FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

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In the Matter of	)	
	)	**MUR 5937**
Romney for President, Inc., *et al.*	)	

STATEMENT OF REASONS

Vice-Chairman MATTHEW S. PETERSEN and Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN II

This matter was generated by a complaint alleging that Kem Gardner made an excessive in-kind contribution to Romney for President, Inc. ("RFP") when Mr. Gardner chartered a plane to fly him and friends and family members to an RFP fundraising event. We do not agree. The Supreme Court has held that travel must be *authorized or requested* by a candidate for it to be considered a contribution to that candidate. Thus, travel undertaken independently of a campaign is not subject to the limits set forth in the Federal Election Campaign Act ("the Act"). In this matter, no evidence was presented demonstrating that Mr. Gardner's travel to the RFP fundraising event was requested or authorized by the candidate or his campaign. Therefore, as explained in greater detail below, we voted (i) against finding a reason to believe that Mr. Gardner and RFP violated the Act[1] and (ii) to close the file.

BACKGROUND

On June 24 and 25, 2007, Romney for President, Inc. hosted a fundraising event in Boston, Massachusetts. To attend, individuals had to commit to bring or raise $5,000 for the campaign. On the evening of the 24th, invitees attended a dinner at Fenway Park. The following day, RFP rented Banknorth Garden, at which attendees could deliver the contributions they had raised, call friends and colleagues to solicit contributions for RFP, consume food and drinks, and otherwise socialize with other supporters of RFP.[2]

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[1] Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively. The undersigned objected. MUR 5937, Certification dated January 28, 2009.

[2] RFP Response at 2.

Kem Gardner, a Utah resident, chartered a plane to travel to the RFP event. He invited friends and family members who were also planning to attend the event to accompany him on the Salt Lake City-to-Boston flight. According to RFP, the campaign did not ask any individual to provide travel for other event attendees.[3]

The complainant in this matter alleged that Mr. Gardner exceeded the "$1,000 personal travel exemption for individuals under federal law" by chartering his flight to Boston. Further, the Complaint states that RFP "knowingly received this illegal contribution."[4]

On the basis of the Complaint and after reviewing the responses of RFP and Mr. Gardner, the Office of General Counsel ("OGC") recommended that the Commission find reason to believe that (i) Mr. Gardner made an excessive in-kind contribution to RFP, and that (ii) RFP knowingly accepted and failed to disclose this excessive in-kind contribution.[5]

ANALYSIS

The Act places limits on contributions by individuals to candidates, political parties, and other political committees.[6] However, the Act includes a variety of exceptions to the definition of "contribution." Among them are (i) services provided by "any individual who volunteers on behalf of a candidate or political committee,"[7] and (ii) "any unreimbursed payment for travel expenses made by any individual on behalf of any candidate . . . to the extent that the cumulative value . . . does not exceed $1,000 with respect to any single election."[8] The corollary to the latter exception is that travel expenses that are not incurred "on behalf of any candidate" are not considered contributions, regardless of whether such expenses exceed $1,000.

The Supreme Court construed the travel exception[9] in *Buckley v. Valeo* and specifically distinguished travel "undertaken as a volunteer at the direction of the

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3 Gardner Response at 1-2; RFP Response at 2.

4 Complaint.

5 First General Counsel's Report ("GCR") at 9.

6 *See* 2 U.S.C. § 441a(a)(1). During the 2008 election cycle, the limit on an individual contribution to a candidate was $2,300 per election.

7 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74.

8 2 U.S.C. § 431(8)(B)(iv); 11 C.F.R. § 100.79.

