FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 19 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Fred Wertheimer
Democracy 21
1875 I Street, NW, Suite 500
Washington, DC 20006

J. Gerald Hebert
Campaign Legal Center
1640 Rhode Island Avenue, NW, Suite 650
Washington, DC 20036

RE: MUR 5854

Dear Messrs. Wertheimer and Hebert:

On February 12, 2009, the Federal Election Commission reviewed the allegations in your complaint dated October 19, 2006, and found that on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe The Lantern Project, and Brian Donlen, as treasurer, violated 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a) by failing to register as a political committee with the Commission; by failing to report its contributions and expenditures; by knowingly accepting contributions in excess of $5,000; and by knowingly accepting prohibited contributions from labor organizations. Accordingly, on February 12, 2009, the Commission closed the file in this matter.

Certain other allegations raised in your complaint were severed from MUR 5854 and merged with an ongoing matter designated as MUR 5831. The Commission will notify you when that matter has concluded and the file is made public.

Documents related to MUR 5854 will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

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The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Lantern Project, and Brian Donlen, as treasurer **MUR:** 5854

I. INTRODUCTION

This matter was generated by a complaint filed with the Commission by Democracy 21 and the Campaign Legal Center. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that the Lantern Project, an entity organized under Section 527 of the Internal Revenue Code, spent over a million dollars, raised outside the limitations of the Federal Election Campaign Act of 1971, as amended, (the "Act") to influence the 2006 Senate election in Pennsylvania between Rick Santorum and Bob Casey.

II. FACTUAL SUMMARY

The Lantern Project was established on January 10, 2005 and files disclosure reports with the Internal Revenue Service under Section 527 of the Internal Revenue Code. 26 U.S.C. § 527. It has not registered with the Commission as a political committee. In reports filed with the IRS, it reports raising $1,700,900 and spending $1,633,502 through February 2007, with most of its financial activity taking place in the months immediately prior to the 2006 general election.[1] The complaint alleges that the Lantern Project raised funds outside the limitations and prohibitions of the Act to influence the 2006 Senate election in Pennsylvania between Rick Santorum and Bob Casey, and therefore should have registered and properly disclosed its activities in reports filed with the Commission.

[1] Almost half of the Lantern Project's receipts, $865,500, came from labor organizations. In addition, $697,000 of the donations received from individuals exceeded $5,000.

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In response to the complaint, Lantern Project denies that it received contributions or made any expenditures for the purpose of influencing a federal election, and thus was not was required to register and report as a political committee under the Act. In asserting that it did not make any expenditures, the Lantern Project states that it did not pay for any communications containing express advocacy. Further, the organization asserts that the complaint errs by equating 527 organization status with political committee status and by claiming that the organization's major purpose was the election of candidates.

The Lantern Project funded at least eight television advertisements, one Internet ad, and one radio ad, all of which criticized Santorum's position on an issue. Representative examples of the ads include:

- "It's hard to make ends meet. Yet Rick Santorum voted against raising the minimum wage. But Santorum voted to allow his own pay to be raised by $8000. What is he thinking?" ("Minimum").

- "From privatizing Social Security to cutting student loans for the middle class, when Rick Santorum has to choose between siding with George Bush or middle class Pennsylvanians, Santorum supports Bush. What is he thinking?" ("Sides").

- "Rick Santorum's committees accepted more money from lobbyists last year than any other member of Congress. No wonder Santorum voted to give billions in special tax breaks to oil companies. What was he thinking?" ("Lobbyists").

Although the complaint generally alleges that the Lantern Project accepted contributions, the complainants do not appear to have had access to any Lantern Project fundraising materials. Although Lantern Project did not submit any sample solicitations with its response, it stated that its "written solicitations ... tell donors expressly that their funds will <u>not</u> be used to support the election or defeat of clearly identified federal candidates." Lantern Project Response at 3 (emphasis added). Further, a review of the organization's website identified an

1 instruction to readers that: "[c]ontributions to the Lantern Project will neither be used to support
2 or oppose the election of a clearly identified Federal candidate nor to influence Federal
3 elections."[2]

4 The mission statement on the Lantern Project's website asserts that "our mission here is
5 simple: [t]o shine a light on the facts about Rick Santorum's extreme positions, failed policies
6 and hypocritical statements – and let the facts speak for themselves." *See* MUR 5854 Complaint,
7 Exhibit B; *see also* www.santorumexposed.com. Although the Lantern Project claims on its
8 website that its "goal is to expose right wing public officials as the extremists they are rather than
9 the pillars of mainstream, middle-American values they claim to be," the website focuses
10 exclusively on Santorum, with articles, editorials, and videos critical of the Senator and his views
11 on a wide range of issues. There is no indication that the organization did any work outside
12 Pennsylvania in 2006. Lantern Project's response acknowledges that it "focused initially on the
13 legislative record" of only Santorum, but claimed that it did so because Santorum's agenda was
14 the "best example" of the "brand of politics" and "right-wing legislative style" they opposed and
15 because the group was based in Pennsylvania, the state Santorum represented. Lantern Project
16 Response at 2-3.

17 **III. LEGAL ANALYSIS**

18 The Act defines a "political committee" as any committee, club, association, or other
19 group of persons that receives "contributions" or makes "expenditures" for the purpose of
20 influencing a federal election that aggregate in excess of $1,000 during a calendar year. 2 U.S.C.
21 § 431(4)(A). To address overbreadth concerns, the Supreme Court has held that only

[2] However, the website's fundraising page also urged donors to contribute in order to "help us expose Rick's radical agenda."

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organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"). The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity. *See* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007).

