Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

September 8, 2008

BY HAND DELIVERY

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6037

Dear Ms. Duncan:

Respondents Jeff Merkley, Jeff Merkley for Oregon, its Treasurer, Kevin Neely, the Democratic Party of Oregon, and the Democratic Senatorial Campaign Committee ("DSCC") hereby move the Federal Election Commission ("FEC" or "Commission") to dismiss MUR 6037.

BACKGROUND

In this complaint, Friends of Gordon Smith alleges that two advertisements financed and run by the Democratic Party of Oregon violated the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("FECA" or the "Act").[1] Because the complaint's charges are completely without merit, MUR 6037 should be promptly dismissed.

The complaint alleges that the two advertisements constituted coordinated public communications and should have been treated as expenditures under 2 U.S.C. § 441a(d) because they (1) republished Merkley campaign materials, *see* 11 C.F.R. § 109.21(c)(2); (2) contained express advocacy, *see id.* § 109.21(c)(3); and/or (3) violated the general coordination provision of § 109.20(b). The complaint further alleged that the advertisements lacked proper disclaimers; that the State Party may have used state funds from prohibited sources to pay for the advertisements; and that the violations were knowing and willful. All of these charges are without merit.

---

[1] The advertisements are available at http://www.youtube.com/watch?v=W4ffWu5myK8 ("Respect"), and http://www.youtube.com/watch?v=Lhe1WmFmwDg ("Back to Basics"). The complaint provides incomplete transcripts of the ads, omitting both the calls to action and the disclaimers.

The advertisements in question simply do not constitute coordinated public communications under the statute, regulations, or court precedent: First, the advertisements contained all new material and did not disseminate, distribute, or republish any Merkley campaign graphics, video footage, or audio. Second, the ads were produced and aired by the Party to advance its legislative and policy agenda, did not contain any express advocacy, and ran outside the time windows for electioneering communications. Third, the advertisements did not constitute coordination under § 109.20—a general coordination regulation that applies to activity other than public communications. Fourth, because the advertisements were produced and aired by the Party and were not coordinated public communications, the disclaimers used were proper. Finally, the State Party used exclusively federal funds to pay for the advertisements, and the DSCC is not a proper party to this action. In short, there were no violations of the Act, let alone knowing and willful violations.

ARGUMENT

I. The Advertisements Do Not Meet Any of the Content Standards for Coordinated Communications

A communication is "coordinated" with a candidate, an authorized committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of five "conduct" standards. 11 C.F.R. § 109.21; *see also id.* § 109.37(a)(2). Contrary to the complaint's contention, the advertisements in question satisfy none of the content standards and therefore do not qualify as coordinated communications.

A. The Advertisements Contain No Campaign Materials and Therefore Do Not Meet the Content Standard Under 11 C.F.R. § 109.21(c)(2) or § 109.37(a)(2)(i).

The complaint first contends that the advertisements satisfy the second content standard, which covers any "public communication . . . that disseminates, distributes, or republishes, in whole or part, campaign materials prepared by a candidate or the candidate's authorized committee," unless an exception is met. *See* 11 C.F.R. § 109.21(c)(2); *see also id.* § 109.37(a)(2)(i); *cf.* 2 U.S.C. § 441a(a)(7)(B)(iii) ("[T]he financing by any person of the dissemination, distribution, or republication, in whole or part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure."); *accord* 11 C.F.R. § 109.23(a).

According to the complaint, the Party's advertisements "disseminated, distributed, or republished" Merkley campaign material. Notably, however, the complaint does not—and cannot—allege that any of the images, graphics, or audio that appeared in the advertisements

came from Merkley campaign materials.[2] Rather, the complaint simply notes that Merkley was featured in the advertisements and that the advertisements contained messages similar to those found on Merkley's own website.

In fact, the Party hired its own media consultants to draft scripts, shoot footage, edit the advertisements, and place them with television stations. None of the scripts or footage came from the Merkley campaign: They were all created by the Party. Consequently, the advertisements simply cannot constitute "dissemination, distribution or republication" of campaign materials.