9 The volunteer travel language examined by the *Buckley* Court is slightly different from the current version. The prior version provided an exception to the definition of "contribution" for "any unreimbursed payment [in excess of $500] for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate." Pub. L. No. 93-443, 88 Stat. 1273 (codified at 2 U.S.C. § 431(e)(5)(D) (1974)). The volunteer travel exception was later amended by the 1979 amendments to the

candidate or his staff" from "independently travel[ling] across the country to participate in a campaign."[10] According to the Court, the former was properly treated as a contribution to the campaign as "a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates."[11]

The Court, however, held that the latter type of travel did not constitute a contribution, nor was it subject to the volunteer travel exception's monetary limit. As the Court noted:

> The statute distinguishes between independent expenditures by individuals and campaign expenditures on the basis of whether the candidate, an authorized committee of the candidate, or an agent of the candidate "authorized or requested" the expenditure. As a result, only travel that is "authorized or requested" by the candidate or his agents would involve incidental expenses chargeable against the volunteer's contribution limit. ~~. . . . Should a person~~ independently travel across the country to participate in a campaign, any unreimbursed travel expenses would not be treated as a contribution. This interpretation is not only consistent with the statute and the legislative history but is also necessary to avoid the administrative chaos that would be produced if each volunteer and candidate had to keep track of amounts spent on unsolicited travel in order to comply with the Act's contribution . . . ceiling[] and the reporting and disclosure provisions.[12]

A Fundraising Event is Not a Volunteer Event; Therefore, Attending a Fundraising Event Does Not Constitute Volunteer Activity

Though found nowhere in the Act or Commission regulations, OGC contemplates a difference between "typical fundraising events" (e.g., golf outings, dinners, and dances) and the event in question here. Under this analysis, individuals may travel to and attend

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Act. Pub. L. 96-187 (1980). The purpose of the amendment was to (i) expand the exception to include volunteer travel on behalf of political parties and (ii) extend the exception not just to volunteers but also to "individuals who are being paid by a candidate or party committee." H.R. Doc. No. 96-422, Comm. on House Admin., at 8 (1979). The change in statutory language does not affect the Court's analysis.

[10] 424 U.S. 1, 36-37 & n.43 (1976).

[11] *Id.* at 36-37.

[12] *Id.* at 37 n.43 (internal citations omitted) (emphasis added).

so-called typical fundraising events without triggering the $1,000 travel limit because these attendees "do not provide services on behalf of the candidate, but merely make or deliver contributions." According to OGC, the event at issue here, by contrast, involved "volunteers, at the invitation of the campaign, expending their time and services on behalf of the candidate" – apparently by attending and participating in a "human telephone bank," a term undefined in the Act.[13]

This line-drawing exercise is ultimately arbitrary, however. Whether one calls friends and family prior to traveling to an event or after one arrives at an event is a distinction without a difference. Yet under this distinction drawn by OGC, the former traveler would be free from the $1,000 limit, while the latter traveler would be subject to it.[14]

Neither law nor regulation supports this dichotomy.[15] The timing of the solicitation of contributions is irrelevant for disclosure purposes. We fail to see the rationale for imposing differing legal standards on persons who perform the same fundraising actions but do so in a different order. We have been presented no reason why

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[13] Under FEC regulations, a "telephone bank" exists when more than 500 calls "of an identical or substantially similar" nature are made in a 30-day period. 11 C.F.R. § 100.28. To be "substantially similar," the calls must "include substantially the same template or language," varying only "in non-material respects such as communications customized by the recipient's name, occupation, or geographic location." *Id.* There is no evidence in this matter indicating that the phone calls made in connection with the RFP fundraising event were "identical or substantially similar." To the contrary, the attendees were calling family members and friends and, without question, were engaging in unique dialogues with each. Merely because telephone calls were made for the same *purpose* does not cause them to be substantially similar in template or language. To view the definition otherwise would stretch beyond recognition the phrase "substantially similar."

[14] It is irrelevant that Mr. Gardner paid for others to travel as well. Whether paying for one's own travel or for the travel of others, the relevant standard remains whether the travel was authorized or requested by the candidate. Commission precedent supports this analysis. In MUR 5020 (Harrah's Entertainment, Inc., *et al.*), which appears to be the only enforcement action involving travel to a campaign event, an individual paid the travel costs both for a federal Senate candidate and for a personal friend to attend a fundraiser. The Commission concluded that the payment for the candidate's travel—which clearly met the "authorized or requested" threshold—constituted a contribution to the candidate *but* that the payment for the friend's travel did not, because it was not at the campaign's request. MUR 5020, General Counsel's Report #3 at 11-14.

