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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

VIA FEDERAL EXPRESS & FACSIMILE

Jeff Jordan
Office of General Counsel
Federal Election Commission
999 "E" Street, NW
Washington, DC 20463

Re: *MUR 6005*

Dear Mr. Jordan:

We represent The American Leadership Project (ALP), Roger V. Salazar, Jason Kinney, Michele Dunkerly, Jay Eisenhofer, Monica Graham, Stephen Kennedy, William Titleman, and Erick Mullen (together "respondents") in the above-mentioned matter filed by Obama for America.[1] Respondents request that this matter remain confidential in accordance with 2 U.S.C. section 437g(a)(4)(B).

INTRODUCTION

The complaint should be dismissed without any further action because it fails to allege any facts or law establishing a violation of federal campaign finance laws. In fact, the real purpose of the complaint seems to be to scare donors from making donations to ALP, thereby chilling ALP's ability to engage in issue advocacy. In naming some of ALP's donors as respondents, asking for "heightened" penalties to be levied against them, and requesting a criminal investigation, complainant apparently hopes that such threats alone will freeze communications it dislikes but that comply with all applicable laws.

The complaint alleges that ALP is a political committee within the meaning of the Federal Elections Campaign Act (FECA or Act), and therefore is required to register and report

[1] Respondents have already filed their designation of counsel forms with the FEC.

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its activity as a political committee and comply with the Act's source and contribution restrictions, including limiting the amount it receives from each donor to $5,000 per year. Importantly, complainant does not contend, much less attempt to demonstrate, that ALP has made *any* political expenditures under the Act. Nor could it: ALP's communications are not express advocacy or its functional equivalent. Nor does complainant argue that ALP's communications failed to meet the requirements for electioneering communications established by *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (June 25, 2007) ("*WRTL*") and the FEC's recent rulemaking, 72 Fed. Reg. 72899. Finally, complainant does not dispute that ALP operates independently from any candidates, does not make any contributions to candidates, does not coordinate with any candidates, and does not engage in any express advocacy or its functional equivalent. In short, ALP does not engage in any federal campaign activity. Thus, complainant is in the untenable position of arguing that ALP is a political committee even though it has never engaged in any federal campaign activity or made any federal political expenditures.[2]

Undeterred, complainant argues ALP is a political committee because it allegedly solicited donations by stating those funds would be used to support or defend a particular federal candidate and that ALP's "major purpose" brings it within the Act. But complainant offers no facts to support the solicitation allegation and even if it did, complainant's proposed rule would be unconstitutional as applied here in light of the Supreme Court's decision in *WRTL*. Complainant's argument that ALP meets the "major purpose" test is also unavailing because ALP has not spent any money on federal election activity and its major purpose is to advocate about economic issues rather than for particular candidates. More fundamentally, these arguments fail because they are tortured attempts to bring ALP within the Act despite the fact that ALP has never engaged in any federal campaign activity. Given this, complainant's efforts to bootstrap ALP into the mandates of the Act are unsupported by the Act and would be unconstitutional.

ANALYSIS

I. ALP is Not a Political Committee Under the Act

The test for when an entity becomes a political committee under the Act is well known. A political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Contributions and expenditures are further limited to receipts and disbursements made "for the purpose of influencing any election for Federal Office." 11 C.F.R. § 100.5(a). That is not all. The United States Supreme Court has further narrowed those definitions in two important ways to avoid constitutional issues. First, in *Buckley v. Valeo* (1976) 424 U.S. 1, 79 and its progeny,

[2] That is made clear by the fact that complainant's request for relief focuses on contributions, not expenditures.

the Court has stated that only expenditures for express advocacy or its functional equivalent can trigger political committee status under the Act. Second, as the FEC has stated, "to avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result' only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act." 72 Fed. Reg. 5595, 5601 (2007) (citation omitted). "Thus, the major purpose test *serves as an additional hurdle to establishing political committee status.* Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in federal campaign activity." *Id.* (emphasis added).

Thus, an entity only becomes a political organization if it raises $1,000 in contributions or spends $1,000 in expenditures. If those thresholds are not met, an entity does not become a political committee. Put differently, the major purpose test is not – and cannot be – a catch-all, alternative test that brings an entity within the Act even if that entity has never received federal contributions or made federal expenditures. To hold otherwise would mean that an entity that engages exclusively in issue-based electioneering communications could nonetheless become subject to the reporting requirements and source and contribution restrictions of the Act. That of course would be unconstitutional in light of *WRTL*.

Viewed under these standards, the complaint's lack of merit quickly becomes apparent: complainant does not contend ALP has ever made any political expenditures and its evidence that ALP has accepted federal contributions is nonexistent. These are the only two routes to political committee status, and neither exists here.