As the Commission has specifically ruled, the appearance of a candidate in a third-party advertisement is not dissemination, distribution, or republication of campaign materials. *See* AO 2006-29 (Bono) (holding that a television infomercial featuring an appearance by a candidate does "not disseminate, distribute, or republish, in whole or in part, campaign materials prepared by [the candidate], her authorized committee, or their agents" (citing 11 C.F.R. § 109.21(c)(2)).

Furthermore, the Commission's Advisory Opinions, Explanations and Justifications, and Matters Under Review all demonstrate that the "dissemination, distribution, and republication" of campaign materials covers the use of existing campaign material—not the creation of new materials by a third party. For example, in MUR 5743 (2006) (EMILY's List), the Commission found that EMILY's List republished campaign materials when it used photographs obtained from Betty Sutton for Congress's publicly available website. Similarly, in MUR 5672 (2006) (Save American Jobs Association), the Commission concluded that republication occurred where an organization published on its website a video that was produced and used by a campaign committee in a prior election. In no circumstance has the Commission suggested that the use of *new* material produced and aired by a third party constitutes republication, simply by virtue of an overlapping message or the appearance of a candidate. *See, e.g., Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 441 (Jan. 3, 2003); MUR 5743 (2006); MUR 5672 (2006); MUR 5474 (2005) (Dog Eat Dog Films, Inc.); MUR 2766 (1988) (Auto Dealers and Drivers for Free Trade).

Without reference to any Commission precedent, the complaint attempts to support its republication theory by emphasizing the "[c]ircumstances surrounding the dissemination of this ad." It notes that Merkley appeared in no ads on behalf of the Democratic Party before he

[2] Even if the advertisements contained brief quotes from Merkley materials, this would not constitute dissemination, distribution, or republication of campaign materials. The regulations make an express exception for "a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views." 11 C.F.R. § 109.23(b)(4).

secured the Democratic nomination for Senator, and that the ad was run after the primary but before the general election. *See* Compl. at 4. These observations are irrelevant to the question whether the ad "disseminates, distributes, or republishes, in whole or part, campaign materials." Indeed, candidates who have secured their party's nomination regularly appear in publications for parties, other candidates, and organizations. The Commission's own regulations and advisory opinions recognize that the "dissemination, republication, distribution" provision in the statute does not apply to such appearances. *See* AO 2006-29 (Bono); 11 C.F.R. § 109.22(g) (safe harbor for endorsements and solicitations).

In sum, because the advertisements contain no audio, video, graphics or other material from the Merkley campaign, but rather contain new material, created and produced by the State Party, they simply do not meet the second prong of the content standard for coordination.

B. The Advertisements Do Not Expressly Advocate the Election or Defeat of a Clearly Identified Candidate for Federal Office and Therefore Do Not Meet the Content Standard Under 11 C.F.R. § 109.21(c)(3) or § 109.37(2)(ii).

The complaint also argues that the advertisements meet the third content standard, which covers any "public communication . . . that expressly advocates the election or defeat of a clearly identified candidate for Federal office." *See* 11 C.F.R. § 109.21(c)(3); *see also id.* § 109.37(2)(ii). This argument fails as well, for the advertisements are issue ads that do not contain express advocacy.

1. The advertisements do not contain express advocacy under the Commission's clear test.

The FEC's third content standard covers public communications that contain express advocacy. *Id.* The regulations first define "expressly advocating" to mean any communication that uses explicit words of express advocacy such as "vote for," "vote against," "elect," and "defeat." *See id.* § 100.22(a). The advertisements in question here contain no such "magic" words and therefore do not qualify as express advocacy under § 100.22(a).

Under § 100.22(b), express advocacy also includes those communications that

> [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Id. § 100.22(b).

However, over the course of the regulation's history, numerous courts, Commissioners, and commentators have questioned the constitutional validity of this provision. *See, e.g., Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001) (finding § 100.22(b) unconstitutional); *Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (Ct. App. 2002) ("The [test] is too vague and reaches too broad an array of speech to be consistent with the First Amendment . . . ."); *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002) (defining express advocacy to mean only communications containing explicit words advocating the election or defeat of a candidate); MUR 5874 (2007) (Gun Owners of America, Inc.), Mason, Statement of Reasons ("Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice [in *FEC v. Wisconsin Right to Life*] because it endorses an inherently vague "rough-and-tumble of factors" approach in demarcating the line between regulated and unregulated speech. . . . With its focus on external events and what a reasonable person might interpret speech to mean, Section 100 22(b) rests on unsustainable constitutional premises.").

