, counsel for the DCCC effectively knew at an early point in the investigation that the Commission was investigating the absence of disclaimers in the telephone polls conducted by Quest relating to the 2004 Iowa 3rd Congressional District race.[1]

The script for the August telephone calls, which comprised 500 completed calls, included basic demographic questions, questions about the likelihood that the voter would vote for a Democratic or a Republican candidate, and the voter's impression of candidates George W. Bush, John Kerry, Leonard Boswell,[2] and Stan Thompson. GCR # 2 at 3-4. According to the script, after these preliminary questions the caller then read voters specific statements about Stan Thompson, some of which included negative information about Thompson, and then asked whether those statements made them much less likely to support Thompson, somewhat less likely to support him, or made no difference in the way they would vote.[3] *Id.* at 3-4.

[1] In its Response Brief, the DCCC states that because it was not initially a respondent in this matter, it had no opportunity to respond to a complaint. Response Brief at 2.

[2] Leonard Boswell was the Democratic candidate who ran against Republican Stan Thompson in Iowa's 3rd District Congressional race.

[3] The statements claimed that Thompson defended big insurance companies, was anti-choice, opposed regulating the tobacco industry, had accepted contributions from tobacco companies, supported outsourcing jobs overseas, and supported tax cuts for the wealthy and large corporations. Those statements are reproduced on page 4 of GCR #2.

The first set of calls in October, made between October 12 and 14, 2004, was comprised of approximately 525 completed calls. According to the script, callers asked preliminary questions similar to those asked in August. GCR # 2 at 4-5. In addition, the caller sought voter reaction to the following statements:

> Stan Thompson supported the Republican Prescription Drug Program that was called a "big win" for the drug industry by the Wall Street Journal. The new program is too confusing, doesn't guarantee lower drug prices and blocked access to safe and affordable drugs from Canada.
>
> Stan Thompson supports free trade agreements that allow the use of child labor by third world countries, undercutting American jobs. Thompson was quoted saying the "child labor is no reason for impeading [sic] trade promotion."
>
> Stan Thompson supports George Bush's economic policies that create tax incentives for American companies to ship their jobs overseas.

Id.

Quest conducted the second set of October calls, which consisted of at least 600 completed calls, between October 21 and 25, 2004. GCR # 2 at 5. After preliminary questions similar to those asked in the preceding calls, the caller sought voter reaction to only one statement:

> Stan Thompson opposes additional spending in Afganistan [sic] that will help in the hunt and capture of Osama Bin Laden and the fight against terrorism.

The DCCC reported its $30,000 in disbursements for the three sets of calls ($10,000 per set) as coordinated expenditures for Leonard Boswell.

Based on the evidence obtained during our investigation, the Commission substituted the DCCC and BFC in place of "unknown respondent" in the Commission's previous reason to believe finding, and provided each of them with a Factual and Legal Analysis. *See* Certification for MUR 5835, dated December 17, 2007; GCR # 2. The reason to believe finding, however,

excluded the August poll because there were not more than 500 calls made to constitute a telephone bank. GCR # 2 at 7. The Commission, as a matter of prosecutorial discretion, admonished Boswell for Congress and Carl McGuire, in his official capacity as treasurer, and took no further action as to them, and authorized pre-probable conciliation with the DCCC [redacted]. We notified Respondents of our withdrawal from pre-probable cause conciliation by letter dated March 31, 2008.

The DCCC was served with our General Counsel's Brief dated July 1, 2008, incorporated herein by reference, indicating that we were prepared to recommend that the Commission find probable cause to believe that the DCCC violated 2 U.S.C. § 441d. Respondents submitted a Response Brief on August 11, 1008, along with a request for a probable cause hearing, which the Commission granted. The hearing took place on October 28, 2008. *See* Probable Cause Hearing Transcript ("Transcript").