A. ALP Has Not Made Any Expenditures Under the Act

ALP is not a political committee through its expenditures. As complainant implicitly concedes, ALP has not spent any money on express advocacy or its functional equivalent. To be sure, ALP has engaged in significant issue-based electioneering communications but it is telling that complainant does not contend that any of those communications: (1) are express advocacy or its functional equivalent; (2) are coordinated with any federal candidate; or (3) fail to comply with the requirements for electioneering communications set forth in both *WRTL* and the FEC's extensive Rulemaking for such communications. In short, ALP has made no expenditures under the Act and complainant does not contend otherwise.

B. ALP Has Not Solicited Any Contributions Under the Act

An entity becomes a political committee under the Act if it receives money in response to a communication that indicates some or all of the money "will be used to support or oppose the election of a clearly identified Federal candidate." 11C.F.R. § 100.57(a). Complainant alleges that either ALP's public descriptions of its work or its communications to donors came within section 100.57(a). Complaint at 7. But it cites no facts to support the

allegation: it points to no fundraising materials or statements by ALP representatives suggesting that funds will be used to support or oppose a clearly identified candidate.

Instead, complainant contends ALP violated section 100.57 because "ALP's organizers are closely tied to the Clintons and many of its donors have already contributed the maximum possible donation to Clinton's presidential campaign." Complaint at 7. But the identity of ALP's organizers and donors has nothing to do with whether ALP's solicitations stated that funds would be used to elect or defeat a particular candidate, and that is the only relevant question under section 100.57. Moreover, the mere fact that there is some convergence of donors between ALP and the Clinton campaign, even if true, is not sufficient as a matter of law to establish any formal relationship between the two or that ALP is a political committee. *See, e.g., FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 865 (1996) (rejecting argument that GOPAC was a political committee because of overlap between donors to it and the Newt Gingrich campaign committee).

Complainant also argues that by referencing its electioneering communications in solicitation materials and on its website, ALP somehow became a committee. The argument is nonsensical. According to complainant's logic, broadcasting electioneering communications or referencing them in solicitation letters causes an entity to become a political committee without more. That, of course, is not and cannot be the law. In addition, neither the solicitations nor the website materials state that any funds will be used to support or defeat a clearly identified federal candidate. And the communications themselves fit within the requirements for electioneering communications, and therefore do not mention any federal candidacy or race or suggest that any funds would go to support or defeat a particular federal candidate. *See generally* 11 C.F.R. § 114.15.

Complainant also misreads the applicable standard. For purposes of determining political committee status, contribution comes within the Act only if it "will be converted to expenditures subject to regulation under FECA." *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295. Donations that flow from a solicitation are contributions under the Act only if "they leave no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat his policies during the election year." *Id.* ALP's solicitation materials do not remotely suggest that funds would be used to advocate the election or defeat of a candidate. ALP's fundraising has not mentioned any federal candidate and instead simply mentions the issues it sought to discuss. ALP's fundraising efforts are not at all similar to the fundraising efforts discussed in the Swiftboat Vets, MoveOn, and League of Conservation Voters conciliation agreements, all of which made clear that the money raised would support the election or defeat of a particular candidate.

Moreover, the FEC approved section 100.57 before the Court's *WRTL* decision last term, and it sweeps too broadly in light of that decision. Briefly, if ALP's communications are not express advocacy or the functional equivalent of express advocacy and therefore are not expenditures under the Act, contributions to support those communications cannot convert ALP into a political committee. If that were the case, an organization would be required to report its

activity and comply with the Act's source and contribution restrictions even if it never engaged in express advocacy or, for that matter, electioneering communications. In deciding *WRTL*, the Court repeatedly stated that an entity's ability to run issue ads cannot turn on the entity's intent or the effect of the ads. "Under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *WRTL*, 127 S. Ct. at 2666. Thus, under *WRTL*, a contributor's motivation for making a contribution is irrelevant. Rather, it is the communication itself, not the intent of the speaker or the donor that determines whether the speaker becomes a "committee." If the donation is used to buy genuine issue ads, as is the case here, the entity to which the donor gave cannot be considered a political committee regardless of what the donor thought when he or she made the contribution; if the donation is used for express advocacy or its functional equivalent, then the entity is a political committee regardless of the donor's intent.

C. ALP Is Not a Political Committee Under the "Major Purpose" Test

Complainant also claims that ALP is a political committee under the "major purpose" test. Complaint at 6. As an initial matter, complainant misreads the scope of that test. As the FEC has stated, the major purpose test is an "additional hurdle" in finding that an entity is a political committee; the contributions and/or expenditure thresholds must be met first. Here, however, ALP has not received or spent any federal contributions or expenditures, and therefore it is not a political committee. There is therefore no need to determine ALP's major purpose. In fact, a rule that would result in an entity becoming a political committee even though it received no contributions and made no political expenditures would be flatly unconstitutional.