But even assuming § 109.22(b)'s validity, the advertisements at issue here clearly did not fall within the boundaries of "express advocacy." Not only did the advertisements lack words such as "vote for," "vote against," "elect," or "defeat", the ads nowhere even suggested that viewers vote for or against any candidates. Rather, the advertisements' sole call to action was for viewers to contact Congress and urge Members to support the Party's policy and legislative positions. Thus, under the Commission's regulatory test, the ads did not contain express advocacy because they encouraged the viewer to "some other kind of action" other than voting.

The complete absence of express advocacy in these advertisements is plain from a review of the Ninth Circuit's 1987 opinion in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which §100.22(b) is based. In that case, the Ninth Circuit held that "speech need not include any words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. The court then established a three-part standard to determine if particular political speech meets this test:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally it must be clear what action is advocated. *Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.*

Id. (emphasis added).

In this important respect, the present advertisements differ significantly from the advertisement at issue in *Furgatch*. Unlike these advertisements, which contain a clear call to action, in *Furgatch* the court found that the advertisement was "bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." *Id.* at 865. Noting that the advertisement simply told the public "[d]on't let him do it," the Ninth Circuit found itself "presented with an express call to action, but no express indication of what action is appropriate." *Id.* After reviewing and ruling out all possible non-electoral actions that the ad could have encouraged (impeachment, judicial or administrative action), the Ninth Circuit was left to conclude that "the only way to not let him do it was to give the election to someone else." *Id.*

In contrast to *Furgatch*, in the instant matter there is no ambiguity as to what action the advertisements encouraged. The advertisements' call to action unambiguously asked viewers to call Congress and express support for the Party's legislative and policy agenda on several issues of central importance in the current political debate. That the advertisements' calls to action were not limited to specific, pending legislation does not change the analysis: Such specificity is plainly not required under Commission precedent. *See* Advisory Opinion 1995-25; MUR 4516. Party platforms contain numerous policy positions not directly tied to pending legislation and parties certainly have the right to attempt to influence the legislative process by framing the issues that will likely be advanced in the future, even if those issues are not currently in concrete legislative form before Congress or the state legislature.

Furthermore, the fact that the advertisements depicted Merkley and discussed his support of the Party's legislative agenda, and did not criticize a Republican candidate, does not transform the advertisements into express advocacy. *Furgatch* instructs courts and the FEC to focus on what the advertisement urges the viewer to do rather than on the tone of the ad. 807 F.2d at 864. ("[T]he pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it"). In this case, it is clear that the only "call to action"

involved telephoning Congress and urging Members to support the Party's policy agenda on such issues as the war, healthcare for veterans, crime, and protecting children from Internet predators.

Similarly, both the *Furgatch* opinion and the Explanation and Justification for the Commission's regulatory definition make clear that, when evaluating an advertisement, the most important consideration is its objective content, rather than the subjective intent of its sponsor. *See Furgatch*, 807 F.2d at 863; Explanation & Justification, *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35292, 35295 (July 6, 1995); *see also Federal Election Commission v. Wisconsin Right to Life* (*WRTL*), 127 S.Ct. 2652 (2007). In this instance, the advertisements speak for themselves -- they are issue ads focused on policy positions.

In considering this matter, the Commission should be mindful of the court's admonition that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy." *Furgatch*, 807 F.2d at 863. In this case the most reasonable reading is that the advertisements advanced a position on issues. Critically, the Commission has repeatedly and consistently treated similar party issue advertisements as *not* containing express advocacy. *See, e.g.*, MUR 4516 (In re Democratic Senatorial Campaign Committee, et al.); MUR 4476 (In re Wyoming State Democratic Party, et al.); *see also* AO 1995-25. The same conclusion is warranted here.

2. The Standard articulated in *FEC v. Wisconsin Right to Life ("WRTL")* does not supplant the express advocacy regulation, but rather creates a floor above which the Commission cannot regulate; and even under the *WRTL*'s standard, these advertisements do not contain express advocacy.

