

SANDLER REIFF

SANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.

1090 Vermont Ave NW, Suite 750
Washington, DC 20005
www.sandlerreiff.com
T: 202-479-1111
F: 202-479-1115

December 14, 2018

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: MUR 7519

Dear Mr. Jordan:

The undersigned serves as counsel for the Arizona Democratic Party and Rick McGuire, in his official capacity as Treasurer (the “Committee”). This letter responds on behalf of the Committee to the Commission’s notification that it received a complaint (the “Complaint”) alleging that the Committees violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

The Complaint alleges that the Committee violated the Act and Commission regulations when it used non-federal funds to pay for a TV advertisement advocating for the election of Arizona Secretary of State candidate Katie Hobbs. The Complaint erroneously alleges that the advertisement, through a brief identification of a federal candidate, violates the Act’s “soft money” restrictions. For the reasons stated below, based on the facts alleged and other information available, the Commission should find that there is no reason to believe that the Committee violated the Act or any of the Commission’s regulations.

I. Factual and Legal Argument

The Complaint alleges that an advertisement the Committee aired in October 2018 violated the Act’s and Commission regulations’ prohibition against using funds not “subject to the limitations, prohibitions, and reporting requirements” of the Act to pay for federal election activity (“FEA”). In making his argument, the Complainant claims the advertisement constituted FEA because it both referred to and supported or promoted a clearly identified federal candidate.¹ That allegation is erroneous for a number of reasons.

Under the Federal Election Campaign Act, and Commission’s regulations, the mere identification of a federal candidate in a public communication that also mentions a non-federal candidate is not FEA unless it also promotes, attacks, supports, or opposes (“PASO”) a federal

¹ Complaint at 2

candidate. Specifically, a party committee must pay for a public communication that PASO's a federal candidate exclusively with federally permissible funds, even if that communication expressly advocates the election or defeat of a non-federal candidate.²

The advertisement in question does not PASO a federal candidate. The 30-second television advertisement clearly advocates for the election of Katie Hobbs for Secretary of State of Arizona with no support or promotion of any federal candidate.³ The ad opens and closes with a shot of a mockup ballot which includes the names of both candidates for Secretary of State. Below the Secretary of State candidates' names, the names of two federal candidates can be seen, either in whole or part.⁴ The mockup ballot appears for approximately six seconds of the 30-second advertisement and focuses on an individual choosing which bubble to fill in between the two Secretary of State candidates. The ad makes no audible reference to the federal candidates on the mockup ballot. Indeed, the advertisement's entire focus is on the two state candidates, with only incidental reference to the two federal candidates within the mocked-up ballot. In each instance the candidate's name is partially obscured.

The advertisement does not PASO a federal candidate, nor was it intended to do so. The advertisement was drafted by John Del Cecato, Creative Director of the Committee's media firm, AKPD Message and Media.⁵ As explained in the attached declaration, Mr. Del Cecato instructed his production team to include a sample ballot featuring the two Secretary of State candidates but did not provide any further direction as to how that ballot should look.⁶ To be sure, neither Mr. Del Cecato, nor any other representative of the Committee, instructed the production team to include the names of any federal candidates on the sample ballot.⁷ The sample ballot was included in the advertisement to emphasize to voters that the Secretary of State candidates would appear on the ballot on November 6, 2018 and to encourage voters to vote for Katie Hobbs for Secretary of State.⁸ The inclusion of the two federal candidates on the sample ballot was not intended to promote or support Sinema or attack or oppose McSally. The inclusion of their names was merely incidental and was added simply for aesthetic purposes in order to make the sample ballot appear more realistic.

Not only did the Committee not intend to PASO a federal candidate in the advertisement in question, the advertisement, in fact, did not PASO a federal candidate based on the guidance the Commission has provided both in its Advisory Opinions on this subject and through similar enforcement matters. In Advisory Opinion 2003-25, the Commission analyzed whether a federal candidate could appear in a state candidate's television advertisement to endorse that state candidate without triggering FEA. The Commission opined that the advertisement would not be FEA because the advertisement did not "promote, support, attack, or oppose any candidate for federal office."⁹ Importantly, the Commission stated that "[u]nder the plain language of the

² 52 U.S.C. §§ 30101(20)(A)(iii) & 30125(b); 11 C.F.R. §§ 100.24(a)(3); 300.32.

³ The full version of the advertisement can be viewed here:

https://www.dropbox.com/s/ry71gp0zhp8gpfw/iVote_TwoWays_V008.mp4?dl=0

⁴ The Committee notes that Senator-elect Sinema's name is misspelled in the advertisement.

⁵ See, Declaration of John Del Cecato at ¶ 1.

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶ 5.

⁸ *Id.* at ¶¶ 7, 8.

⁹ Advisory Opinion 2003-25 (Weinzapfel), Legal Analysis and Conclusions, at 2.

FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate.”¹⁰ The Commission reiterated its interpretation of that PASO standard in a 2007 Advisory Opinion regarding a federal candidate’s appearance on a billboard endorsing a state candidate.¹¹ In that Opinion, the Commission noted that the advertisement “only identifie[d] [the Federal candidate] without additional comment or statement.”¹² The Complainant uses these Opinions in an effort to support its proposition that the advertisement in question *does* PASO a federal candidate, but their argument is misplaced. Here, the federal candidates’ names partially appear briefly on the screen without any other written or oral references to either candidate and without any commentary on either candidate. While the Complainant alleges that the advertisement promotes or supports federal candidate Kyrsten Sinema, he ignores that the fact that the advertisement also contained a portion of Sinema’s opponent Martha McSally’s name. The brief appearances of the two federal candidates’ names on a sample ballot are not tantamount to any promotion, attack, support, or opposition for either candidate. The fact that both names appear on the sample ballot, at least in part, further confirms that there was no intent to PASO either candidate. In fact, candidate Kyrsten Sinema’s name was even misspelled on the sample ballot.

This case should also be compared with MUR 6684 (Gregg for Indiana) decided by the Commission in 2013. In that case, the Commission analyzed a television advertisement paid for by a state candidate related to a gubernatorial election where the advertisement provided “a series of comparative statements and positions associated with Mourdock, a federal candidate office, and Pence, Gregg’s [state] opponent.”¹³ In its analysis, the Commission re-stated its position that “the mere identification of an individual as a federal candidate in a public communication … does not, by itself, promote, attack, support, or oppose the federal candidate.”¹⁴ The Commission voted to dismiss the matter and stated that *even if* “the advertisement could be interpreted as opposing Mourdock under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not exhort viewers to vote against Mourdock.”¹⁵ The Commission should likewise dismiss the instant case. The advertisement here merely identifies two federal candidates without any promotion, attack, support, or opposition towards either candidate. The two candidates are mentioned *without commentary* and without any exhortation for voters to take any action in relation to either candidate. Furthermore, the advertisement focuses on the Arizona Secretary of State race. Just as the Commission did in Gregg, it should dismiss this case.

The Complaint goes on to allege that, even if the advertisement does not qualify as FEA, the Committee was required to allocate the costs of the advertisement between its federal and non-federal accounts. That argument is also flawed. State party committees are only required to allocate non-FEA expenses if they are made “in connection with both Federal and non-Federal elections.”¹⁶ The advertisement in question was not made in connection with a Federal election — it is a non-federal advertisement advocating for the election of a specific state candidate. The

¹⁰ *Id.*

¹¹ See, Advisory Opinion 2007-34 (Jesse Jackson)

¹² *Id.* Legal Analysis and Conclusions at 3.

¹³ MUR 6684 (Gregg for Indiana), Factual Background at 2.

¹⁴ *Id.* Legal Analysis at 5.

¹⁵ *Id.* at 6.

¹⁶ 11 C.F.R. § 106.7(b).

brief mention of two federal candidates, by name only, is merely incidental and was only included to simulate a ballot. The advertisement was not intended to, and does not, PASO a federal candidate. It is simply not an expenditure in connection with a Federal election. Furthermore, allocation of expenses between federal and non-federal accounts is reserved for specific activities, including staff salaries, administrative costs, fundraising, generic voter-drive activities, and exempt party activities.¹⁷ The advertisement at issue here is not an allocable expense.

II. Conclusion

For the reasons described above, the advertisement is not federal election activity because it does not promote, attack, support, or oppose a federal candidate. Accordingly, the Commission should find no reason to believe that a violation of the Act has occurred and dismiss this matter.

If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,



Neil P. Reiff
Counsel to Arizona Democratic Party
Rick McGuire, Treasurer

¹⁷ *Id.* at §106.7 (c).

**FOR THE
ELECTION COMMISSION**

IN RE)
)
Arizona Democratic Party (MUR 7519))
)
)

DECLARATION OF JOHN L ATO

1. My name is John Del Cecato. I am a partner and the creative director at KPD Message and Media, a political media production firm.

2. During the 2018 election cycle, I served as the strategic point person for the Arizona Democratic Party's media strategy.

3. I drafted the script for the advertisement at issue in this case.

4. In advising my production team on the creation of the advertisement, I instructed them to create a sample ballot featuring the two candidates for Secretary of State in Arizona.

. I did not instruct any member of the production team to include the name of any federal candidate on the sample ballot.

. When I reviewed the drafted advertisement, I did not notice the appearance of the federal candidates on the sample ballot.

. The sample ballot was included in the advertisement to visually reinforce to voters that there the Secretary of State candidates would appear on the November 2018 ballot.

8. The advertisement was intended to influence individuals to vote for Katie Hobbs for Secretary of State and was not intended to promote or support Kyrsten Sinema.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 13th day of December, 2018.

John Del Cecato

John Del Cecato