FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
David Vitter, *et al.*	)	MUR 6798
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

The complaint in this matter alleged that then-Senator David Vitter, along with a super PAC that supported Vitter, and two fundraising consultants retained by both Vitter's authorized committee and the super PAC, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by soliciting soft money. Because the complaint merely described activity that is expressly permitted by the Act and Commission guidance, we voted against recommendations of the Commission's Office of General Counsel ("OGC") to find reason to believe that the respondents violated the Act and voted, instead, to close the file.

I. BACKGROUND

In 2011, David Vitter filed a Statement of Candidacy for reelection to the U.S. Senate in 2016. In January 2013, the Fund for Louisiana's Future ("super PAC") registered with the Commission as an independent-expenditure-only committee and with the Louisiana Board of Ethics.[1] In January 2014, Vitter entered the 2015 Louisiana governor's race and concurrently ran for both state and federal office, until losing the governor's race and ending his Senate reelection bid.[2]

The super PAC and Vitter's authorized committee ("Vitter's Committee") retained Courtney Guastella and Lisa Spies, two professional fundraisers. Guastella and Spies have provided services to numerous candidates, PACs, and such charities as the Humane Society of the United States.[3] Commission disclosure reports indicate that Guastella and Spies provided

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[1] Statement of Organization, The Fund for Louisiana's Future (Jan. 23, 2013), https://docquery fec.gov/pdf/326/13031021326/13031021326.pdf; Statement of Organization, The Fund for Louisiana's Future (Jan. 28, 2013), http://www.ethics.la.gov/CampaignFinanceSearch/13000776.pdf.

[2] Citing press reports, the complaint alleged that the super PAC was formed to support "Vitter's election to *both* federal and state office." Compl. at 3.

[3] *See* Vitter Resp. at 9; FFLF Resp. at 3 ("[B]oth Ms. Guastella and Ms. Spies operate separate and successful fundraising consulting businesses that have served multiple clients during the period cited by Complainants."); *id.* at Exs. A & B (attaching news articles describing Spies's fundraising efforts for other clients); *see also* Compl. at 4 n.7 (citing the LS Group's website, which lists dozens of clients).

services to Vitter's Committee as early as 2005 and 2009, respectively. The responses described Guastella and Spies as independent contractors with their own fundraising businesses. Guastella and Spies maintained contracts with their clients that included geographic and substantive limitations on their scope of work. Under their contracts with Vitter's Committee, Guastella was responsible for raising funds in Louisiana, and Spies was responsible for raising funds in Washington, DC,[4] and their fundraising authority was limited to funds that complied with the Act's contribution limits and source prohibitions. According to the responses, Guastella's and Spies's contracts, including those with the super PAC, prohibited Guastella and Spies from raising funds for any other organization when fundraising for a particular client.[5]

The super PAC's website included photographs and references to Vitter.[6] As of March 18, 2014 (the date of the complaint), the website discussed Vitter's proposed legislation to "cut health subsidies for congressional and senior executive branch officials" and asked the reader to sign a petition supporting the legislation by providing the reader's name, zip code, and e-mail address.[7] The website also provided a "Contribute" link directing the reader to a separate webpage with instructions on how to make a contribution to the super PAC. A disclaimer on the webpage stated that the super PAC was registered with the Commission and the Louisiana Board of Ethics, and that the super PAC "may accept contributions up to $100,000 per election cycle from individuals, corporations, and other organizations."[8] The webpage also included the disclaimer required for communications by unauthorized committees under the Act.[9]

From September 5 through September 7, 2013, the super PAC held a three-day "Louisiana Bayou Weekend." A flyer attached to the complaint described the event as an opportunity to enjoy Cajun cooking, take an airboat swamp tour, and participate in an alligator hunt with "special guest U.S. Senator David Vitter."[10] The cost to attend was $5,000 per person, and the flyer directed interested persons to contact Guastella to make their reservations. The flyer, like the super PAC's website, included a disclaimer stating that the super PAC could

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4 Vitter Resp. at 9.

