



607 Fourteenth Street NW  
Washington, D.C. 20005-2011  
PHONE 202 628 6600  
FAX 202.434 1690  
www.perkinscoie.com

Brian G Svoboda  
PHONE 202 434 1654  
FAX 202 434 1690  
EMAIL bsvoboda@perkinscoie.com

May 1, 2006

Lawrence Norton, Esq.  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 5718

Dear Mr. Norton:

On behalf of the Honorable Jesse L. Jackson, Jr., I write in response to the complaint filed by the Illinois Republican Party (the "Complaint") and subsequently labeled MUR 5718. For the reasons set forth below, the Complaint should be dismissed immediately and the matter closed.

The Complaint alleges that by providing an endorsement of Alexander Giannoulis, a Democratic candidate for Illinois State Treasurer, in both a radio ad and a billboard ad, Congressman Jackson received an in-kind contribution to his own campaign for re-election to the U.S. House of Representatives.

The facts belie any notion that the advertisements in question were for the purpose of influencing Congressman Jackson's own election. Congressman Jackson was unopposed in the March 21, 2006, Illinois Democratic primary. The script for the radio ad and the copy of the billboard ad submitted with the Complaint focus entirely on the candidacy of Mr. Giannoulis in the Democratic primary for State Treasurer. They do not promote or support Congressman Jackson.

As such, these communications do not satisfy the statutory standard for coordinated expenditures set forth in 2 U.S.C. §§ 441a(7)(B) and 431(9)(A), and thus do not constitute in-kind contributions to Congressman Jackson's campaign. The United

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States Court of Appeals for the District of Columbia Circuit explained this standard in the context of the Commission's coordination rules, when it wrote:

[U]nder the statute, coordinated expenditures "shall be considered to be a contribution," so if a communication involves "expenditure" and is made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or party – the provision's two elements, see 2 U.S.C. §§ 441a(7)(B)(i), (ii) – then the FEC lacks discretion to exclude the communication from its coordinated communication rule. **Yet to qualify as "expenditure" in the first place, spending must be undertaken "for the purpose of influencing" a federal election (or else involve "financing" for redistribution of campaign materials).** See 2 U.S.C. §§ 431(9)(A), 441a(a)(7)(B)(iii).

*Shays v. Meehan*, 414 F.3d 76, 99 (D.C. Cir. 2005) (emphasis added).

The ads identified in the Complaint fail to meet this statutory standard. There is no basis to conclude that they were "for the purpose of influencing" a federal election. Neither communication includes a reference to Congressman Jackson's candidacy. They do not even include any information about Congressman Jackson, other than that he supports Alexander Giannoulis's candidacy for Illinois State Treasurer. Congressman Jackson was unopposed in the federal election then pending.

Apparently recognizing that 11 C.F.R. § 109.21(c)(4) can be read to encompass conduct beyond that which the Act regulates, the Commission has acted to narrow the rule's scope. It recently voted to create a safe harbor in the coordination rules for endorsements just like this one, as long as the communication does not promote or support the endorsing federal candidate:

*(h) Safe Harbor for endorsements and solicitations by Federal candidates.*

(1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office does not satisfy the standards in paragraphs (c) or (d) of [section 109.21] with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks or opposes the endorsing candidate or another candidate for the same office as the endorsing candidate.

FEC Agenda Document 06-25 at 6; *see also* FEC Agenda Document 06-27 at 6. Even before the Commission voted to change the rule, however, there is no evidence on the

public record that it has ever pursued an enforcement action under section 109.21(c)(4) involving a communication like this one.

The Administrative Procedure Act requires the Commission to avoid agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . contrary to constitutional right . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A)-(C). The Commission has declined to launch investigations of allegations of coordination in the past when concerns about fairness and overbreadth were raised. *See* MUR 5369, Statement for the Record of Commissioners Mason, Smith and Toner, and MURs cited therein; *see also Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976) . Given the Commission's known enforcement history and recent vote to create a safe harbor, and given the fact that the statute does not extend to this sort of conduct, it would be an abuse of discretion for the Commission to single out the men identified in this Complaint for investigation and penalty.

Thus, there is no justification for the Commission to expend its resources on an investigation into the communications identified in the Complaint. The Commission should exercise its prosecutorial discretion and dismiss the Complaint immediately. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

Very truly yours,



Brian G. Svoboda  
Counsel to the Honorable Jesse L. Jackson, Jr.

- cc: Chairman Michael Toner  
Vice Chairman Robert D. Lenhard  
Commissioner David M. Mason  
Commissioner Hans A. von Spakovsky  
Commissioner Steven T. Walther  
Commissioner Ellen L. Weintraub

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