In its Response Brief and at the probable cause hearing, the DCCC did not dispute any facts related to this matter. Instead, the DCCC contends that Congress did not intend to apply section 441d disclaimer requirements to phone banks, and even if it did, it did not intend to cover

"legitimate public opinion" telephone polls because such calls are not a form of "general public advertising." The DCCC further maintains that finding probable cause that the DCCC violated section 441d in the present circumstances would impinge on its First Amendment rights. As discussed below, none of these positions warrant a determination to take no further action. Accordingly, we recommend that the Commission find probable cause to believe that the Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer, violated 2 U.S.C. § 441d and approve the attached proposed conciliation agreement.

III. LEGAL ANALYSIS

The Act requires that political committees "making a disbursement for the purpose of financing any communication ... through any other type of general public political advertising" must place a disclaimer in the communication identifying the committee that paid for the communication and whether the communication was authorized by any candidate. 2 U.S.C. § 441d. Such disclaimers must be presented in a "clear and conspicuous manner" in order to give the listener "adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication." 11 C.F.R. § 110.11(c)(1).

Commission regulations further specify that the Act's disclaimer requirements apply to any "public communication" for which a political committee makes a disbursement. 11 C.F.R. § 110.11. A "public communication" is defined 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." *See* 2 U.S.C. § 431(22); *see also*, 11 C.F.R. § 100.26. A "telephone bank to the general public," as used in the definition of public communication, means "more than 500

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

The Explanation and Justification ("E&J") discussing the disclaimer regulations implementing the 2002 Bipartisan Campaign Reform Act ("BCRA") amendments to the Act makes clear that a telephone bank is considered a type of general public advertising. 67 Fed. Reg. 76962, 76963 (December 13, 2002) ("each form of communication specifically listed in the definition of 'public communication,' as well as each form of communication listed with reference to a 'communication' in 2 U.S.C. 441d(a), must be a form of 'general public political advertising'"). Therefore, any candidate, political committee or their agent(s) making any disbursement for telephone bank calls must include a disclaimer on the calls.

A. The DCCC's Calls Satisfy the Definition of "Telephone Banks" and Qualify as "General Public Political Advertising"

Respondents argue that the Commission has exceeded its statutory authority by applying the disclaimer regulations to telephone banks because the section 441d(a) disclaimer provision, on its face, omits the phrase "telephone bank," and that the Commission's reliance on the definition of "public communication" found in section 431(22) of the Act, which includes the phrase "telephone bank," is contrary to Congress' intent. Response Brief at Attached Memorandum ("Respondent's Memorandum") at 8-13. Rather, Respondents contend that the provision is limited only to "general public political advertising." *Id.* This contention, which was raised during the comment process on the post-BCRA disclaimer regulations, was specifically considered and rejected by the Commission. *See* E&J at 76963.

Through its rulemaking process, the Commission examined and interpreted Congress' intent in enacting BCRA's amendments to the disclaimer provisions, and explicitly set forth a

well reasoned and permissible approach in the E&J. *See* 67 Fed. Reg. at 76962-76965. At the outset, the Commission noted that the descriptive list provided in the BCRA disclaimer provision is "similar to the language used by Congress in BCRA to describe a 'public communication' as defined in 2 U.S.C. § 431(22)." *Id.* at 76963. There were, however, three notable differences between the lists.

First, the definition of "public communication" in the Act covers "any broadcast, cable, or satellite transmission" whereas 441d(a) refers only to "any broadcasting station." *See* 67 Fed. Reg. at 76963. Second, "public communication includes a telephone bank to the general public" and 441d(a) does not specifically mention telephone banks. *Id.* Third, "public communication" includes a "mass mailing" while 441d(a) refers only to a "mailing." *Id.*

The Commission concluded that equating the description of "communication" in the disclaimer statute to the term "public communication" as defined in 2 U.S.C. § 431(22) would have the effect of subjecting "telephone banks to the general public" to the disclaimer provisions and "harmonizing" the meaning of "mailing" to "mass mailing" and "any broadcasting station" with "any broadcast, cable, or satellite transmission." *See* 67 Fed. Reg. at 76963. The Commission further explained that Congress only used the term "general public political advertising" in these two sections in BCRA (*i.e.*, in §§ 431(22) and 441d), and therefore, it should be interpreted in a virtually identical manner because "Congress has provided additional guidance as to the proper interpretation of that general language elsewhere in the same statute." *Id.* By equating the meaning of "communication" and "public communication," the Commission was "establishing consistent meaning from the repeated use of a single statutory phrase, in order

to promote simplicity and symmetry between the various statutory provisions and within the regulations." *Id.*