5 *See* Vitter Committee Resp. at 2-3 ("[T]heir authority is limited and circumscribed to raising contributions for the [Vitter Committee] that comply with the contribution limits and source prohibitions from their assigned areas."); Fund Resp. at 2-3 (describing Spies and Guastella's contracts as "prohibit[ing] Ms. Guastella and Ms. Spies from soliciting funds for [the super PAC] when they are working in their capacity as fundraising consultants for the [Vitter committee], and forbid them from soliciting funds for the [Vitter committee] when in their capacity as fundraising consultants for [the super PAC].").

6 The complaint alleged that Vitter's photograph appeared as part of the website's banner on each page of the super PAC's website.

7 Compl. Ex. A.

8 Compl. at 5 & Ex. A.

9 Compl. at Ex. A. (including in printed box "[p]aid for by the Fund for Louisiana's Future. Not authorized by any candidate or candidate's committee. 6048 Marshall Foch Street, New Orleans, LA 70124. (202) 772-0909. LouisianasFuture.com").

10 *See* Compl. Ex. B.

accept contributions up to $100,000 per election cycle from individuals,[11] corporations, and other organizations. The flyer also contained the disclaimer required by the Act for unauthorized committees, stating that the communication was "Paid for by The Fund for Louisiana's Future. Not Authorized by any Candidate or Candidate's Committee."[12]

The complaint alleged multiple and overlapping violations of the Act's soft money ban (52 U.S.C. § 30125). First, it alleged that Vitter solicited soft money for the super PAC and that the super PAC solicited soft money as Vitter's agent.[13] In support, the complaint emphasized the super PAC's "nature, purpose, and activities," Vitter's "involvement" with those activities, and that Guastella and Spies served as fundraisers for both the super PAC and Vitter's Committee.[14] Separately, the complaint alleged that Guastella and Spies solicited soft money as Vitter's agents "as an extension of their work for Senator Vitter."[15]

II. LEGAL ANALYSIS

Federal candidates and their agents shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements

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[11] At the time, Louisiana limited an individual's contributions to an independent expenditure-only committee to $100,000 per election cycle. *But see Fund for Louisiana's Future v. Louisiana Bd. of Ethics*, 17 F. Supp. 3d 562 (E.D. La. 2014) (enjoining Louisiana Board of Ethics and its members from enforcing $100,000 cap).

[12] Whenever a political committee makes a disbursement for a communication through a mailing or general public political advertising, the Act and Commission regulations require that the communication shall clearly state that it has been paid for by the committee. 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(a)(1), (b)(1). The disclaimer on any printed communication must be of sufficient type size to be clearly readable, and must be contained in a printed box set apart from the other contents of the communication. 52 U.S.C. § 30120(c)(1)-(2); 11 C.F.R. § 110.11(c)(2)(i)-(ii).

[13] Compl. at 11-12.

[14] *Id.* at 11.

[15] *Id.* at 13. In this matter, OGC identified a series of contributions from Vitter's Committee to the super PAC. The contributions totaled $950,000 and were made between February 2014 and July 2015. Based on these contributions, OGC concluded that Vitter "established, financed, maintained, or controlled" the super PAC and recommended that the Commission find reason to believe that Vitter, Vitter's Committee, and the super PAC violated section 30125(e). Before making a finding, the Commission provided respondents an opportunity to respond to the new information. The super PAC denied that Vitter "established, financed, maintained, or controlled" the super PAC, pointing out that the contributions from Vitter's Committee represented only 12% of the super PAC's receipts between the 2014 and 2016 election cycles. We concluded that 12% of total receipts, broken up over several transactions and beginning a year after the super PAC first formed, was insufficient to find Vitter "financed" the super PAC. Further, the super PAC's Treasurer (and counsel here before the Commission) had sworn out an affidavit that "define[d] the very essence of the independent expenditure committee." *Fund for Louisiana's Future*, 17 F. Supp. at 574. A federal court relied upon that affidavit, which included sworn representations that the Treasurer (not a candidate) had established the super PAC, that the super PAC would not make contributions to candidates (including in-kind contributions), and that the Super PAC "was not established, financed, maintained, or controlled" by any other committee authorized by a candidate. *Id.* at 573-74.

of the Act."[16] Following *Citizens United v. FEC*[17] and *SpeechNow.org v. FEC*,[18] however, corporations, labor organizations, and individuals are generally free to make unlimited contributions to super PACs.[19] Additionally, federal candidates, officeholders, and their agents may solicit contributions to super PACs if the amounts solicited do not exceed the federal contribution limits and are from permissible sources under the Act.[20]

Although the complaint in this matter contained much speculation and innuendo, it lacks any evidence that Vitter authorized Guastella, Spies, or the super PAC to solicit, receive, direct, transfer, or spend soft money on his behalf. To the contrary, the complaint's allegations and the responses thereto described activities that federal courts have held to be protected under the First Amendment, or that the Commission previously has either expressly approved or has determined do not violate the Act.