In suggesting that the advertisements should have been treated by the Party as expenditures under section 441a(d) rather than administrative or Party building expenses, the complaint advocates an unprecedented expansion of the "express advocacy" standard. Federal courts, however, have consistently held that the First Amendment requires that limitations on political speech must be construed as narrowly as possible. Thus, courts have long construed and applied the express advocacy standard narrowly. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 22-25, 42 (1976); *FEC v. Christian Action Network*, 894 F. Supp. 946, 951, 953 (W.D. Va. 1995); *FEC v. American Federation of State, County, and Municipal Employees*, 471 F. Supp. 315, 317 (D.D.C. 1979).

Most recently, in *Federal Election Commission v. Wisconsin Right to Life* (*WRTL*), 127 S.Ct. 2652 (2007), the Supreme Court emphasized that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it" and that the Federal Election Campaign Act is unconstitutional insofar as it restricts issue advocacy. *Id.* at 2659. Further, the

Court made clear that the speaker's intent to affect an election is immaterial to the analysis whether an advertisement contains express advocacy, *id.* at 2665-66, and that any doubt about an advertisement must be resolved in favor of "protecting rather than stifling speech," *id.* at 2667.

The complaint puts great emphasis on *WRTL*, arguing that the case changes the standard for express advocacy in public communications such that the advertisements at issue here qualify as express advocacy. This argument is wholly without merit for two reasons.

First, the Court in *WRTL* did *not* make more expansive the Commission's definition of "express advocacy," nor did it limit in any way the protection the FEC can provide to issue advocacy. Rather, the Court established a floor above which the government cannot regulate: The Court held that, in regulating speech by corporations and unions, Congress and the Commission are forbidden from prohibiting all speech except express advocacy and its functional equivalent. Communications that lack the "magic words," the Court explained, can be regulated only if they are the functional equivalent of express advocacy. To the extent that Congress or the Commission decides to regulate less speech, that decision is wholly permissible and consistent with the First Amendment. Thus, *WRTL* does not in any way expand the reach of the express advocacy regulation discussed above.

Moreover, the Commission has not incorporated the *WRTL* standard into the coordination regulations: It has adopted the *WRTL* standard only with respect to the regulation of electioneering communications by corporations and unions. *Compare* 11 C.F.R. § 109.21(c)(3) (content standard for coordinated communications), *and id.* § 100.22 (definition of "expressly advocating"), *with id.* § 114.5 (standard for permissible electioneering communications by corporations and labor organizations). Indeed, it would make no sense to incorporate the *WRTL* test into § 100.22: The *WRTL* test and § 114.5 encompass the functional equivalent of express advocacy, while the coordination regulations and § 100.22 cover only express advocacy. "Express advocacy and its 'functional equivalent' cannot be identical. . . .Thus, to the extent that 100.22(b) is broader or more vague than the *WRTL* [] test, it is constitutionally impermissible. If the test is identical, its application is impermissible under principles of statutory and judicial construction." MUR 5874, Mason, Statement of Reasons (internal citations omitted). In short, the complaint's application of *WRTL* and § 114.5 to these ads is wholly misplaced.

Second, even if the *WRTL* standard were to apply to these advertisements, they would not qualify as coordinated communications: They contain neither express advocacy nor its functional equivalent. Chief Justice Robert's opinion in *WRTL* emphasized the primacy of the content of an ad in determining whether the ad is the functional equivalent of express advocacy. Consistent with § 100.22, *WRTL* makes clear that contextual factors "should seldom play a significant role in the inquiry." 127 S.Ct. at 2669. The Commission's regulation for corporate and labor electioneering communications, incorporating *WRTL*'s guidance, is in accord: Only if a

communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate can it be restricted. *See* 11 C.F.R. § 114.15.

As discussed above, the plain reading of these advertisements is as an appeal to support particular legislative and policy positions, not to vote for or against a Federal candidate. The ads "focus[] on a public policy issue"—the war and health care for veterans in the case of the first ad; crime and protecting children on the Internet in the case of the second—and urge the public to contact Members of Congress on those issues. *See id.* § 114.15(c)(2)(i). And they include a "call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party." *Id.* § 114.15(c)(2)(ii). There can be no doubt that the ads can be reasonably interpreted other than as an appeal to vote for or against a clearly identified Federal candidate. But even if there were doubts, the First Amendment requires that they "be resolved in favor of permitting the communication." *Id.* § 114.15(c)(3); *see also WRTL*, 127 S. Ct. at 2674.