A. **There is an Insufficient Basis to Conclude Lantern Project Has Made Expenditures Exceeding $1,000**

In determining whether an organization makes an expenditure, the Commission "analyzes whether expenditures for any of an organization's communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007). Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 C.F.R. § 100.22(a); *see also MCFL,* 479 U.S. at 249 ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature."). Courts have held that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate."

1 *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424
2 U.S. at 44, n.52, included the word "support," in addition to "vote for" or "elect," on its list of
3 examples of express advocacy communication).

4 The Commission's regulations further provide that express advocacy includes
5 communications containing an "electoral portion" that is "unmistakable, unambiguous, and
6 suggestive of only one meaning" and about which "reasonable minds could not differ as to
7 whether it encourages actions to elect or defeat" a candidate when taken as a whole and with
8 limited reference to external events, such as the proximity to the election. *See* 11 C.F.R.
9 § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated
10 that "communications discussing or commenting on a candidate's character, qualifications or
11 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
12 they have no other reasonable meaning than to encourage actions to elect or defeat the candidate
13 in question." *See* 60 Fed. Reg. 35292, 35295 (July 6, 1995).[3]

14 As explained earlier, Lantern Project distributed at least ten advertisements. A review of
15 the ads reveals that each of them is critical of Santorum, but at the same time, they focus on
16 issues, and never mention Santorum's candidacy or his political opponent. Finally, the ads
17 contain no exhortations that a viewer would understand as urging action for Santorum's election.

[3] In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S.Ct. 2652 (2007) (*WRTL*), the U.S. Supreme Court held that "an ad is the functional equivalent of express advocacy," and thus subject to the ban against corporate funding of electioneering communications, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*, 127 S.Ct. at 2667. Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court's analysis included examining whether the electioneering communication had "indicia of express advocacy" such as the "mention [of] an election, candidacy, political party, or challenger" or whether it "take[s] a position on a candidate's character, qualifications, or fitness for office." *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R § 114.15. *See* Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

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The ads in question do not contain phrases, slogans or words that explicitly urge the election of Rick Santorum or the defeat of Bob Casey. *See* 11 C.F.R § 100.22(a). Rather, they end with the rhetorical question asking "What was he thinking?" While the communications clearly indicate that the Lantern Project disagrees with Santorum's policies on the various issues, it does not tell readers to vote for Santorum, and does not identify him as a candidate for the office of Senate.

Moreover, the communication's electoral portion is not "unmistakable, unambiguous, and suggestive of only one meaning"; and reasonable minds could differ as to whether it encourages electoral, or some other action. *See* 11 C.F.R. § 100.22(b). While the ads appear to have been broadcast in the months preceding the general election, the overwhelming focus of the communication is on issues and Santorum's policies or positions on those issues. Even ads that arguably attack Santorum's "character, fitness and qualifications," such as "Lobbyists," where Santorum's legislative votes are linked to lobbyist's political contributions, do not appear to qualify as express advocacy. *See* 60 Fed. Reg. at 35295. "Lobbyists" is principally about the legislative issue of oil industry tax policy, not Santorum's character. Given the lack of any electoral directives in the various Lantern Project ads, and taking the communication as a whole, one can reasonably view each communication as criticizing Santorum's legislative or issues agenda, and not as encouraging voting for or against Santorum. Therefore, there is an insufficient basis on which to conclude that the Lantern Project has made expenditures exceeding $1,000 and triggered political committee status through expenditures.

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B. <u>There is an Insufficient Basis to Conclude Lantern Project Has Received Contributions Exceeding $1,000</u>

The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Commission regulations provide that a gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. 11 C.F.R. § 100.57(a).

The complaint has not specifically alleged that the Lantern Project has received contributions under 11 C.F.R. § 100.57. Instead, it provides details on the donors to the Lantern Project whose contributions would be impermissible under the Act if the Lantern Project was a political committee. The complaint did not submit any Lantern Project solicitation letters or direct mail fundraising appeals. The Lantern Project response directly addresses the complaint's allegations by explaining that Lantern Project donors were "expressly" told "that their funds will not be used to support the election or defeat of clearly identified federal candidates." Lantern Project Response at 3. A similar admonition was set forth on the organization's website. Although such a disclaimer would not immunize a fundraiser from the reach of 11 C.F.R. § 100.57 if in fact the Lantern Project communications to donors "indicate[d] that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," there is no evidence that Lantern Project engaged in fundraising under these

1 provisions. 11 C.F.R. § 100.57(a).[4] Therefore, there is an insufficient basis on which to
2 conclude that the Lantern Project has received contributions exceeding $1,000 and triggered
3 political committee status through contributions.

4 **C. Major Purpose**

5 Because the Commission concludes that the Lantern Project has not made expenditures in
6 excess of $1,000 and has not accepted contributions in excess of $1,000, it is unnecessary to
7 make a determination as to the major purpose of Lantern Project.

8 **D. Conclusion**

9 Therefore, there is no reason to believe that the Lantern Project, and Brian Donlen, as
10 treasurer, violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political
11 committee with the Commission; by failing to disclose its contributions and expenditures in
12 reports filed with the Commission; by knowingly accepting contributions in excess of $5,000;
13 and by knowingly accepting union contributions.

[4] Lantern Project's website set forth a message urging readers to contribute to the Lantern Project to help "expose Rick's radical agenda," but this message does not appear to request contributions to elect a clearly identified candidate for federal office because there are no references to elections or elective office in the solicitation. *See* Political Committee Status & Definition of Contribution: Explanation and Justification, 69 Fed. Reg. 68056, 68057 (Nov. 23, 2004).

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