

Olson | Remcho

VIA EMAIL

March 18, 2024

Wanda D. Brown
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20436

Re: MUR 8205

Dear Ms. Brown:

We write as counsel to Senator Dave Min and Dave Min for Senate 2024 (“Respondents”), with respect to the above-referenced complaint. The Complaint – which was filed by the attorney for Senator Min’s Democratic primary opponent – alleges that Respondents violated 52 U.S.C. § 30125(f) when Dave Min for Senate 2024, the Senator’s state senate committee (the “State Committee”), distributed two mailers related to Dave Min’s status as a state senator. The Complaint alleges that this is so because the mailers were paid for with funds that were not subject to the limits, prohibitions and reporting requirements of federal law.

The Complaint is without merit. In prior matters, the Commission has addressed nearly-identical mailers and determined that they did not promote, attack, support or oppose a federal candidate. And Section 30125(f) does not apply when the public communication is in connection with a nonfederal candidate’s nonfederal campaign or officeholder activities, which was the case here. For these reasons, the Complaint lacks merit. The Commission should find that there is no reason to believe that Respondents violated the Act and close the file.

Factual Background

Senator David Min is a member of the California State Senate, representing the 37th District. After he was elected in 2020, in December 2020, Senator Min established the State Committee in connection with his anticipated 2024 reelection campaign by filing FPPC Form 410 with the California Secretary of State. He also filed the required Candidate Intention Statement (FPPC Form 501) to permit him to raise funds in connection with that reelection campaign.

Two years later, after Representative Katie Porter announced that she would be vacating her congressional seat to run for the United States Senate, Senator Min established a federal campaign committee and declared his candidacy for Congress in the 47th Congressional District. At that point, Senator Min began focusing on his federal election, though he continued

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to use the funds in the State Committee for normal and usual expenses associated with his status as an incumbent state officeholder, as is permissible under state law.¹

The mailers that are the subject of the Complaint were two of those expenses. The first mailer was a legislative update (the “Legislative Update”) that the State Committee sent to the Senator’s constituents in the 37th Senate District. The mailer cost \$35,433 and was paid by the State Committee on December 21, 2023.

The second mailer identified by the Complaint is the Senator’s annual holiday card (the “Holiday Card”), which he sends to a small group of recipients every year. The 2,829-piece mailing was sent to a universe that largely consisted of state legislators, local public officials in the Senator’s state senate district, and contributors to, and supporters of, the Senate Committee. The full cost of the card was \$3,358.20 including printing and postage, and was paid by the State Committee (not by the government, as the complaint alleges) on December 26, 2023.

Legal Background and Analysis

Under the Act and Commission regulations, “[t]he Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.”²

The Complaint fails to meet this standard. The Complaint alleges that the two mailers violate the soft-money ban, which provides in relevant part that “[a] candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication [that promote, attack, support, or oppose (“PASO”) a candidate for federal office] unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”³ However, this prohibition does not apply “if the public communication is in connection with an election for State or local office, and refers to one or

¹ Cal. Gov’t Code § 89510(b) (“All contributions deposited into the campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office”).

² Statement of Reasons, Commissioners Mason, Sandstrom, Smith & Thomas, MUR 4960 (Dec. 21, 2000), at 1; see 11 C.F.R. § 111.4(d).

³ 52 U.S.C. § 30125(f)(1).

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more candidates for State or local office or to a State or local officeholder but does not promote, support, attack, or oppose any candidate for Federal office.”⁴

The FEC has repeatedly found that the Act does not prohibit a state officeholder from using nonfederal funds to pay for *bona fide* officeholder activities. For example, in Advisory Opinion 2009-26, the Commission advised a state legislator who was running for Congress that she could use nonfederal funds to send a legislative update that discussed the legislator’s legislative position on healthcare issues to health professionals in her district, reasoning that the communications were not “in connection with” an election.⁵