3. The Express Advocacy Standard Urged by the Complaint Would Be Unconstitutionally Vague.

There is an additional, related reason why the express advocacy standard urged by the complaint must be rejected here. The Supreme Court has long held that because the right to free political expression is at the core of the First Amendment "[a] statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the [Fifth] Amendment." *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964). Because of this, the Court has consistently held that "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *see also Baggett*, 377 U.S. at 372. The test for constitutional vagueness is whether the statute or regulation forbids the "doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1929).

This problem of vagueness is precisely the one that caused the Supreme Court in *Buckley* to hold that the Act's expenditure limitations "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for public office." 424 U.S. at 44. In adopting this limiting construction, the Court expressed concern—directly implicated in this matter—that the Act's expenditure limitations might inhibit the free discussion and debate of issues and candidates:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental

> actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Id. at 42 (note omitted). In sum, as the Supreme Court later concluded, "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986); *see also Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (noting that *McConnell v. FEC*, 540 U.S. 93 (2003), does not obviate the applicability of *Buckley*'s line-drawing exercise where court is confronted with a vague standard); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004); *N.C. Right to Life v. Leake*, 525 F.3d 274, 280-86 (4th Cir. 2007).

It is just this distinction—between the discussion of issues and candidates on the one hand and "exhortations to vote for particular persons" on the other—that controls the outcome of this matter. There is no question that in these advertisements the State Party staked out positions with respect to certain issues—positions Merkley has supported. However, "[i]n *Buckley*, the Court agreed that funds spent to propagate one's views on issues without expressly calling for the election or defeat of a clearly identified candidate are not covered by the FECA." *FEC v. NOW*, 713 F. Supp. 428, 434 (D.D.C. 1989).

The complaint urges a standard based on a variety of factors including the "circumstances surrounding the dissemination of th[e] ad[s]," the comments of Democratic officials following the airing of the ads, and whether a voter will find Merkley's campaign page upon using Google after watching the ads. This sort of standard is far too vague. First Amendment rights cannot be burdened by a *post hoc* determination that political speech was unlawful. A standard that empowers the government to make *post hoc* judgments about the lawfulness of political speech violates the Fifth Amendment's guarantee of due process. "Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (notes, internal quotations and citations omitted).

The vague standard urged by the complaint lacks sufficiently clear and well marked boundaries to provide fair warning regarding the contours of the law. For this reason, the Commission should reject the complaint's approach, adhere to its longstanding standard, and hold that these advertisements did not constitute express advocacy.

C. The Advertisements Do Not Meet Any of the Other Content Standards for Coordinated Public Communications.

The complaint does not argue that the advertisements meet any of the other content standards for coordinated communications—and it cannot. First, the advertisements are not and cannot be construed to be electioneering communications under 11 C.F.R. § 100.29 and therefore do not meet the first content standard at § 100.21(c)(1).

An electioneering communication is defined as

> . . . any broadcast, cable or satellite communication that (1) [r]efers to a clearly identified candidate for Federal office; (2) [i]s publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) [i]s targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

Id. § 100.29. In this case, the advertisements did not air within 60 days before a general election or 30 days before a primary election. The advertisements at issue in this complaint began to air on July 1, 2008 and ceased to air as of August 5, 2008. The primary for United States Senate was held on May 20, 2008.

For the same reason, the advertisements do not meet the content standard at § 109.21(c)(4) or § 109.37(a)(2)(iii). They were not aired in the candidate's jurisdiction "90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus." *Id.* § 109.21(c)(4)(i); *accord id.* § 109.37(a)(2)(iii)(A).

III. The Advertisements Are Not Covered by the General Coordination Provision of 11 C.F.R. § 109.20(b)

Because the advertisements do not satisfy any of the content standards for coordinated communications, the complaint argues in the alternative that the advertisements constitute coordination under 11 C.F.R. § 109.20(b)—the general coordination provision.

Section 109.20(a) defines "coordination" as "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee. . . ." Section § 109.20(b) states that "[a]ny expenditure that is coordinated

within the meaning of paragraph (a) of this section but that is not made for a coordinated communication under 11 C.F.R. § 109.21 or a party communication under 11 C.F.R. § 100.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee."