In sum, the Commission has already decided that its disclaimer regulations apply to "telephone banks." "It is elementary that an agency must adhere to its own rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). As the D.C. Circuit has stated, the Commission's unwillingness to enforce its own regulations would in itself "establish that such agency action was contrary to law" in a suit under 2 U.S.C. § 437g(a)(8). *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995).

Apparently realizing the Commission is bound by its regulations, Respondents also attempt to challenge the rulemaking process itself as giving inadequate notice that the disclaimer rules might cover calls such as those in issue. Respondents' Memorandum at 12-13. That attempt fails. The Commission's Notice of Proposed Rulemaking specifically sought comment on the scope of "communication," as follows:

> whether the term *communication*, as used in this section, should have the same scope as the term *public communication*. *See* 2 U.S.C. 431(22) and 11 CFR 100.26. The two terms differ in some respects. A 'public communication,' as defined in 2 U.S.C. 431(22), includes a telephone bank to the general public, whereas telephone banks are not mentioned in section 441d(a).

67 Fed. Reg. at 55349. Further, the Act's definition of "telephone banks" does not specifically include any particular types of calls, but rather addresses the number of substantially similar telephone calls made within a certain number of days, which may or may not apply to some telephone polls, some get-out-the vote-calls, some advocacy calls, some "undecided" survey polls, or some other types of calls, depending on whether they meet the statutory definition of "telephone banks." 2 U.S.C. § 431(24). Any claim that no one would have considered the types

of calls at issue in this matter to qualify as "telephone banks," because if they did there would have been widespread interest at the time of the rulemaking, *see* Respondent's Memorandum at 13, is speculative. Such a claim is belied by the discovery response in this matter, submitted by the DCCC's counsel on behalf of Anzalone, which included a sworn declaration from Anzalone's Vice-President, stating that Anzalone "contracted with *phone banks* to complete interviews," and that individuals providing services to BFC included "research director Bethany Hicks, who oversaw *phone banking*." *See* March 23, 2007 Letter from Brian Svoboda, attaching Anzalone's interrogatory responses. (Emphasis added).

There can be no dispute that the calls at issue were telephone banks, as that term is commonly understood, because a large number of telephone calls in a compressed time period were made from a calling center by multiple persons reading identical scripts. More importantly, the DCCC's telephone calls conducted in October 2004 fulfill the statutory requirements for a "telephone bank" because each involved more than 500 calls that were identical or substantially similar and were conducted within a 30-day period. While the DCCC maintains that the calls involved "individualized dialogue," because voters might have responded differently to questions, *see* Transcript at 99, the questions asked are substantially similar. According to the DCCC, once the questionnaire is made available to the call center, "the call center will hire people who are trained -- basically, like trained phone interviewers who will then call the voters and read *strictly* from the questionnaires. They'll be given clear instructions *not to deviate* from the questionnaires. These people are -- I mean not to be mean or dehumanizing, but they're like robots. I mean they are delivering the messages that the pollsters want them to convey in as dispassionate a way as possible, so as not to bias or interfere with the integrity of the results."

Transcript at 95-96. (Emphasis added). Because the DCCC's calls clearly meet the statutory definition of telephone banks, they were required to contain disclaimers.

