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February 28, 2013

**VIA ELECTRONIC MAIL AND HAND DELIVERY**

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**Re: Matter Under Review 6678**

Dear Ms. Hampton:

We represent the County of Los Angeles, California-registered "primarily formed ballot measure committee," No on Government Waste, in connection with the above-captioned matter under review ("MUR") filed by Complainant AIDS Healthcare Foundation. The Complaint alleges No on Government Waste violated the Federal Election Campaign Act ("FECA") and its implementing regulations relating to election-related activity by foreign nationals.<sup>1</sup>

The Federal Election Commission ("Commission") has for decades concluded that 2 U.S.C. § 441e does not apply to state and local ballot measure committees, their fundraising, and expressive activities. Based on the Commission's public, long-standing, unvarying conclusion regarding Section 441e's scope, due process also precludes the Commission from changing course and enforcing Section 441e in this MUR. Accordingly, for the reasons set forth more fully herein, No on Government Waste respectfully requests that the Commission dismiss the Complaint as against it for lack of jurisdiction.

<sup>1</sup> Respondent No on Government Waste is the same committee as a second purported California-registered political committee identified by Complainant as No on Measure B-Major Funding By Manwin USA Committee. This response is also submitted on behalf of No on Measure B, to the extent a response is somehow required.

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### **EXECUTIVE SUMMARY**

The Federal Election Campaign Act's foreign national prohibition, 2 U.S.C. § 441e, does not apply to state or locally-registered ballot committees, such as No on Government Waste. Indeed, just recently, the Commission filed a brief with the Supreme Court in *Bluman v. Federal Election Commission*, No. 11-275, seeking to affirm the decision of a three-judge court upholding Section 441e's constitutionality.<sup>2</sup> The Supreme Court did so. In its brief, the Commission confirmed its long-standing, clearly articulated conclusion this statutory provision does not apply to ballot initiative committees and other issue-related advocacy. The FEC explained, "By regulating only campaign related spending, Congress has tailored Section 441e to address the financial activity most likely to influence elections." FEC, Motion to Dismiss or Affirm, at 23 (Nov. 2011) (hereinafter, "FEC S. Ct. Brief") (available on FEC website); *see generally id.* at 23-25.

### **ARGUMENT**

#### **I. COMPLAINANT'S ALLEGATIONS ADDRESS ONLY BALLOT MEASURE-RELATED ACTIVITY**

Complainant, AIDS Healthcare Foundation, filed its complaint with the Commission on October 26, 2012, and supplemented it on January 11, 2013. The October 26 Complaint solely alleges conduct related to Los Angeles County Measure B, which would impose certain restrictions and fees on adult filmmaking in Los Angeles County. In pertinent part, Complainant alleges that:

- "[T]he No on B Committee has knowingly provided substantial assistance in the solicitation, making, acceptance, or receipt of prohibited contributions, expenditures or disbursements by" a series of persons, certain of which are alleged to be foreign nationals.
- "Manwin USA is the sponsor of the No On B Committee, a political committee established to defeat County Measure B. Manwin USA has made substantial monetary contributions to the No On B Committee, and is funding banner ads that opposed Measure B and provide a link to a website operated by the Committee for the purpose of defeating Measure B at the polls." Manwin USA is alleged to be controlled by foreign nationals.

<sup>2</sup> 800 F. Supp.2d 281 (D.D.C. 2011).

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- "Immediate action is necessary to protect the integrity of the November 6, County of Los Angeles election, and to prevent further violations of the FECA and Commission regulations by these foreign persons."

For its part, the January 11 supplement nowhere alleges activity relating to any ballot or election-related activity other than the Measure B referendum. Instead, the supplement simply lodges irrelevant attacks against other respondents based on purported foreign enforcement activities on unrelated subjects.

