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May 27, 2010

VIA HAND DELIVERY

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Reference Number
031980.00002

Jeff S. Jordan
Supervisory Attorney
Complaints Examination &
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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6268
Rep. Alan Grayson

Dear Mr. Jordan:

This response is submitted on behalf of Rep. Alan Grayson (D-FL) ("Rep. Grayson") in response to a complaint filed by Steve Gillespie ("Gillespie") with regard to an invitation to a fundraising event for Scott Maddox ("Maddox"), a candidate for Florida Commissioner of Agriculture & Consumer Services, which was held on March 25, 2010. The essence of the Gillespie complaint is that Rep. Grayson violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 by authorizing his name to be used on the invitation to the Maddox fundraising event without an appropriate disclaimer and by authorizing the Committee to Elect Alan Grayson ("the Grayson campaign") to distribute the invitation by e-mail. For the reasons set forth below, the Federal Election Commission ("FEC" or "the Commission") should activate this case and find that there is no reason to believe that Rep. Grayson committed any violation of 2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62.

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Summary of the Facts and Legal Arguments

The Gillespie complaint is based entirely on the text of the invitation to the March 25, 2010 Maddox event. Without any additional supporting evidence, the Gillespie complaint then jumps to the conclusion that Rep. Grayson "willfully disregarded Federal law by failing to include the appropriate statements on an invitation for a non-federal candidate" and that he personally violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62. Gillespie complaint at page 3. To support this bald accusation, the Gillespie complaint cites Advisory Opinion 2003-3 (Cantor) as establishing the Commission's definitive interpretation of a Federal officeholder's obligations under 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62.

Perhaps Mr. Gillespie should have read Advisory Opinion 2003-3 more carefully, for it establishes a test for determining when a Federal officeholder violates 2 U.S.C. § 441i(e)(1) by having his name appear as a featured guest on an invitation to a non-Federal fundraising event. In order to be held personally liable for violating 2 U.S.C. § 441i(e)(1) in that situation, a Federal officeholder must have "approved, authorized, or agreed or consented to be featured or named in, the publicity." Advisory Opinion 2003-3 at page 7. In fact, Rep. Grayson never gave his final approval for the use of his name on the invitation for the Maddox event. Rep. Grayson was still in the process of negotiating with the host committee for the Maddox event over the final language for the invitation when a volunteer on the Grayson campaign mistakenly instructed a campaign vendor to distribute the unauthorized invitation by e-mail. Rep. Grayson may not be

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held personally liable for a violation of 2 U.S.C.§ 441i(e)(1) based solely on the actions of an agent without actual authority to act on his behalf. 11 C.F.R. § 300.2(b).

More importantly, the Gillespie complaint's reliance on Advisory Opinion 2003-3 as the Commission's definitive interpretation of 2 U.S.C. § 441i(e)(1) is, to say the very least, misplaced. Advisory Opinion 2003-3 was only the first in a long series of Commission advisory opinions and enforcement actions that provided multiple conflicting interpretations of 2 U.S.C. § 441i(e)(1) and its implementing regulations.[1] Indeed, less than two weeks before the invitation to the Maddox event was distributed, the Commission held a public hearing on its third attempt to issue regulations implementing 2 U.S.C. § 441i(e)(1). At that hearing, the Commission conceded that its prior efforts to delineate a Federal officeholder's obligations under 2 U.S.C. § 441i(e)(1) had resulted in a "mishmash of rules" that provided no clear guidance to the regulated community.[2] Less than a month after the complaint in MUR 6268 was received by Rep. Grayson, the Commission issued a new final rule governing Federal officeholder participation in non-Federal fundraising events.[3] The final rule specifically supersedes the Commission's prior advisory opinions interpreting 2 U.S.C. § 441i(e)(1).[4] Needless to say, attempting to hold Rep. Grayson liable for violating 2 U.S.C. § 441i(e)(1) based on interpretations of that statute that the

[1] See, e.g., Advisory Opinion 2003-3 (Cantor), Advisory Opinion 2003-36 (Republican Governors Association), Advisory Opinion 2004-12 (Democrats for the West), Advisory Opinion 2007-11 (California State Party Committee), MUR 5711 (Dianne Feinstein, et al.), MURs 5712 and 5799 (John McCain).
[2] Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events: Public Hearing Before the Federal Election Commission at 75 (March 16, 2010) (Statement of Commissioner McGahn).
[3] Federal Election Commission, Final Rule on Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375 (May 5, 2010) (to be codified at 11 C.F.R. § 300.64) (hereinafter "Non-Federal Fundraising Final Rule").
[4] Id. at 24382-83.