The DCCC further argues, however, that even if the calls met the definition of "telephone bank," the definition of "public communication" additionally requires that the "telephone banks" contain "political advertising," because it includes, after a specific listing of modes of communication, the clause "or any other form of general public advertising." Respondents' Memorandum at 11-12; 2 U.S.C. § 431(22). Through their inclusion in the Act, however, it appears that Congress has determined that those modes of communication specifically listed in the statute (*i.e.*, broadcast, cable, or satellite communication, newspaper, magazine, telephone bank, outdoor advertising facility, mass mailing) are, either on their face or through their potential usage, forms of "general political advertising." Therefore, the clause can be read to cover other forms of communication with similar possible uses. Even the DCCC's counsel stated that while he did not know how Congress had come to the number of "500" telephone calls to the general public when crafting the BCRA amendments, he "assumed that Congress thought it was a useful proxy to capture the extent of communications that would have an election-influencing purpose." Transcript at 59. That seems reasonable to us.

Even assuming that the specifically listed "public communications" must also demonstrably contain some content qualifying as "political advertising," the calls at issue did so because they disseminated information regarding a candidate in close proximity to his Congressional race. Moreover, the disseminated information was of a nature that could influence voters' views regarding that candidate.

Taking the second October poll as an example, voters heard: "Next, I am going to read you some statements about congressional candidate Stan Thompson and get your reaction." The next sentence asks the voter to react in one of four ways as to how each statement will affect his or her support for Thompson, and then the voter is informed: "Stan Thompson opposes additional spending in Afganistan [sic] that will help in the hunt and capture of Osama Bin Laden and the fight against terrorism," expressed as a statement of fact. The poll does not provide any indicator that the voter should take the statement as anything but a true characterization of the candidate's stance.[4] Moreover, although the script for the second October poll states that "some statements" would be read, only one statement was included in the poll.

Statements with the potential to influence voters' views about Thompson were also made in the first set of calls in October; specifically, the pollster made statements that suggested that Thompson supported big drug companies, child labor in third world countries and tax incentives for companies that ship jobs overseas. *See supra* at 4. Although contending that this poll was for research purposes, the DCCC admitted that such statements were "crafted and focused as an attack on the opponent." Transcript at 40. While it may be "legitimate" for a researcher to convey candidate information to a large number of voters, however negatively, in order to make strategic decisions about future advertising, that purpose does not negate that such information has been effectively disseminated to voters whose decisions may thereby be impacted.[5] In fact,

[4] Our investigation revealed that information for the statement used in the second October poll was derived from the results of a 2004 Congressional National Political Awareness Test, conducted by ProjectVote Smart, that asked candidates, *inter alia*, whether they would support increased financial or military support for Afghanistan. http://www.votesmart.org. The survey did not, however, include any language regarding "Osama Bin Laden and the fight against terrorism."

[5] The fact that a statement is followed by a question does not change the situation. For example, if a caller says, "Candidate X embezzled from his employer. Does that make you less likely to vote for him?," the charge, whether true or false, has been planted in the voter's mind even before the question has been asked.

the DCCC admits that if one were to take some of the statements in the polls in isolation, such as the Afghanistan statement, and send it to 10,000 callers, the calls could require a disclaimer. Transcript at 75. Therefore, whether in isolation, or as part of longer poll, the same information is disseminated and the impact on the voter is the same. Accordingly, the calls in issue contained "political advertising." Nothing forecloses the possibility that strategic surveys can have a dual purpose—to collect data and influence voters—and that such telephone polling is a cost-effective means of accomplishing both purposes at the same time. However, in this matter, even counsel for the DCCC was unable to verify whether the results of the second October poll were ever used for strategic decision making. Transcript at 83-84.

Respondents nevertheless contend that Congress did not intend, when it included "telephone banks" in the definition of "public communication," to require disclaimers for telephone banks engaged in "legitimate public opinion" polling. There is no evidence of that. Rather, the evidence indicates that Congress was interested in broadening the reach of the disclaimer requirements. Through a number of legislative recommendations between 1989 and 1997, at a time when the disclaimer provisions of the Act only covered express advocacy and solicitations for contributions, the Commission took the position that the Act's disclaimer requirements should be expanded to encompass phone bank activities. For example, the Commission's 1997 Legislative Recommendations to Congress included recommendations that the Act be revised to require political committees to display a disclaimer "in any communication issued to the general public, regardless of its content or how it is distributed." *See* 1997 Legislative Recommendations, http://www.fec.gov/info/legrec.htm . In the document, the Commission explained that expanding the disclaimer requirements in the Act would eliminate