[15] Notwithstanding any attempts in the GCR to use Advisory Opinion 2007-08 as a sword against Mr. Gardner and RFP in this matter (which in and of itself is improper), the AO simply does not conflict with our views here. In fact, the AO merely restates the general exception to the definition of contribution for volunteer activities and the specific $1,000 limit on travel expenses "incurred on behalf of a Federal candidate." The example provided in footnote 2 of the AO contemplates a specific request made by a campaign to a specific person to travel across the country to "arrange for an entertainer to perform at the candidate's campaign event." Clearly, in that example, the person in question was asked solely and specifically by the campaign to travel to another location to set up a campaign event. Conversely, in the matter at hand, RFP sent a broad invitation to numerous individuals to attend an event that the campaign itself set up as a reward for previous support and an incentive for continued support, which could be undertaken at the event itself. The two situations have little in common.

changing the order in which the fundraising activities occur matters, which is understandable, because there is no appreciable difference.

Moreover, the event in question consisted not only of the gathering at the Banknorth Garden, but also a dinner at Fenway Park the night before. To be able to go to both the Garden and Fenway, individuals were required to bring or commit to raising $5,000. Therefore, attendance was premised not on seeking contributions, but rather on bringing or pledging contributions. According to RFP, attendees utilized the Garden event not only to make solicitations of friends and contacts, but also to deliver the contributions they brought with them in addition to dining and socializing with other attendees. Simply because RFP provided an arena for attendees to fulfill their $5,000 commitment along with an opportunity to raise even more money for RFP does not convert the entire two-day gathering into a volunteer event, subjecting volunteers to a spending limit.

Mr. Gardner's Travel Expenses Were Not "Incurred On Behalf of" RFP

To our knowledge, the Commission has never held that a mere invitation from a campaign to its supporters to attend an event—regardless of whether the event was a "volunteer event" or a "fundraising event"—constitutes a campaign request or authorization to travel.[16] The volunteer travel exception itself only covers "travel expenses made by any individual on behalf of any candidate or any political committee of a political party."[17] As set forth above, *Buckley* further limited the scope of this exception to cover only travel "authorized or requested" by the candidate or the committee.

Therefore, "on behalf of" must mean something more than merely "at the invitation of." Instead, the campaign must make a specific request to travel as an agent of the candidate or committee. Otherwise, any mass invitation, email, or text message from a candidate asking people to attend an event or volunteer would require the candidate to ensure that no invitee who had already reached the legal limit on what he or she could contribute had, in addition, spent more than $1,000 on any travel connected with the campaign during the entire election cycle. Such an application would constitute the sort of "administrative chaos" that *Buckley* disdained.[18]

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[16] In fact, OGC provided no examples of enforcement actions where the Commission has found reason to believe that a violation of 2 U.S.C. § 431(8)(B)(iv) and 11 C.F.R. § 100.79 occurred. It is our understanding that there are none.

[17] 2 U.S.C. § 431(8)(B)(iv); 11 C.F.R. § 100.79. Though OGC attempts to define the event in question as a volunteer event rather than a fundraising event, it is unclear why the type of event is of any import. Event type does not appear to play any role in the functionality of the travel exception limit itself. In fact, neither "volunteer" nor "fundraiser" appears in the language of the statute or regulation.

[18] To illustrate the administrative chaos that could emerge if we were to adopt OGC's recommendation in this matter, consider the following hypothetical: a presidential candidate, a week before the election, emails and text messages all of his supporters, asking them to come volunteer during

Moreover, because the Supreme Court has held that an individual's ability to engage in unfettered travel is a constitutional right,[19] the Commission must have a compelling reason to restrict it. We are not the first to recognize this.[20] Though an individual may not assume travel expenses for a candidate, one's personal travel cannot be regulated. And assumption of travel expenses does not occur where a mere invitation is extended for individuals to attend a campaign event, a volunteer event, or a fundraising event. As *Buckley* requires, a more specific request must be made, such that the traveler is actually specifically asked to travel to an event at the behest of the candidate.