More recently, the Commission has more clearly articulated the appropriate legal standard for a state legislator’s communications with constituents about state legislative matters, as well as a state legislator’s holiday cards. In MUR 7106, the Commission unanimously found no reason to believe that a state senator violated the Act when she used nonfederal campaign funds to distribute a newspaper advertisement that discussed the problem of toxic waste in her county. The Commission reasoned that a communication is not “in connection with” an election unless it solicits funds, expressly advocates for a candidate’s election, gathers information for the campaign’s use, or constitutes federal election activity (“FEA”), as defined by the Act. Moreover, the Commission noted that a communication does not PASO a candidate solely because it identifies the candidate or discusses a candidate’s previous or ongoing legislative efforts.⁶ It ultimately found that the communication did not PASO the candidate because it discussed the candidate’s position on issues, did not identify another candidate, and was directed to constituents of the state senate district.⁷

In MUR 7954, the Commission voted 6 to 0 to find no reason to believe that then-Assemblymember and congressional candidate Kevin Mullin violated the Act by using nonfederal funds to pay to produce and send a legislative update and a holiday card. The analysis approved by the Commission reached this conclusion for two separate reasons. First, the materials were not “in connection” with an election for the same reasons articulated in MUR 7106: they addressed Assemblymember Mullin’s past legislative achievements and did not solicit funds, gather information about potential voters, or expressly advocate the election

⁴ 11 C.F.R. § 300.72; *see* 52 U.S.C. § 30125(f)(2).

⁵ Advisory Opinion 2009-26 (State Representative Coulson), at 9 (citing Advisory Opinion 1999-11 (Byrum)).

⁶ MUR 7106 (Citizens for Maria Chappelle-Nadal, et al.), Factual and Legal Analysis, at 8-9 (Apr. 24, 2018) (citing Advisory Opinion 2009-26).

⁷ *Id.*

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or defeat of a federal candidate.⁸ Second, the materials were in connection with Assemblymember Mullin's election to state office because they only referred to Mullin in his capacity as a state officeholder.⁹ And for both of these reasons, the Commission concluded that the state committee had not made an unreported contribution to the federal committee.¹⁰

The Legislative Update and the Holiday Card that are the subject of the Complaint are substantially similar to the pieces in the above-described matters and, for these reasons, the Commission should find no reason to believe that Respondents violated the Act.

1. The Legislative Update is Materially Indistinguishable from the Advertisements in MURs 7106 and 7954.

The Legislative Update sent by Respondents is the type of legislative update commonly sent by incumbent legislators to their constituents. It was sent solely to Senator Min's constituents (as explained in further detail below) and discussed his legislative achievements. Further, it did not expressly advocate his election, seek funds for his federal election, seek information to be used in the federal elections. Nor did it identify any other federal candidate or constitute FEA. It is materially indistinguishable from the "toxic waste" advertisement in MUR 7106 and the legislative update in MUR 7954. It, therefore, does not PASO Senator Min.

Moreover, the legislative update falls into the exception of 11 C.F.R. § 300.72. At the time that the Legislative Update was sent, Senator Min was legally a candidate for reelection to the State Senate, having filed a Candidate Intention Statement in connection with his reelection campaign and not having terminated his state candidacy.¹¹ The Legislative Update related solely to the Senator's official duties and made no reference to his federal candidacy. Accordingly, for two separate reasons, Respondents did not violate 52 U.S.C. § 30125(f).

The sole support that the Complaint provides for its allegation that the Legislative Update was intended to influence the Senator's congressional election is the fact that a single mailer was distributed to Aliso Viejo, which the Complaint asserts is outside of the 37th Senate District. However, this allegation fails for two reasons.

⁸ MUR 7954 (Mullin), First General Counsel's Report, at 7-8 (Oct. 7, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Cal. Gov't Code § 82007.

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First and foremost, as the Complainant could have easily verified before wasting the Commission's time on this matter, Aliso Viejo is not in the 47th Congressional District.¹² Thus, the Complaint's contention that the mailer was sent to influence the Senator's congressional campaign simply defies logic.