the need to consider whether a communication indeed contains express advocacy or a solicitation.[6] Recognizing that Congress' expansion of the disclaimer requirements in BCRA was intended to cover more communications, including phone banks, the Commission stated in its E&J that "[r]equiring a caller to identify himself or herself serves important disclosure functions consistent with Congressional intent to broaden the reach of the previous laws regarding disclaimers." 67 Fed. Reg. at 76963. Indeed, in explaining her vote for the BCRA amendments, Senator Patty Murray stated that she was guided by certain "principles for reform" and that "we must demand far more disclosure from those who work to influence elections....[including disclosure for] telephone calls....Citizens have a right to know who's trying to influence them." 147 Cong. Rec. S 3233 (April 2, 2001).[7]

B. Requiring Disclaimers for Telephone Banks Serves a Compelling Government Interest

The DCCC further argues that applying section 441d to the calls in question violates the First Amendment's guarantee of free speech and that the Commission's regulations pertaining to telephone banks are not narrowly tailored to serve an overriding government interest.

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[6] *See also* 1996 Legislative Recommendations, http://www.fec.gov/pdf/legrec1996.pdf; 1995 Legislative Recommendations, http://www.fec.gov/pdf/legrec1995.pdf; 1994 Legislative Recommendations, http://www.fec.gov/pdf/legrec1994.pdf; 1993 Legislative Recommendations, http://www.fec.gov/info/LegislativeRecommendations1993.htm; 1992 Legislative Recommendations, http://www.fec.gov/pdf/legrec1992.pdf; 1991 Legislative Recommendations, http://www.fec.gov/pdf/legrec1991.pdf; 1990 Legislative Recommendations, http://www.fec.gov/pdf/legrec1990.pdf; 1989 Legislative Recommendations, http://www.fec.gov/pdf/legrec1989.pdf (all recommending that the disclaimer provision be expanded to any communication issued to the general public, regardless of its purpose or content).

[7] To the extent the DCCC suggests that legislation introduced in Congress to require disclaimers for telephone push polls indicates that Congress did not intend the disclaimer requirement to include such polls, *see* Respondents' Memorandum at 7 and Transcript at 33, that suggestion does not apply in the context of political committee disbursements when such calls meet the Act's definition of "telephone banks." It is likely that the push poll legislation is intended to reach other persons making such calls, other than political committees, when the calls do not contain express advocacy, solicitations, or are not electioneering communications. *See* 11 C.F.R. §110.11(a)(2)-(4)

Respondent's Memorandum at 13-15. Respondents' First Amendment arguments are based on the premise that the calls in question did not support or oppose a candidate and were not intended to influence an election. *Id.* at 14. As we have shown, however, the calls on their face disseminated negative information about candidate Stan Thompson in such a way as to influence an election. In any event, requiring disclaimers on the DCCC's telephone banks here does not violate the First Amendment.

In the past, federal courts have upheld the Act's disclosure and disclaimer provisions, recognizing such requirements to be "reasonable and minimally restrictive method[s] of furthering First Amendment values by opening the basic process of our federal election system to public view" *Buckley v. Valeo*, 424 U.S. 1, 81 (1976). Courts have typically identified the government's interests in mandatory disclosure requirements to include encouraging maximum transparency in political activity by providing financial information to the public and deterring actual or apparent corruption, among others. *See infra* pp. 15-17. In *Buckley*, the Supreme Court upheld the Act's disclosure requirement, finding that it was "narrowly limited" to information that has a "substantial connection with the governmental interests sought to be advanced." *Id.* at 81. It also held that the government's interest in providing information to the public was sufficient to justify mandatory disclosure of campaign financing and express advocacy. 424 U.S. at 66-67.