A. FUNDRAISING BY GUASTELLA AND SPIES

The complaint alleged that Guastella and Spies violated the Act by soliciting soft money on Vitter's behalf as his agents. The complaint also pointed to their relationship with the super PAC as evidence that Vitter solicited soft money and authorized the super PAC to solicit soft money on his behalf. Much of the complaint rested upon these faulty premises.

The Commission's soft money regulations define "agent" as "any person "who has *actual* authority, either express or implied" to "solicit, receive, direct, transfer, or spend funds in connection with any election."[21] The Commission made clear "that the definition of 'agent' . . . does not apply to individuals who do not have any actual authority to act on their [principals']

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16 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61. Nor may federal candidates, officeholders, or their agents "solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office . . . unless the funds (i) are not in excess of the amounts permitted with respect to candidates and political committees under [the Act]; and (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office." 52 U.S.C. § 30125(e)(1)(B).

17 558 U.S. 310 (2010).

18 599 F.3d 686 (D.C. Cir. 2010).

19 *See, e.g.*, Advisory Opinion 2010-11 (Commonsense Ten) (applying *Citizens United* and *SpeechNow*).

20 Advisory Opinion 2011-12 (Majority PAC); *see also* Contributions Limits for 2013-2014 Federal Elections, Fed. Election Comm'n, https://transition.fec.gov/info/contriblimitschart1314.pdf.

21 11 C.F.R. § 300.2(b)(3) (emphasis added); *see also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49064, 49121 (July 29, 2002).

behalf, but only 'apparent authority' to do so."[22] The Commission rejected calls (including those from the complainant) to incorporate apparent authority[23] into the definition of "agent," stating:

> [A]pparent authority to do an act is created as to a third party by written or spoken words or any other *conduct of the principal* which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.[24]

The Commission warned against confusing implied authority with apparent authority, emphasizing that a principal "*may not be held liable*, under an implied actual authority theory, *unless the principal's own conduct* reasonably causes the agent to believe that he or she had authority."[25] Thus, as the complainant correctly noted during the Commission's rulemaking, "agency" under actual authority is "determined by the instructions (express or implied) given directly by the principal to the agent."[26]

Further, under the Commission's definition of agent, "a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals."[27] In other words, even where an individual is an agent, a principal is only liable for the agent's actions when the agent "act[s] on behalf of the principal."[28] The Commission thereby provided breathing room for the same individual to permissibly maintain agency relationships with both principals that may permissibly solicit and accept soft money, and those that may not. That definition has withstood challenge in federal court as well as subsequent re-examination in a 2005-06 rulemaking,[29] in

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[22] Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49082 (July 29, 2002).

[23] *See* Comment on Notice 2002-7: Non-Federal Funds at 16-17, Democracy 21 (May 29, 2002) (calling for definition of "agent" that considers whether it would "reasonably appear" that a person is an agent of the principal and acting on behalf of the principal); Comment on Notice 2002-7: Non-Federal Funds at 6, Campaign & Media Legal Center (May 29, 2002) (supporting definition that "includes[s] persons who are 'held out to the world' such that a reasonable person would believe they had authority to act for the principal").

[24] 67 Fed. Reg. at 49082 (quoting Restatement (Second) of Agency, 27) (emphasis added).

[25] *Id.* at 49083 (emphasis added).

[26] *See* Comments on Notice 2005-3: Definition of "Agent" at 4, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics (Mar. 4, 2005).

[27] 67 Fed. Reg. at 49083.