II. ACCORDING TO THE RECORD, NO ON GOVERNMENT WASTE WAS REGISTERED TO CONDUCT, AND ONLY CONDUCTED, LOCAL BALLOT MEASURE-RELATED ACTIVITY

The scope of the expressive activity involved in this matter under review relates solely to a Los Angeles County ballot initiative the voters considered last November. The record in no way demonstrates that No on Government Waste was either formed to conduct activity supporting or opposing candidates for public office or that the Committee did, in fact, support or oppose any candidate for public office. More specifically, Complainant has attached No on Government Waste's registration statement with Los Angeles County, and certain of its periodic disclosures thereafter. First, the committee was formed and registered as a "primarily formed ballot measure committee." Under California law, a committee may only form under this provision primarily to support or oppose a single measure, or two or more measures being voted upon in the same city, county, multicounty, or state election. Cal. Gov. Code § 82047.5 (2013). Respondents' periodic disclosure filings likewise reveal no candidate-related activities whatsoever.

III. THE FECA'S FOREIGN NATIONAL RELATED PROVISIONS DO NOT APPLY TO STATE OR LOCAL BALLOT INITIATIVES

Section 441e does not, by its terms, apply to state and local ballot initiatives and referenda. Rather, that section prohibits a "foreign national" from "directly or indirectly ... mak[ing] a contribution or donation in connection with a Federal, state, or local election." 2 U.S.C. § 441e(1)(A). Relatedly, no person may "solicit, accept or receive [such] a contribution or donation" from a foreign national. *Id.*, § 441e(1)(B). FECA's definition of "election," moreover, relates to candidate elections: "general, special, primary, or runoff" elections. That provision makes no reference to ballot initiatives or referenda. *Id.*, § 431(1).

The Bipartisan Campaign Reform Act (BCRA) amended FECA's foreign national provisions. These provisions were amended in response to allegations relating to federal candidates and so-called "soft money" contributions to political parties in connection with the

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1996 federal election cycle, mostly relating to the presidential election. *See generally*, FEC S. Ct. Motion, at 20-21.

In advisory opinions rendered both before and after BCRA amended Section 441e and the FECA's definition of "election," the Commission has concluded, in the context of construing 2 U.S.C. § 441e, that the FECA does not reach state and local ballot initiative activity. *See, e.g.*, A.O. 1989-32 ("The Commission has consistently stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act."); A.O. 2003-12 (affirming "previous advisory opinions, stating or otherwise indicating that 'contributions or expenditures' related exclusively to ballot referenda measures are not in connection with an election..."). Finally, research of the Commission's Matters Under Review database yielded no instances where the Commission has enforced Section 441e in connection with state or local ballot initiatives.

In fact, the Commission recently argued in no less than the Supreme Court that First Amendment candidate-related elections stand on a very different footing from ballot measures in the Section 441e context. In so doing, the Commission cited *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 299 (1981), which held "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committee's there is no significant state or public interest in curtailing debate and discussion of a public issues." FEC S. Ct. Motion, at 24. For these reasons, the Complaint lacks any basis in law.

**IV. APPLYING SECTION 441e TO RESPONDENTS IN THIS CASE WOULD VIOLATE DUE PROCESS**

The "fair warning" protections of the Fifth Amendment's due process clause apply to regulatory enforcement actions that can deprive a respondent of property, just as they apply to criminal law enforcement actions. *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-30 (D.C. Cir. 1995).

It is difficult to imagine a situation in which fair warning issues could be implicated any more squarely than in this MUR. As explained above, the Commission has repeatedly concluded that Section 441e does not apply to state and local ballot measures and other issue-related activity. To the extent any conceivable inclarity might exist, as explained above, the Commission confirmed to the Supreme Court Section 441e's exclusively candidate-related scope. In fact, in arguing that Section 441e was constitutional, the Commission emphasized the determinative constitutional distinctions between candidate and ballot-related activity. More specifically, the FEC argued Section 441e was both narrowly tailored and not unconstitutionally under-inclusive because ballot initiative and other issue-related activity appropriately and constitutionally differed from the candidate-related activity to which Section 441e applies. FEC

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S. Ct. Motion, at 23, 24. The public has the Fifth Amendment right to rely on the Commission's long-standing, explicitly-defended limitation on Section 441e's scope to candidate-related activity. Fundamental fairness points in the very same direction.

**CONCLUSION**

For the foregoing reasons, the Commission should expeditiously dismiss this Complaint as against to Respondent No on Government Waste Committee *a/k/a* No on Measure B. Please do not hesitate to contact me if you have any questions or require additional information.

Respectfully submitted,



**KELLEY DRYE & WARREN, LLP**

David E. Frulla

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