A number of Federal Circuit Courts have specifically upheld the Act's disclaimer requirements. The Ninth Circuit relied upon the Supreme Court's decision in *Buckley* in upholding the constitutionality of the Act's independent expenditures disclosure and disclaimer provisions. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). The Court recognized the

provisions' importance in keeping "the electorate fully informed of the sources of campaign-directed speech . . . so that they may freely evaluate and choose among competing points of view." *Id.* at 862. Using the Supreme Court's "reasonable and minimally restrictive" language, the Court concluded that the disclosure provisions do not detrimentally affect the exercise of First Amendment rights. Instead, the Court opined that the Act's "disclosure requirements . . . are indispensable to the proper and effective exercise of First Amendment rights" and serve "to deter or expose corruption, and therefore to minimize the influence that unaccountable interest groups and individuals can have on elected federal officials." *Id.*

Additionally, the Second Circuit upheld provisions of the Act requiring disclaimers on solicitations for contributions. *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995). The Court in *Survival Education Fund* ("*SEF*") found that "441d(a)(3) serves important First Amendment values" and that the government has an interest in ensuring that potential contributors know who they are supporting when they make a contribution in response to a solicitation. *Id.* The Court explained that by requiring such disclosure, the Act also served to deter corruption and concluded that the statute was narrowly tailored to serve those interests.

In *Public Citizen*, the Eleventh Circuit held that disclaimers advanced a "compelling [government] interest" by providing voters with information about the candidate and the sponsor of a communication, "which in turn aids the overall electoral process." *FEC v. Public Citizen*, 268 F.3d 1283, 1287 (11th Cir. 2001). The Court distinguished the Act's disclaimer requirements from a state statute previously considered by the U.S. Supreme Court in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, at 336 (1995), that prohibited distribution of anonymous campaign literature. In *McIntyre*, the Supreme Court held that simply informing the electorate is

not a sufficiently compelling interest to justify a ban on anonymous campaign literature. The Eleventh Circuit found, however, that similar to the Second Circuit's findings in *SEF*, requiring Public Citizen to include disclaimers in its television advertisements and flyers did serve a compelling interest because the Act's disclaimer provisions are "designed to inform the public whether in fact the communication is independent advocacy or an authorized communication." 268 F.3d at 1289. Thus, the Act's disclaimer provisions go a step further and serve to protect the integrity of the electoral process.

After BCRA, the Supreme Court upheld the amended disclaimer provisions in the context of electioneering communications as bearing "a sufficient relationship to the important governmental interest of 'shed[ing] the light of publicity' on campaign financing." *See McConnell v. FEC*, 540 U.S. 93, 231 (2003) (quoting *Buckley*, 424 U.S. at 81). *See also FEC v. Adams*, 558 F.Supp. 2d 982, 983 (C.D. Cal. 2008) (rejecting First Amendment challenge to BCRA disclaimer requirements in matter involving the failure to include proper disclaimers on billboards).

The Commission's disclaimer regulations are narrowly tailored to reach only those telephone calls covered by the definitions of "public communication" and "telephone bank." Moreover, the DCCC fails to demonstrate any cognizable First Amendment burden arising from a requirement to include a disclaimer in telephone calls such as those at issue, or any cognizable chill on its ability to conduct research. While the DCCC claims that voters' responses may not be reliable if they know in advance who has paid for or authorized the calls, the DCCC admits that the solution is to put the disclaimer at the end of the call. Transcript at 18. Where the problem arises, according to the DCCC, is when a person receiving a call immediately posts information about the call on the

Internet, thereby potentially reaching other call recipients; counsel stated, "[t]his is a problem that actually now, with the advent of the Internet, is starting to happen with polling." Transcript at 19.

Telephone polls are already the subject of extensive discourse on the Internet and have been for some time, regardless of whether the sponsor of the poll is identified. The anonymity that was feasible in the past is no longer truly possible or realistic. A Google search using only the search terms "message testing," "campaign" and "telephone" alone produced 1,480 entries, many of which disclose the poll questions and speculate on the sponsors. For example, Politico reports that on April 4, 2007, Dan Comley "took a call for the most detailed political poll he had ever participated in." According to the article,

> after Comley got off the phone, he did what any 21st century Democratic activist would do: he went to his favorite liberal blog, My Left Wing, and wrote about the questions, which "began to make me queasy. Someone was trying to bash John Edwards and Barack Obama, and pitch Hillary."