The complaint contends that if an advertisement does not satisfy the content and conduct requirements at 11 C.F.R. § 109.21 or § 109.37, it may still be a coordinated communication under § 109.20. This argument is wholly without merit.

First, the complaint's reading of § 109.20 would render meaningless the coordinated communications and party coordinated communications. *See* MUR 5546 (Knowles), Mason and Von Spakovsky, Statement of Reasons; *id.*, Lenhart, Statement of Reasons. If all communications qualify as coordinated under § 109.20, the clear guidelines established by § 109.21 and § 109.37 would be superfluous.

Second, the complaint's reading of § 109.20 is contrary to Commission guidance and precedent. In its 2003 Rulemaking on Coordinated and Independent Expenditures, the Commission stated that § 109.20(b) applies only to expenditures that do not involve communications: "[P]aragraph (b) of section 109.20 addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee or political party committee." Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added).

Furthermore, the Commission made clear that § 109.21 operates to create certain safe harbors: "In effect, the content standard of paragraph (c)(4)(ii) operates as a 'safe harbor' in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election *will not be deemed to be 'coordinated' under this particular content standard under any circumstances*." 68 Fed. Reg. at 430 n.2; *see also* Explanation and Justification, *Bipartisan Campaign Reform Act of 2002, Reporting; Coordinated and Independent Expenditures*, 68 Fed. Reg. 430 (Jan. 3, 2003) (same). This safe-harbor would be eviscerated under the complaint's interpretation of § 109.20.

Though there has been some disagreement among the Commissioners and the OGC about the precise scope of § 109.20, there is no question that the regulation does not reach public communications. For example, in their Statement of Reasons in MUR 5564 (Knowles), Commissioners Mason and Von Spakovsky emphasized that § 109.20's "explanation and justification . . . limit[s] section 109.20 to expenditures that are not communications . . . . OGC sensibly resolved this tension . . . by applying sections 109.21 and 109.37 only to *public* communications . . . and by applying section 109.20 only to what is not a *public* communication." Commissioner Lenhart took a slightly different view, but also rejected the

reading that § 109.20 serves as a "catch all" definition that captures political party communications that otherwise do not meet the specific requirements of coordinated communications. "The Commission crafted its regulations at 11 CFR § 109.37 with specificity," Lenhart reasoned, "and to the degree that a coordinated party communication does not meet the test set forth there, it is not a coordinated party communication[]."

Accordingly, the Commission has consistently applied § 109.21 and § 109.37 to public communications and, upon conclusion that the content or conduct requirements are not met, the Commission has not applied § 109.20. *See, e.g.*, MUR 6484 (Sean Combs); MUR 5564 (Knowles).

Finally, as the complaint recognizes, neither the D.C. District Court nor the D.C. Court of Appeals in *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd in part, rev'd in part*, 528 F.3d 914 (D.C. Cir 2008), interpreted § 109.20 to capture all public communications not captured by § 109.21. To the contrary, according to the D.C. Circuit, "[o]utside the 90/120-day windows . . . the regulations prohibit[] only coordinated advertisements that 'disseminate[], distribute[], or republish[] . . . campaign materials prepared by a candidate,' or 'expressly advocate[] the election or defeat of a clearly identified candidate." *Shays*, 528 F.3d at 922. According to the court, candidates can, consistent with the rules, coordinate with outside groups and parties "so long as the ads those groups funded did not include the magic words or recycle campaign materials." *Id.* at 921. The court struck down the coordinated communications regulations in part because it determined that the standard was unreasonably lax outside the 90/120 day-windows. *Id.* at 924. Had the court interpreted the regulation in the manner advocated by the complaint, there would have been no reason to strike down § 109.21.

Recognizing the absurdity of its position that § 109.20 catches all communications expressly exempted by § 109.21, the complaint goes on to argue the opinion in *Shays* rendered § 109.21 inapplicable. This is simply wrong. In fact, neither the District Court nor the Court of Appeals enjoined the operation of the existing regulations pending new rulemaking, nor did they order the FEC to engage in expedited rule making or to adopt interim regulations. Thus, until the agency promulgates new rules, § 109.21 is still in effect.

