



LEAGUE OF CONSERVATION VOTERS

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OFFICE OF GENERAL  
COUNSEL

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VIA E-MAIL AND U.S. MAIL

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RE: MUR 6411

Dear Mr. Jordan:

On behalf of the League of Conservation Voters, Inc. ("LCV"), I am replying to the Complaint filed by Let Freedom Ring, Inc. alleging illegal coordination by Representatives Nancy Pelosi and John Larson and other unnamed Members of Congress with more than twenty outside organizations including LCV. For the reasons set forth below, the Commission should find no reason to believe that a violation by LCV of the Federal Election Campaign Act of 1971, as amended ("FECA") has occurred, and take no further action.

The Complaint cites to several published articles that indicate that Representatives Pelosi and Larson (and unnamed others) made statements expressing a desire for outside groups to spend funds supporting Democratic candidates for Congress, and that thereafter, certain named groups including LCV made independent expenditures and/or electioneering communications. Without providing any actual linkage between the two series of events, the Complaint concludes that the expenditures by the groups such as LCV were made "following the demands of Pelosi and her henchmen." Complaint at 7.

The FECA requires the Commission to have a factual basis for a reason to believe that a person has committed or is about to commit a violation of FECA before it may commence an investigation. See 2 U.S.C. § 437g(a)(2). Vague allegations are insufficient to satisfy the threshold requirements for a "reason to believe" finding. Complaints "should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). Consistent with the regulations, the Commission's 2007 Statement of Policy states that "a reason to believe finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (March 16, 2007).

In following the law, regulations, and policy statement cited above, the Commission's enforcement actions have concluded that the Commission should only make a "reason to believe" finding and commence an investigation if a complaint sets forth sufficient specific facts which if proven true would constitute a violation of the FECA. See Statement of Reasons of

Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960 (Dec. 21, 2000); ~~Statement of Reasons of Commissioners Mason, Sandstrom, McDonald, Smith, Thomas, and~~ Wold in MUR 5141 (April 17, 2002). In both MUR 4960 and MUR 5141, the Commission pointedly declared that unwarranted legal conclusions from asserted facts or mere speculation in a complaint would not be accepted as true.<sup>1</sup>

Finally, the Commission regulations state, in relevant part, that the request or suggestion conduct standard is met if "the person creating, producing or distributing the communication does so at the request or suggestion of a candidate, authorized committee, or any agent thereof." 11 C.F.R. § 109.21(d)(1). In establishing the coordination rules implementing the Bipartisan Campaign Reform Act of 2002 that address this standard, the Commission explicitly rejected the idea that a "presumption" of coordination could be established and dictated that "a request or suggestion must be based on specific facts, rather than presumed, to satisfy this conduct standard."<sup>2</sup>

In accordance with this legal framework, the Commission should find no reason to believe that a violation occurred for any or all of the following reasons: (1) LCV's own actions refute the vague claims contained in the Complaint; (2) the Complaint, on its face, is speculative and fails to provide sufficient facts to proceed; and (3) statements appearing in published articles do not constitute a "request or suggestion" under the regulations.

LCV did not create, produce or distribute any communication at the request or suggestion of Representatives Pelosi, Larson, or any unnamed candidates or their agents.

LCV categorically denies that it made any communications at the request or suggestion of Representative Pelosi, Representative Larson or any unnamed federal candidate for office (or their agents). LCV's decisions regarding its independent expenditures (i.e. which races, which ads, how much to spend) were made "totally independently" of any candidate or his/her agent. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). This was true for LCV's independent expenditures for the six races for which FEC records are provided in the Complaint, as well as for all federal candidates for whom it engaged in independent expenditures in 2010. LCV's independent efforts were undertaken in accordance with FECA and Commission rules, as well as LCV's own internal anti-coordination and firewall policies.

LCV's communications were instead the result of the organization's own initiative, plans and processes. These efforts began long before any statements made in the articles that appear in the Complaint. LCV's public support for the candidates listed in the Complaint began in January of 2010 when LCV's separate segregated fund -- LCV Action Fund -- publicly endorsed Rep.

<sup>1</sup> *Id.* All of the current Commissioners have voted to approve Factual & Legal Analysis recommend by the Office of General Counsel that cite MUR 4960 and MUR 5141 in finding no reason to believe a violation occurred when speculative complaints lacked specific facts. See e.g. MUR 5972 (Nov. 4, 2008), and MUR 6077 (May 19, 2009).