ALP's major purpose, as articulated by the group itself, is not the election or defeat of a particular candidate, but rather "to raise public awareness of vital public policy issues affecting America's middle class – the economy and jobs, tax fairness, health care reform, public education, trade policy, and the mortgage crisis, among others – against the high-visibility backdrop of closely-contested primary elections." ALP's communications do not contain express advocacy or the equivalent of express advocacy as those terms have been interpreted by the U.S. Supreme Court in *WRTL* and the FEC's subsequent rulemaking – neither of which is even mentioned in the complaint.

Complainant contends that ALP's status as a section 527 organization under the Internal Revenue Code entity is prima facie proof that it is a political committee under FECA. Complaint at 6. But the FEC has expressly rejected that argument, declining to promulgate a rule requiring all 527 organizations to register as political committees. Its decision in this regard was upheld by the U.S. District Court in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). As the FEC stated during its rulemaking, "[a]n organization's election of section 527 tax status is not sufficient evidence in itself that the organization satisfies FECA and the Supreme Court's contribution, expenditure and major purpose requirements." 72 Fed. Reg. 5595, 5598 (2007). The reason is that "'tax law is not a very good mechanism for differentiating between election-focused and ideological groups.'" 72 Fed. Reg. at 5598 (citation omitted).

The only other evidence complainant points to are press reports suggesting that ALP was created to help the candidacy of Hillary Clinton. Those conclusions, however, are not based on any statements attributable to ALP representatives. In any event, even if the newspaper claims were correct (they are not) and were based on statements from ALP representatives (they are not), they would not be evidence on which a trier of fact could rely for the purpose of finding ALP is a political committee. *GOPAC*, 917 F. Supp at 864.

The FEC enforcement actions cited by complaint provide no support for the complaint. In both the Swift Boat Veterans, POWs for Truth, and The Media Fund settlements, the FEC expressly found that both entities had engaged in express advocacy as its functional equivalent and had raised funds by clearly indicating that funds received would be targeted to the election or defeat of a specific federal candidate. Neither of those facts exists here, as the complaint implicitly concedes.

II. THERE ARE NO GROUNDS FOR BRINGING THIS ACTION AGAINST DONORS TO ALP

Complainant has named some but not all of ALP's donors and there is no rhyme or reason for why some are named and others are not.[3] The reason for naming donors, however, could not be more clear: complainant wants to scare donors and chill ALP's advocacy. But while there may be a political rationale for naming them there is no legitimate legal reason for doing so. ALP donors were simply responding to ALP's solicitation materials, which made it clear that ALP would advocate about several economic issues but did not state or suggest that such advocacy would support or oppose any particular federal candidate. The solicitation materials further made clear that ALP would not coordinate with any candidate, would not engage in any express advocacy or its functional equivalent, but would fully comply with all laws, including filing electioneering communication reports. In responding to those materials, donors have done nothing wrong and should be dismissed without more. We are aware of no case where the FEC has pursued claims against donors even where the donors were responding to explicit requests for money to fund efforts to elect or defeat a particular candidate, including in the recently completed settlements with Swiftboat Veterans and POWs for Truth, the Media Fund, League of Conservation Voters, or MoveOn.

Certainly the FEC should not open an investigation naming a donor simply because that person's name appears on an electioneering communication report. Doing so would turn those disclosure reports into nothing more than another tool to be used against those whose

[3] The named donors are Michele Dunkerly, Jay Eisenhofer, Monica Graham, Stephen Kennedy, and William Titleman. In addition, complainant alleges, without any facts, that Erick Mullen was involved in ALP's communications. That is not true and should be dismissed forthwith. Mr. Mullen would be willing to provide an affidavit stating he had no involvement with ALP's electioneering communications.

message may not be consistent with that of a candidate. Surely that was not the purpose behind the electioneering communication reports.

* * * * *

In sum, ALP has at all times been well aware of its obligations under the Act and other laws and has worked hard to make sure its conduct and message complied with those laws. Complainant's unsubstantiated allegations are rebutted by the facts that ALP has been engaged in communications regarding economic issues, has operated independently of any candidates, has not engaged in express advocacy or its functional equivalent, and has not raised or spent funds in a manner that would make it a political committee under the Act. The complaint should be dismissed without further action. If you would like additional information, please do not hesitate to contact us.

Sincerely,

Karen Getman/NL

Karen Getman

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