IV. The Advertisements Contain the Proper Disclaimers

The complaint argues that because the advertisements were coordinated they should have contained disclaimers indicating that the candidate authorized the ads. However, for the reasons explained above, these advertisements were *not* coordinated communications, but rather were party issue advertisements not subject to the limits of § 441a(d). Consequently, the disclaimers used were correct.

In Advisory Opinion 1995-25 the Commission concluded that advertisements advocating a party's legislative agenda should be characterized "as administrative costs or generic voter drive costs." That is precisely what was done in this instance. *See also* 11 C.F.R. § 106.5. In such circumstances, the Commission has rejected arguments that a candidate authorization statement is needed. *See, e.g.*, MUR 4476 (Wyoming State Democratic Central Committee et al.).

Indeed, the disclaimer rule urged by the complaint would require a candidate authorization disclaimer on all materials distributed by a party committee with any candidate involvement, whether a fundraising letter or a website page. Thus, every communication from the DSCC, the Democratic Congressional Campaign Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee—all of which are run by federal candidates—would require a disclaimer. This has never been Commission practice and would make no sense. Only materials that are distributed by a candidate or campaign or coordinated with a candidate or campaign within the meaning of the rules require a candidate authorization disclaimer. Although the Bipartisan Campaign Reform Act of 2002 purported to change the content of certain disclaimers, it did not alter the circumstances when such disclaimers were required.

Here, Merkley was not hiding from his involvement in the advertisements: His participation was evident on the face of the advertisements. But the ads were state party issue advertisements—not coordinated communications. Thus, they properly used the "not authorized by" language.

V. The State Party Did Not Use Prohibited Funds to Pay for the Advertisements

The complaint speculates that the State Party may have used state funds, including from prohibited sources, to pay for the advertisement. The complaint provides no basis for this assertion and it is false: The advertisements were paid for entirely with federal funds.

VI. The DSCC Should Be Dismissed As a Party

There is no basis for the DSCC to be a respondent in this matter. The DSCC transferred funds to the State Party in full compliance with FECA and Commission regulations. Other than the permissible transfer of funds, the DSCC engaged in no conduct. In such circumstances, the Commission has previously dismissed national parties from enforcement matters. *See, e.g.*, MUR 5564.

VII. Because there were no violations of established Commission Precedent, let alone knowing and willful violations, for the Commission to proceed against Respondents Here Would Be Arbitrary and Capricious and Would Violate Due Process

It is well-established precedent that once an agency adopts a final interpretation, it cannot significantly change its position without notice and comment. *See, e.g., CBS Corp. v. F.C.C.*, 535 F.3d 167, 175, 179-89 (3d Cir. 2008); *Transportation Workers Union of America, AFL-CIO v. Transportation Security Administration*, 492 F.3d 471 (D.C. Cir. 2007); *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

In this case, numerous enforcement matters involving similar issue advertisements establish a definitive agency interpretation: Advertisements like these simply do not constitute coordinated communications. Accordingly, the agency cannot proceed against respondents, but rather must engage in notice and comment before revising its reading of the statute. *See In re Sealed Case*, 223 F. 3d 775, 779 (D.C. Cir. 2000) (probable cause determinations, including statements of reasons, constitute definitive agency interpretation analogous to "formal adjudication"); *see also* MUR 5564, Mason and Von Spakovsky, Statement of Reasons.

To reverse course without notice would not only violate the Administrative Procedures Act, but would deprive the parties of fair notice:

> Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Although [an agency's] construction of its own regulations is entitled to "substantial deference," *Lyng v. Payne*, 476 U.S. 926, 939 (1986), we cannot defer to [its] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation. *See United States v. Matthews*, 787 F.2d 38, 49 (2d Cir.1986).

Upton v. S.E.C., 75 F.3d 92, 98 (2nd Cir. 1996); *see also KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, MUR 6037 should be dismissed.

Very truly yours,

Marc E. Elias
Kate Andrias

Counsel to Jeff Merkley, Jeff Merkley for Oregon, its Treasurer, Kevin Neely, and the DSCC.

Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, DC 20005-2003
(202) 628-6600

Neil P. Reiff
Stephen E. Hershkowitz

Counsel to the Democratic Party of Oregon.

Sandler, Reiff & Young, P.C.
300 M Street, S.E.
Suite 1102
Washington, DC 20003
(202) 479-1111