No such evidence was presented here. For instance, there is no evidence that RFP asked Mr. Gardner to transport other attendees to the event. In fact, RFP specifically states that "[t]he campaign did not request that any individual or entity pay for the travel of any other individual or group of individuals."[21] The Complaint provides no evidence to the contrary.

Likewise, as in MUR 5020 (Harrah's Entertainment, Inc., *et al.*), there is no evidence to suggest that Mr. Gardner transported any RFP campaign staff, volunteers, or paid consultants to Boston. In fact, Mr. Gardner, in his response, specifically denies ~~knowingly doing so.[22] Again, the Complaint provides no evidence to the contrary.~~

Finally, to the extent it is relevant here, application of the travel exception's $1,000 limit to Mr. Gardner would improperly convert him from a campaign fundraiser

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the last weekend before the election. Under the legal theory we are being asked to adopt, those who travelled to a battleground state would be required to document their travel costs. And the campaign would have to essentially set up check points at its campaign headquarters to determine whether any volunteer's travel costs, either by themselves or combined with other volunteer travel that a particular supporter had previously undertaken, exceeded $1,000. If the costs did exceed the limit, the campaign would then be required to research how much the traveler had already contributed in order to ensure that the travel expenses that exceeded $1,000, when coupled with previous contributions, did not exceed the contribution limits in place for that election cycle. The administrative costs would be crippling.

Furthermore, those supporters who are most enthusiastic about the candidate, as evidenced by their previous contributions and travel, would be barred from traveling anywhere to help that candidate once the limits were reached. Such a perverse result cannot be the intention of the statutes and regulations in question.

[19] *See, e.g., Saenz v. Roe*, 526 U.S. 489, 498-501 (1999) (collecting authority).

[20] In a Statement of Reasons signed in 2007, Commissioner Weintraub and then-Chairman Lenhard stated that "an individual's personal travel and lodging expenses are just that – they are personal not campaign expenditures, even if the individual expresses political opinions once he or she arrives at the destination. One need not report such expenses to the Government, whether one travels by Greyhound or Lear jet." MUR 5642 (Soros), Robert D. Lenhard and Ellen L. Weintraub, Statement of Reasons dated Dec. 31, 2007, and Jan. 2, 2008, at unnumbered p. 3

[21] RFP Response at 2.

[22] Gardner Response at 2.

into a campaign volunteer subject to a spending limit simply because he conducted his fundraising activities at a campaign-event.[23] Neither the Act nor FEC regulations allow such a conversion to take place. One cannot be transformed into a volunteer subject to spending limits solely by either contributing one's own money or soliciting or bundling contributions from friends or colleagues.[24]

CONCLUSION

Acting on behalf of a candidate means more than merely accepting an invitation to attend a fundraising event. To hold otherwise would not only restrict core Constitutional rights but also create an administrative nightmare for supporters and candidates alike. The Supreme Court has warned against both outcomes. Therefore, we cannot support the recommendation that there exists a reason to believe that Mr. Gardner and RFP violated the Act simply because Mr. Gardner chartered a plane for himself and other individuals in response to RFP's general invitation to attend a fundraising event. For these reasons, we voted to close the file in this matter.

March 10, 2009

Matthew S. Petersen
Vice Chairman

Caroline C. Hunter
Commissioner

Donald F. McGahn II
Commissioner

[23] For the reasons stated previously, however, we believe the dichotomy between "fundraiser" and "volunteer" to be of dubious significance.

[24] Though not addressed in the GCR, the fact that Mr. Gardner chartered a flight for himself and others rather than flying coach does not convert Mr. Gardner's actions into a violation of the Act. That actions, to some, may *feel* like a violation is not sufficient. Rather, the circumstances in question must actually *be* a violation of the Act in order for enforcement to commence.