Second, the Complaint's assertion that Senator Min does not represent constituents in Aliso Viejo is false. This is because the Complaint references an outdated map that was in effect before the 2021 decennial redistricting process. In 2021, in connection with the decennial redistricting process, the California Citizens Redistricting Commission adopted new district maps for the State Senate. The new 37th District includes Aliso Viejo.¹³ Though this map does not take effect in full until the 2024 election, the California Senate Rules Committee has "accelerated" the incorporation of portions of the new 37th District into the district that Senator Min currently represents, including portions of Aliso Viejo.¹⁴ This is because of a quirk of the redistricting process and how it intersects with the state's election calendar. Under California law, state senators are elected to staggered, four-year terms. The senators from even-numbered districts are elected in one biennial election (e.g., 2018, 2022, 2026, etc.), and the senators from odd-numbered districts are elected in the next biennial election (e.g., 2020, 2024, 2028). Under this system, the 2020 senate elections involving odd-numbered districts were held under the pre-2021 district lines, but the 2022 Senate elections were held under the post-2021 district lines. The result is that communities that were moved from even numbered districts to odd numbered districts do not have elected representation in the Senate during the 2023-2024 legislative session. To remedy this inequity, the Senate Rules Committee "accelerates" portions of the new map, and assigns Senators responsibility for these areas that would otherwise go without representation. In short, then, Senator Min does currently represent portions of Aliso Viejo, and the Complaint's assertion to the contrary is simply false.

¹² See California Citizens Redistricting Commission, Congressional Final Map, *available at* <https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Congressional-pdf-Final-1.pdf>.

¹³ See California Citizens Redistricting Commission, Senate Final Map, *available at* <https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Senate-pdf-Final-1.pdf>.

¹⁴ <https://sdmg.senate.ca.gov/Current>.

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2. The Holiday Card Did Not PASO Senator Min and Was Sent for State Committee Purposes

For similar reasons to those described above, the Holiday Card did not violate the Act. As an initial matter, the Complaint alleges that the Holiday Card was paid for using state funds; this is false. The Holiday Card was paid for by the State Committee.

In any case, the Holiday Card did not violate 52 U.S.C. § 30125(f) because the Holiday Card, too, did not PASO Senator Min. It does not expressly advocate for his election, solicit contributions to his federal campaign, solicit information to be used by his federal campaign, or constitute FEA. Nor does it reference any other federal candidate.¹⁵

While the card does briefly reference his federal candidacy, this reference was not included for a federal election-influencing purpose. The card was sent to a mix of public officials and friends and supporters of the State Committee. Its purpose was both governmental, to foster relations between the Senator and other governmental officials, and also related to the state campaign, to acknowledge and thank those who had supported the State Committee in the past. As is typical in a holiday card, the card updated recipients about the Senator and his family, and the endeavors that have filled their time in the preceding year. It is in this context only that the card contains a brief reference to the Senator's candidacy. But, on a time/space basis, less than 5% of the card is dedicated to the discussion, and the discussion is purely informational; again, it does not solicit support for his federal candidacy or contain express advocacy.

Moreover, while the Holiday Card was sent outside of the Senator's senate district, this, too, is consistent with its purely nonfederal purpose. It was sent to elected officials around the state, again, not to influence any federal election but to foster relationships with those officials, and it was sent to State Committee supporters because of their past relationship with and support of the State Committee.

Thus, the Holiday Card does not PASO Senator Min. And for the same reasons, the card was sent in connection with the Senator's state candidacy, and falls into the exception of 11 C.F.R. § 300.72. However, even if the Commission disagrees with this conclusion, the card still does not violate the Act for a second reason: it was paid for with federally permissible funds. At the time that the card was paid for, the State Committee had approximately \$50,064.71 cash on hand. Based on a last-in, first-out analysis of the State Committee's records, at least \$21,316.63 of

¹⁵ See *supra* notes 6 & 8.

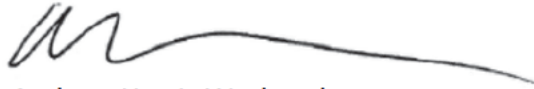
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that amount was received from individuals within the federal limits.¹⁶ Accordingly, even if the Commission concludes that the Holiday Card PASOs Senator Min and that it does not fall within the exception at 11 C.F.R. § 300.72, Respondents have still not violated the Act because the State Committee had sufficient federally permissible funds on hand to pay for the \$3,358.20 expense.

Conclusion

For the reasons stated herein, the Commission should find that there is no reason to believe that Respondents have violated the Act and close the file.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew', followed by a long, sweeping horizontal line that extends to the right.

Andrew Harris Werbrock

(00505048)

¹⁶ In addition to this \$21,316.63 in individual money, the State Committee's cash-on hand also included partnerships with individual partners, so the actual total of federally permissible funds is likely higher.