Ben Smith, *Negative Poll Questions Alienate Base*, POLITICO, June 27, 2007, http://www.politico.com/news/stories/0607/4696.html (last visited Dec. 11, 2008). Likewise, commenting on a round of stories about telephone calls to Iowa and New Hampshire voters that included negative information about a candidate, the president of the American Association for Public Opinion Research stated, "[t]he speed at which we are learning about these calls—and the number of stories on the subject—do raise interesting questions for campaigns....Campaigns have traditionally been able to conduct message testing in relative privacy. Now that's changed." AAPOR.org, *Recent Press Releases: AAPOR Provides Clarification on "Push Poll" Issue*, Nov. 16, 2007, http://www.aapor.org./aaporprovideclarificationonpushpollissue (last visited Dec. 11, 2008). The author of another article comments on the way the Internet has changed political campaigns, stating:

> Ten or twenty years ago, if a voter participated in a "message testing" poll, they might have the same angry reaction as the respondents quoted in the stories above. They might mention their experience to a friend or colleague, but few bothered to call a reporter. Now, however, if you call 600 or 1000 voters, the odds are good that a handful will know how to leave a comment on a blog, and rather than ask friends or family, they will turn to thousands of readers of, say, DailyKos and ask, "what the heck was that?" And given the nature of the blogosphere, one comment will beget another, and these various testimonials will quickly get into the hands of political reporters.
>
> All too often in the not so distant past, campaign consultants operated under the illusion that they could test the "family jewels" of a campaign in secrecy. Now, the reality is that if you put it on a questionnaire, especially in the context of a high profile campaign, it stands a good chance of being discussed somewhere on the Internet and found out by the political press.

Mark Blumenthal, *More Clinton "Message Testing,"* POLLSTER.COM, June 27, 2007, http://www.pollster.com/blogs/more_clinton_message-testing.php (last visited Dec. 11, 2008). Another Internet posting from 2008 instructs recipients of message testing calls to "Take notes on everything you hear," "As soon as you can after getting the call, contact the campaign of the targeted candidate and ask to speak to the campaign manager," "write up the call and post a diary about it on your state's community blog," and "Don't forget to **cross-post your diary on several National blogs....**" (Emphasis in the original.) *What to do if you get push-polled or message-tested,* June 29, 2008, http://www.bleedingheartland.com/showDiary.do?diaryId=1621 (last visited Dec. 11, 2008).

Even if there is a legitimate concern that some telephone poll participants might have read something on the Internet that might affect the reliability of their answers, the solution is simple: the caller can ask the voter at the beginning of the call if he or she has read or heard anything relating to the particular poll, and if so, not include that voter in the survey. The solution is not to eliminate disclaimers from these polls. Of course, should the DCCC or another

political committee want anonymity in their polls, they have a number of options, including limiting the number of their calls to 500, as was the case with the DCCC's August 2004 calls, varying their scripts, spacing calls within 31days, and convening focus groups. Because individuals are already posting information about these types of calls on the Internet, regardless of whether a sponsor is identified, the DCCC's concerns about requiring disclaimers at the end of "message testing" telephone banks are not justified. Using the DCCC's own stated rationale, it is clear that enforcing the disclaimer requirements will have very little, if any, future impact on political committees, and, thus, the compelling purposes disclaimers serve far outweigh the negligible harm on research results alleged.