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Commission has since renounced would raise grave concerns under both the Due Process Clause and First Amendment of the Constitution.

Statement of Facts

On March 11, 2010, a member of the host committee invited Rep. Grayson to attend a March 25, 2010 fundraising event for Scott Maddox, a Democratic candidate for Commissioner of Agriculture and Consumer Services, a state-wide office in Florida. Rep. Grayson responded that he would not be able to attend because Congress would be in session that day, but he did give the host committee permission to use his name in connection with the event subject to his prior approval of the invitation to the Maddox event.

On March 20, 2010, the Grayson campaign received a draft of the invitation to the Maddox event. A Grayson campaign volunteer forwarded the draft invitation to Rep. Grayson for his approval. Rep. Grayson responded by asking whether the invitation needed to have a disclaimer reflecting his participation in the event. Rep. Grayson also asked that the invitation be changed to inform recipients that he would not be able to attend if Congress was in session that day.

On March 21, 2010, the Grayson campaign volunteer asked the Maddox host committee to change the invitation to let people know that Rep. Grayson would not be able to attend the event if votes were scheduled that day in Washington. Inexplicably, the Grayson campaign

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volunteer failed to ask the Maddox committee to respond to Rep. Grayson's question about the need for a disclaimer regarding his participation in the event. The Grayson campaign volunteer also failed to raise the issue of the need for a disclaimer with either the Grayson campaign's professional staff or outside counsel to the Grayson campaign.

The Maddox host committee responded to the Grayson campaign volunteer later on March 21, 2010 with a revised version of the invitation. The Grayson campaign volunteer never forwarded the revised version of the invitation to Rep. Grayson for his final review and approval. Instead, the Grayson campaign volunteer forwarded the revised version of the invitation to the campaign vendor who managed the Grayson campaign's e-mail list and asked the vendor to distribute the invitation to e-mail subscribers in the Winter Park, Florida area where the event was scheduled to be held. The campaign vendor e-mailed the revised version of the Maddox invitation to e-mail subscribers in the Winter Park area late in the afternoon of March 21, 2010.

Rep. Grayson never saw the revised version of the invitation to the Maddox event until March 24, 2010, when a reporter sent him a copy of the complaint in this case. Rep. Grayson did not attend the Maddox event the following day because the House of Representatives voted on the health care reconciliation bill late in the afternoon of March 25, 2010.

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Legal Arguments

There is simply no basis in law or fact for the Commission to find reason to believe that Rep. Grayson violated 2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62. A straightforward application of the law in effect on March 21, 2010 to the facts in this case demonstrates that Rep. Grayson may not be held responsible for any violation of 2 U.S.C. § 441i(e)(1) that may have occurred in connection with the Maddox fundraising event. Moreover, given the confused state of the law prior to the Commission's recent adoption of a new final rule governing a Federal officeholder's participation in a non-Federal fundraising event, any attempt to now hold Rep. Grayson responsible for any violation of 2 U.S.C. § 441i(e)(1) that may have occurred prior to the issuance of the new final rule would raise grave constitutional issues under both the Due Process Clause and the First Amendment.

Rep. Grayson Did Not Violate 2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62

The Gillespie complaint bases its allegation that Rep. Grayson violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 on the Commission's interpretation of those provisions in Advisory Opinion 2003-3 (Cantor) – an advisory opinion whose reasoning has since been superseded, in all but one respect, by the Commission's new final rule. Even if that advisory opinion had not been abrogated, a plain reading of it would demonstrate that Rep. Grayson did not violate 2 U.S.C. § 441i(e)(1). In Advisory Opinion 2003-3, the Commission held that a two-step analysis is required when an alleged violation of 2 U.S.C. § 441i(e)(1) is based on the

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appearance of a Federal officeholder's name on publicity for a non-Federal fundraising event. First, did the publicity for the event constitute a solicitation for donations outside the limitations and prohibitions of the Federal Election Campaign Act, and, if so, did the Federal officeholder approve, authorize, agree or consent to be featured or named in the publicity. If both of these questions are answered in the affirmative, "there must be an express statement in that publicity to limit the solicitation to funds that comply with the amount limitations and source prohibitions of the Act." Advisory Opinion 2003-3 at page 7.

The invitation prepared by the host committee for the Maddox event clearly did constitute a solicitation for non-Federal funds because it expressly requested corporate contributions prohibited by 2 U.S.C. § 441b(a). Rep. Grayson, however, never finally authorized the use of his name on the Maddox invitation. His consent was contingent on receiving an answer to his question on the need for a legal disclaimer regarding his participation in the event. Rep. Grayson never received an answer to that question and, indeed, never even saw the final version of the invitation bearing his name until after it was distributed. Accordingly, Rep. Grayson may not be held liable for having personally violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 because he did not authorize his name to be used on the invitation to the Maddox event and he did not authorize the distribution of the invitation by e-mail.