<sup>2</sup> *Explanation and Justification for Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

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Mark Schauer for re-election.<sup>3</sup> LCV's endorsement process is a multi-step process, including candidate responses to a lengthy LCV Congressional Questionnaire, review of the candidate's voting record (if applicable), including his/her score(s) on the annual "LCV Environmental Scorecard," as well as discussion and approval by a committee of the LCV Board of Directors. LCV Action Fund endorsed each of the six candidates listed in the complaint (for whom LCV made independent expenditures) following completion of this process.<sup>4</sup>

Without discussing the internal strategic reasons behind each of its specific independent expenditures, LCV can represent that such decisions were the result of a series of factors, including public and internal polling data, ability of LCV to make a difference, cost and availability of placement of TV and radio ads, potency of an environmental or energy related message, research by staff, and committee-level approval of the Board of Directors. Some of these decisions required advanced planning; for example, LCV established an independent canvass operation in New Hampshire during the summer of 2010 and shortly after the New Hampshire primary on September 14, 2010, LCV launched its canvass in support of candidates Shea-Porter and Kuster.

The overwhelming majority of LCV's independent expenditures were made towards the end of the 2010 election. Contrary to the Complaint's unsupported claim that such increased spending was evidence of a link to the statements made in the articles, the reasons are very straight-forward. LCV, like most politically active organizations, historically expends more on independent expenditures in the final weeks of an election for several reasons including:

- Ads and other public communications run in the final weeks are generally more effective because it is not until shortly before an election that the majority of voters pay attention;
- Waiting until later in the election allows LCV to better project which elections will be close and where its limited resources can be maximized.<sup>5</sup>

<sup>3</sup> While it was in the legislative context, it should be noted that when the House of Representatives was debating the American Clean Energy and Security Act (ACES) in June of 2009, LCV took the position that it would not endorse any House member in the 2010 election who voted against ACES. See "League of Conservation Voters to Deny Endorsement to any Member of Congress Who Votes No on American Clean Energy and Security Act," 6/23/09; <http://www.lcv.org/newsroom/press-releases/league-of-conservation-voters-to-deny-endorsement-to-any-member-of-congress-who-votes-no-on-american-clean-energy-and-security-act.html>. Among those voting for ACES, which passed by a seven vote margin, were Representatives Perriello, Schauer, Baccieri, Shea-Porter, and Shuler. Many of these members came under attack for their votes, and LCV and other groups ran ads after the vote thanking these members. LCV had also supported some of these same candidates for election in earlier cycles. For example, LCV endorsed Rep. Shuler when he first ran for Congress in 2006 and engaged in independent expenditures to defeat his opponent Rep. Charles Taylor. Thus, it should come as no surprise that LCV chose to support these same individuals in 2010 that were supportive of LCV's legislative environmental agenda.

<sup>4</sup> LCV Action Fund publicly endorsed Rep. Tom Perriello in February, Rep. John Boccieri in March, Rep. Carol Shea-Porter and Ann McLane Kuster in July and Rep. Heath Shuler in October. Tim Walberg, wife is also listed in the Complaint and was Rep. Schauer's opponent, was named in September to LCV's Dirty Dozen, its long-standing electoral program to defeat candidates.

<sup>5</sup> For example, based on reports filed with the FEC in 2008, approximately sixty-eight percent of LCV's independent expenditures were made after September 17, 2008.

In contrast to the speculative nature of the Complaint (discussed further below), LCV's response provides a factual basis for the Commission to make a "no reason to believe" determination and take no further action. See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (March 16, 2007) (a "no reason to believe" finding is appropriate when complaint, response and any publicly available information "fail to give rise to a reasonable inference that a violation has occurred.")

**The Complaint is mere speculation unsupported by any facts giving rise to a reason to believe LCV violated campaign finance laws or regulations.**

Based on the standard for a reason to believe finding set forth in the FECA, the Commission's regulations and 2007 policy statement, the Complaint is facially inadequate to provide a basis for the Commission to proceed in this matter.

The Complaint fails to contain any specific factual evidence to provide the Commission with a reason to believe a violation of FECA by LCV occurred. Complainant relies on two unrelated sets of events to allege coordination: (1) two elected officials, Representatives Pelosi and Larson (and unnamed others), were quoted in news reports in mid-September 2010 expressing frustration that unnamed outside groups were not spending enough money to support their party's candidates; and (2) a list compiled from FEC reports showing amounts expended on independent expenditures and electioneering communications by over 20 organizations in support of Democratic candidates including LCV. Any conclusion that the first led to the second is speculative at best, and ignores demonstrable reasons why the spending occurred.