C. The Commission Should Continue to Adhere to the Bright-Line Test Requiring Disclaimers on Telephone Banks to the General Public

Contrary to Respondent's claim, applying the Commission's regulation to the calls in issue in this matter would not be "unprecedented," Respondents' Memorandum at 15-16, or even a stretch from prior Commission action. In MUR 5578R (David Vitter for U.S. Senate), one set of calls simply asked the listener, "[i]n the U.S, Senate Race [sic] in November are you more likely to vote for" and then listed the names of the candidates (rotating the names from call to call) including David Vitter. The Vitter Committee, much like the DCCC, argued that no disclaimer was required for these calls because it was a poll that did not contain any advocacy and because providing a disclaimer that associated the calls with the Vitter Committee would have impacted the results. *See* MUR 5587R, Response Brief, dated September 25, 2006 at 6-8. Nonetheless, the Commission found probable cause that these calls were "telephone banks" within the

meaning of the Act and Commission regulations and required disclaimers.[8] Contrary to the specter set forth by the DCCC, in the nearly a year and a half since the Commission found probable cause in the Vitter MUR, there has been no public outcry that its action has "wreak[ed] havoc within the regulated community" or "diminish[ed] the accuracy and utility of legitimate polling." *See* Respondents Memorandum at 16.

The Commission should, as in MUR 5587R, enforce its regulation and adhere to the "bright-line test" set forth therein. Requiring political committees to place disclaimers on all calls meeting the definition of "telephone bank" provides clear guidance to the regulated community and ease of administration for the Commission. Debating whether calls meeting that definition are or are not "legitimate polls" is an exercise in semantics, and entails exactly the kind of effort the rule is intended to avoid. Resolution of competing claims would require a case-by-case examination of intent, context, impact, the nature and relevance of the number of statements about candidates, and a host of other factors that neither the regulated community nor the Commission are equipped to undertake. To illustrate the problem, we need look no further than the calls in this matter.

Concluding that the calls at issue meet the definition of "telephoue banks," and thus required disclaimers, obviates the need to determine the purpose and impact of the negative statements about Stan Thompson contained therein, or the relevancy of whether

[8] Five Commissioners approved the probable cause recommendation. In a Statement of Reasons, Commissioner von Spakovsky agreed that the Commission's determination in its regulation that "telephone banks" are subject to the disclaimer requirements was "entirely correct," but dissented because he thought the polls in question, which "did not promote, attack, support or oppose any candidate or party," were not "political advertising." MUR 5578R (David Vitter for U.S. Senate), Statement of Reasons of Commissioner Hans a. von Spakovsky, dated September 4, 2007, at 4-5. Here, as we have shown, the calls in question conveyed information that could be perceived as attacking or opposing Stan Thompson, and therefore constituted "political advertising." *Supra* at 11-13

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those statements were fair or accurate. Moreover, that conclusion eliminates any questions raised by the timing of the second October telephone poll, 9-13 days before the 2004 General Election. The DCCC is unable to show that the results of this telephone poll were ever used for any tangible purpose, Transcript at 79, and a search of publicly available information did not reveal any ads supporting Boswell or opposing Thompson after October 25, 2004 that may have been derived from information developed from the poll. Without additional investigation, it is difficult to determine whether the calls in issue were the type of purely "legitimate" public opinion telephone polls that the DCCC maintains should not be subjected to the disclaimer requirements. It may be equally difficult to determine in future cases without significant factual development whether other telephone polls are "legitimate" public opinion polls or merely candidate attacks disguised as research.[9] A bright-line rule eliminates the need for these determinations, and does not, as we have shown, impose a cognizable chill on political committees' First Amendment rights. All it does is guarantee that voters know, by the end of the telephone calls meeting the definition of "telephone bank," the identity of the political committee that has paid for them.

D. Conclusion

Accordingly, based on the evidence in this matter, including information set forth in the General Counsel's Brief, the Response Brief, and from the Probable Cause Hearing, we recommend that the Commission find probable cause to believe that the

[9] Moreover, establishing a possible "poll loophole" may increase the possibility that "telephone banks" attacking or supporting candidates, but employing some polling techniques, will be paid for with prohibited non-federal funds (i.e., soft money).

Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer, violated 2 U.S.C. § 441d.

IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

[redacted]

V. RECOMMENDATIONS

1. Find probable cause to believe that the Democratic Congressional Campaign Committee and Brian Wolff, in his official capacity as treasurer, violated 2 U.S.C. § 441d;

2. [redacted]

3. Approve the appropriate letter.

12/19/2008
Date

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