Nor can Rep. Grayson be held personally responsible for the actions of the Grayson campaign volunteer. While 2 U.S.C. § 441i(e) does apply to the actions of a Federal officeholder

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or an agent of a Federal officeholder, when the Commission issued regulations implementing 2 U.S.C. § 441i(e)(1) it defined the term "agent" as "any person who has actual authority, express or implied, to" solicit funds on behalf of a Federal officeholder in connection with any election. 11 C.F.R. § 300.2(b). The Explanation and Justification for 11 C.F.R. § 300.2(b) made it clear that, for purposes of 2 U.S.C. § 441i(e)(1), the term "agent" does not apply to individuals who only have apparent authority to act on behalf a Federal officeholder.[5] Moreover, the Commission expressly limited the circumstances under which liability would attach to a Federal officeholder for the actions of an agent under an implied actual authority theory. "[T]he Commission emphasizes that a [Federal officeholder] may not be held liable, under an implied actual authority theory, unless the [Federal officeholder's] own conduct reasonably causes the agent to believe that he or she had authority. For example, a [Federal officeholder] cannot be held liable for the actions of a rogue or misguided volunteer who purported to act on behalf of the [Federal officeholder], unless the [Federal officeholder's] own written or spoken word, or other conduct, caused the volunteer to reasonably believe that the [Federal officeholder] desired him or her to so act"[6]

In this case, Rep. Grayson's instructions to the Grayson campaign volunteer were to determine whether there was a need for a disclaimer regarding his participation in the Maddox event before approving the text of the Maddox invitation and the distribution of the invitation by

[5] Federal Election Commission, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49064, 49081-83 (July 29, 2002).
[6] Id. at 49083.

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e-mail. The Grayson campaign volunteer actually acted in contravention to Rep. Grayson's instructions and therefore could not have reasonably believed that Rep. Grayson wanted the volunteer to authorize the use of his name on the Maddox invitation and the distribution of the invitation by e-mail. When those actions were taken, the Grayson campaign volunteer was precisely the type of "misguided volunteer" whose actions the Commission has held cannot be the basis for holding a Federal officeholder liable for violations of 2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62.[7]

Given the Muddled State of the Law as it Existed on March 21, 2010, Imposing Liability on Rep. Grayson for Alleged Violations of 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 Would Raise Grave Concerns Under Both the Due Process Clause and the First Amendment

A vague campaign finance rule "denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions." Blount v. SEC, 61 F.3d 938, 948 (D.C. Cir. 1995) (quoting Timpinaro v. SEC, 2 F.3d 453, 460 (D.C. Cir. 1993). See also Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech . . . . [A] man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.") (citation and internal quotation marks omitted).

[7] Id. See also Advisory Opinion 2003-3 (Cantor) at pages 8-9. Significantly, this portion of Advisory Opinion 2003-3 discussing agency under 2 U.S.C. § 441i(e)(1) is the only portion of that advisory opinion that was not specifically superseded by the Commission's new final rule on Federal officeholder participation in Non-Federal fundraising events. See 75 Fed. Reg. at 24382 (May 5, 2010).

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Moreover, the Supreme Court has recently held that the First Amendment is violated by campaign finance rules that do not provide the regulated community with clear guidance as to what the law requires. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of 'common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S. Ct. 876, 889 (2010) (internal citation omitted).

Clearly there can be no doubt that the Commission's effort to implement 2 U.S.C. § 441i(e)(1) through regulations and advisory opinions had, until the recent adoption of the new final rule on Federal officeholder participation in non-Federal fundraising events, created a situation where the regulated community could only guess as to what was required when a Federal officeholder was listed as a featured guest on an invitation to a non-Federal fundraising event. The Commission conceded that point when enacting the new final rule.

On March 16, 2010 – a mere five days before the dissemination of the Maddox invitation that is the subject of this enforcement case – the FEC held a public hearing on its proposed rule governing Federal officeholder participation in non-Federal fundraising events.[8] At that hearing, witnesses representing both the national party committees and the reform community reached a

[8] Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events: Public Hearing Before the Federal Election Commission (March 16, 2010) (hereinafter "Public Hearing Transcript").

