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October 21, 2010

Christopher Hughey, Esq.  
Acting General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

MUR # 6405

Dear Mr. Hughey:

The Democratic Congressional Campaign Committee, by and through its general counsel, files this complaint under 2 U.S.C. § 437g against Senator John McCain; Friends of John McCain, Inc.; Ruth McClung, a candidate for Congress from the 7th District in the state of Arizona; Ruth McClung for Congress; Jesse Kelly, a candidate for Congress from the 8th District in the state of Arizona; and Kelly for Congress ("Respondents"), for violations of the Federal Election Campaign Act.

Violating coordination rules that were written as a direct result of McCain-Feingold, Senator McCain is sponsoring an advertisement for two Republican House candidates in vast excess of his legal limits to their campaigns. The Commission should open an immediate investigation, stop these ongoing violations, and see that Senator McCain commits no further violations of his own law.

#### A. FACTS

John McCain is the senior Senator from the state of Arizona; he is on the ballot for re-election this November. He is the proud architect of the Bipartisan Campaign Reform Act of 2002, "McCain-Feingold," which fundamentally reshaped the raising and spending of money in federal elections. McCain-Feingold required tough new rules on coordinated communications. And it is these very rules that the McCain campaign is now choosing to ignore.

On or about October 18, 2010, Senator McCain's authorized campaign committee, Friends of John McCain, Inc., began airing two advertisements that feature him standing alongside Senator Jon Kyl, his junior Senator. In one advertisement, the senators attack Congressman Raul Grijalva and urge the election of his opponent, Ruth McClung. The advertisement, entitled

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ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MADISON  
MENLO PARK · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Cole LLP and Affiliates

"Vote Ruth McClung," can be found here: [http://www.youtube.com/watch?v=MEDoaGOE8\\_I](http://www.youtube.com/watch?v=MEDoaGOE8_I). In the other, the senators attack Congresswoman Gabrielle Giffords and urge the election of her opponent, Jesse Kelly. That advertisement, entitled "Vote Jesse Kelly," can be found here: <http://www.youtube.com/watch?v=pWYDIJuRYWw>. On information and belief, both ads are now running on Arizona television stations, in McClung and Kelly's respective districts.

Senator McCain personally approved these ads. Both end with him saying, "I'm John McCain and I approve this message." The text disclaimer states "Authorized by John McCain and paid for by Friends of John McCain."

## **B. SENATOR MCCAIN IS ILLEGALLY SUPPORTING MCCLUNG AND KELLY IN EXCESS OF THE LIMITS**

The Federal Election Campaign Act provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."<sup>1</sup> At the direction of McCain-Feingold, the Commission wrote rules providing specifically that a communication will be considered an in-kind contribution to a campaign if it (1) is paid for by an entity other than the campaign; (2) contains express advocacy; and (3) is coordinated with the campaign.<sup>2</sup>

Under McCain-Feingold, agreement or formal collaboration is not required for a finding of coordination.<sup>3</sup> Indeed, Senator McCain has often complained that the FEC's coordination rules are not strict enough, and has gone to court to strengthen them. *See, e.g., Shays v. FEC*, No. 04-5352, 2005 WL 622966 (D.C. Cir. 2005) (Brief Amicus Curiae of Sen. McCain *et al.*) ("The loopholes created by the regulations may seem small and hyper-technical to some. But they are neither. In fact ... any loophole, no matter the size, will be exploited and lead to consequences directly at odds with the purposes of BCRA. ").

There can be no doubt that these ads were coordinated with McClung and Kelly, even under the current FEC rules as commonly understood. It is utterly implausible that the state's most senior Republican, who appeared at a Tea Party rally for these two candidates just days ago,<sup>4</sup> would have commenced this ad blitz without their assent, substantial discussion or material involvement.

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<sup>1</sup> 2 U.S.C. § 441a(a)(7)(B)(i).

<sup>2</sup> *See* 11 C.F.R. § 109.21.

<sup>3</sup> *See* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 214(c), 116 Stat. 95.

<sup>4</sup> *See* <http://zingstrom.wordpress.com/2010/10/10/mcclung-kelly-campaigns-surge-as-mccain-meets-the-tea-party/>.

**1. The McCain Campaign Has Made Excessive Contributions to McClung and Kelly**

As coordinated communications, these advertisements constitute in-kind contributions from Friends of John McCain, Inc. to the McClung and Kelly campaigns. The value of the advertisements has certainly exceeded the contribution limit.<sup>5</sup> Thus, Senator McCain's campaign has made – and the McClung and Kelly campaigns have received – illegal in-kind contributions.<sup>6</sup>

**2. The McCain Campaign Has Violated the Conditions of Its Status as Senator McCain's Authorized Committee**

The Federal Election Campaign Act prohibits an authorized campaign committee from supporting more than one candidate.<sup>7</sup> A special exception allows Senator McCain's campaign only to contribute up to \$2,000 to another candidate; it makes no allowance for larger contributions or independent expenditures.<sup>8</sup> And yet the McCain campaign has spent in vast excess of this limit. It no longer meets the statutory conditions for authorized committee status, and may not enjoy any of its benefits.

**C. REQUESTED ACTION**

This is not the first time Senator McCain has had trouble complying with his own law. In 2007, the Commission came to the brink of litigation against Senator McCain. It found reason to believe that he violated the soft money fundraising restrictions, and its general counsel recommended a finding of probable cause that he broke the law. The Commission ultimately exercised its prosecutorial discretion to take no further action.<sup>9</sup>

Especially at this late hour in the campaign, as he seeks wrongfully to tilt the balance in two contested House elections, the Commission should take immediate action to enjoin Senator McCain and his campaign from further violations. It should seek the maximum penalties permitted by law. And given Senator McCain's professed knowledge of campaign finance law, the Commission has no evident alternative but to follow McCain-Feingold and determine

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<sup>5</sup> See *id.* § 441a(a)(1).

<sup>6</sup> A separate provision of the law allows candidates to support others on the ballot through so-called "coattails" activity – but not through "the use of broadcasting." 2 U.S.C. § 431(8)(B)(x).

<sup>7</sup> See 2 U.S.C. § 432(e)(3).

<sup>8</sup> See *id.* § 432(e)(3)(B).

<sup>9</sup> See MURs 5712 and 5799.

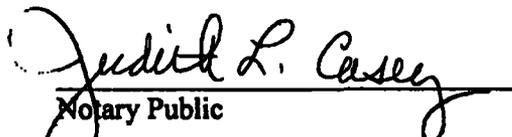
whether the violation of law was knowing and willful, hence requiring referral for criminal prosecution.<sup>10</sup>

Very truly yours,



Brian G. Svoboda  
General Counsel  
Democratic Congressional Campaign Committee

SUBSCRIBED AND SWORN to before me this 21st day of October, 2010.

  
Notary Public

My Commission Expires:

December 14, 2014

JUDITH LEIGH CASEY  
Notary Public, District of Columbia  
My Commission Expires December 14, 2014

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<sup>10</sup> See Pub. L. 107-155, § 312.

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