Neither the Complaint, nor the news articles cited, provides any evidence that conversations occurred with LCV regarding its independent expenditures. While the articles suggest that Representatives Pelosi and Larson made general entreaties to organizations to be more active, there is nothing more. This is not a sufficient, specific factual basis.

The Complaint also fails to point to any specific public communications that were made by LCV that are alleged to have been coordinated. The Commission has required the "request or suggestion" conduct standard to contain a connection to specific communications, in part, to ensure that certain permitted communications may occur.<sup>6</sup>

Without any actual facts or evidence, the Complaint is left with a sole speculative link – LCV's independent expenditure activity after the published articles in mid-September of 2010. As discussed previously, however, there are straight-forward explanations for LCV's spending in

<sup>6</sup> See *Explanation and Justification for Final Rules on Coordinated Communications*, 71 Fed. Reg. 33190, 33203 (June 8, 2006).

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the remaining weeks of the 2010 election, which are entirely consistent with LCV's activity in prior elections.<sup>7</sup>

The Complaint offers no factual basis to support an investigation against LCV and clearly does not rise above the level of mere speculation.<sup>8</sup> If taken to its logical conclusion, the dubious theory found in the Complaint would result in a finding of illegal coordination (or at a minimum, investigation) by any organization or individual that made independent expenditures for Democratic candidates in the remaining weeks of the 2010 election after the articles appeared.

**Public statements in a news article do not constitute a "request or suggestion" within the meaning of the regulations.**

There is a final basis by which the Commission should make a "no reason to believe" finding. Statements by Representatives Pelosi and Larson published in news reports do not constitute a "request or suggestion" under the Commission's regulations. Therefore, even if, as the Complaint appears to allege, LCV made independent expenditures in response to the comments in published news reports, such an action does not meet the "request or suggestion" conduct standard under 11 C.F.R. 109.21(d)(1).

As a matter of law "the 'request or suggestion' conduct standard in the regulations is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally."<sup>9</sup> The Commission went on to explain that "a request in a public campaign speech or a newspaper advertisement is a request to the general public."<sup>10</sup> A statement appearing in news article would therefore also be for the general public. Thus, even were there to be evidence that LCV, in response to the statements of Representatives Pelosi and Larson that

<sup>7</sup> Moreover, one of the very articles cited in the Complaint contains a quote from LCV's president stating that LCV had pre-existing plans to continue spending. See *Politico* article dated 9/22/2010 (Attachment 2 of Complaint) in which LCV's President Gene Karpinski is quoted as saying: "There's no doubt that Big Oil and the polluters are going to spend more money. But we've spent some money, and we'll definitely spend some more.")

<sup>8</sup> The Complaint does not meet any pleading standard analogous to that of the Federal Rules of Civil Procedure, nor by extension, would it meet any heightened pleading standard required for FEC complaints that is beyond the standard set in the Federal Rules of Civil Procedure. See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Munster and Donald F. McGahn II in MURs 5977 and 6025 at pg 4, FN 12 (May 1, 2009).

<sup>9</sup> *Explanation and Justification for Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 431 (Jan. 3, 2003).

<sup>10</sup> *Id.* LCV is not attempting to invoke the "publicly available information" safe harbor since that does not apply to "request or suggestion" conduct standard under 11 C.F.R. § 109.21(d)(1). But in creating such a safe harbor for the remaining four conduct standards (see 11 C.F.R. 109.21(d)(2),(3),(4) and (5)), the Commission re-enforced that a "request or suggestion" could not be one merely provided to the general public. See *Explanation and Justification for Final Rules on Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

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appeared in the published articles, made public communications under 11 CFR 109.21, the Complaint would be insufficient as a matter of law.<sup>11</sup>

**Conclusion**

For the foregoing reasons, I respectfully request that the Commission make a "no reason to believe" finding with respect to LCV and take no further action.

Sincerely,



Richard L. Thomas  
General Counsel & Senior Vice President

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<sup>11</sup> See also "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," Fed. Reg. 12545, 12546 (March 16, 2007) (Stating that a "no reason to believe" finding is appropriate when a "complaint fails to describe a violation of the Act.")

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