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consensus with the Commissioners that the FEC's guidance on 2 U.S.C. § 441i(e)(1) had become unintelligible. All four witnesses stressed the need for the Commission to act decisively to provide "clarity" or "clear guidance" in this area of law.[9] Former FEC Chairman Thomas Josefiak, testifying on behalf of the National Republican Congressional Committee, characterized the Commission's guidance on the disclaimers required under 2 U.S.C. § 441i(e)(1) as "murky waters."[10] He later testified that event organizers, Federal officeholders, and Federal candidates were all concerned that they would "find themselves in an enforcement case" by attempting to navigate the "chasm of FEC confusion" regarding the use of disclaimers on event invitations.[11] Similarly, John Phillippe, Chief Counsel of the Republican National Committee, testified that "the Commission has admitted that" the development of the Commission's guidance on 2 U.S.C. § 441i(e)(1) has been "murky and confusing."[12] He later urged the Commissioners to address the issue of pre-event publicity in the final rule or the regulated community would "be sort of stuck in the same morass that we have been."[13]

After hearing testimony from the witnesses, a bipartisan group of Commissioners acknowledged the tortured history of the FEC's guidance. Commissioner McGahn characterized the current state of the law as a "mishmash of rules."[14] Commissioner Weintraub noted that

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[9] Id. at 22, 34, 54 and 95.
[10] Id. at 79.
[11] Id. at 91.
[12] Id. at 51.
[13] Id. at 52.
[14] Id. at 74. See generally MURs 5712 and 5799, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 10-17 (analyzing the Commission's conflicting

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"what [the Commission has] been trying to do for years is to try and make sense out of all of this."[15] Commissioner Hunter stated the entire purpose of the proposed rule was to "take all of the sordid history of this issue in one place and provide some guidance going forward."[16]

And that is precisely what the new final rule on Federal officeholder participation in non-Federal fundraising events does – establishes a comprehensive new rule for these events while abrogating the "mishmash of rules" that existed on March 21, 2010. The Preamble of the new final rule recounts the Commission's tortured history of efforts to enact regulations implementing 2 U.S.C. § 441i(e)(3), culminating in the U.S. Court of Appeals for the District of Columbia Circuit's final decision invalidating 11 C.F.R. 300.64.[17] Shays v. Federal Election Commission, 528 F.3d 914, 933-34 (D.C. Cir. 2008) ("Shays III"). It also describes the Commission's equally-tortured efforts to provide guidance interpreting 2 U.S.C. § 441i(e) through a series of advisory opinions.[18] The Explanation and Justification for the new final rule then goes on to state that, "Although the Shays III decision does not mandate the adoption of a single rule that addresses participation by Federal candidates and officeholders at all non-Federal fundraising events, Federal candidates and officeholders, as well as entities that solicit non-Federal funds in connection with elections, would benefit from the explicit guidance of a more

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interpretations of 2 U.S.C. § 441i(e)(1) in Advisory Opinions 2003-3 (Cantor), 2003-36 (Republican Governors Association), 2003-37 (Americans for a Better Country), 2007-11 (California State Party Committees) and MUR 5711 (Dianne Feinstein et al.).

[15] Public Hearing Transcript at 56.

[16] Id. at 49.

[17] Non-Federal Fundraising Final Rule, 75 Fed. Reg. at 24375-76 (May 5, 2010).

[18] Id. at 24376-77.

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comprehensive rule."[19] The Explanation and Justification then goes on to state specifically that the new final rule supersedes, in whole or in part, all of the advisory opinions that had previously constituted the body of law interpreting 2 U.S.C. § 441i(e).[20] A "comment suggested that the Commission indicate explicitly that the series of advisory opinions on this issue no longer articulate the correct standard of law and are thus superseded. The Commission agrees that where the new rule addresses the same issue as a prior advisory opinion, the new rule provides the applicable standard of law, and the advisory opinion is superseded."[21]

Accordingly, the body of law upon which the complaint in MUR 6268 is premised has been abrogated by the Commission's new final rule. Attempting to impose sanctions on Rep. Grayson now for alleged violations of 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 based on the muddled body of law that existed on March 21, 2010 would violate Rep. Grayson's constitutional rights under both the Due Process Clause and First Amendment.

Conclusion

For all of the reasons discussed above, the Commission should determine that there is no reason to believe that Rep. Grayson, either personally or though an agent, committed any violation of 2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62 and should dismiss this matter promptly. Alternatively, should the Commission determine that there is reason to believe that a violation of

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[19] Id. at 24378.
[20] Id. at 24382-83.
[21] Id. at 24383.

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2 U.S.C. § 441i(e)(1) or 11 C.F.R. § 300.62 occurred in connection with the Maddox event, we respectfully request that the Commission exercise its prosecutorial discretion and dismiss this matter without any further proceedings that would raise grave issues of constitutional law.

Respectfully submitted,

Brett G. Kappel

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