[28] *Id.*

[29] *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005); *see* Definitions of ''Agent'' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006) ("BCRA does not prohibit individuals who are agents of candidates . . . from also raising non-Federal funds for other political parties and outside groups.").

which the Commission again rejected the complainant's call to incorporate apparent authority within the Commission's definition of agent.[30]

In the current matter, the complaint assumed that Vitter must have authorized Guastella and Spies to solicit soft money for the super PAC on his behalf, because Guastella and Spies were the Vitter Committee's and the super PAC's only paid fundraising agents.[31] These allegations are based on complainants' own impressions arising from Guastella's and Spies's dual business relationships. In fact, the complaint did not provide any information indicating that Vitter or Vitter's Committee conferred actual authority on Guastella or Spies to solicit or direct soft money for the super PAC on Vitter's behalf.[32]

By contrast, the respondents spelled out the parameters of the agency agreements that Vitter, Vitter's Committee, and the super PAC entered into with Guastella and Spies. Guastella and Spies maintained "limited and circumscribed" authority to "raising contributions for the Campaign that comply with the contribution limits and source prohibitions."[33] Further, "[a]ny fundraising services provided by each independent fundraising consultant to any other clients are separate and apart from and not in connection with the services provided to David Vitter for US Senate."[34] In other words, their "authority . . . to raise funds on behalf of Senator Vitter is limited, and did not include raising funds for others."[35] Similarly, the super PAC asserted that its agreements with Guastella and Spies prohibited them from raising money for the super PAC

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30 *See* Comments on Notice 2005-3: Definition of "Agent" at 4, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics (Mar. 4, 2005); Hearing Transcript, NPRM Definition of ''Agent'' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures at 130 (asking Commission "to adopt the rules proposed for. . . [11.C.F.R.] 300.2(b) to include apparent authority in the definition of "agent").

31 In making this allegation, the complaint acknowledged the Commission has long recognized that individuals may wear "multiple hats," but attempts to distinguish Guastella and Spies's activities through incorrect interpretations of two Commission advisory opinions: 2003-10 (Reid) and AO 2007-05 (Iverson). Even assuming *arguendo* that these advisory opinions did not contradict the complaint's theory of liability, it is well-established that advisory opinions cannot be used as a sword, but instead are merely a shield from Commission enforcement action. *See* 52 U.S.C. § 30108.

32 RESTATEMENT (SECOND) OF AGENCY 13 ("merely acting in a manner that benefits another is not necessarily acting on behalf of that person") (cited in Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006)). *See generally* MUR 7151 (Great America PAC) (finding Rudy Giuliani was not an agent of Donald Trump because, even though he was an advisor to Trump at the time he appeared in a Trump advertisement, "he [did] not appear to have had actual authority, express or implied" to make decisions regarding communications on Trump's behalf") (a majority of Commissioners voted to find no reason to believe in MUR 7151); AO 2003-10 (Rory Reid) (an individual "may at different times act in his capacity as an agent on behalf of the State Party and act as an agent on behalf of Senator Reid").

33 Vitter Resp. at 2.

34 *Id.* at 2-3.

35 *Id.* at 7, 9 ("The scope of work does not include authority to raise funds for any other organization on behalf of Senator Vitter or the Campaign.").

when they were working for Vitter's Committee; nor did the contract permit Guastella and Spies to raise money for Vitter's Committee when working for the super PAC.[36]

On this record, a reason-to-believe finding that Guastella and Spies solicited soft money as "agents" of Vitter and Vitter's Committee was not justified.

B. THE SUPER PAC'S "FOCUS" AND ITS WEBSITE

The super PAC's website enabled users to contribute to the super PAC via pre-selected, designated amounts up to $25,000, in accordance with the *SpeechNow* decision and Commission advisory opinions. The super PAC's website also referred to Vitter by name, included a publicly available picture of him, discussed his position on health care policy, and generally supported Vitter and his state and federal candidacies — all of which is also permissible under judicial and Commission precedent.[37]

Ultimately, the complaint's argument that the super PAC was Vitter's agent rested on inferences drawn from the super PAC's purpose (to support Vitter), its activities (to raise and spend money to speak independently in support of Vitter), and its contractual relationships with Guastella and Spies. But all of this conduct is expressly contemplated and permissible under the Act and Commission guidance issued after the *SpeechNow* decision. For the Commission to find reason to believe that this conduct violated the Act, it would first have to construe the super PAC's legally-permissible activities as evidence of illegality. This approach has no basis in the Act, Commission regulations, or prior judicial or Commission decisions, and would be vulnerable to legal challenge. Accordingly, we declined to adopt it here.

C. THE SUPER PAC'S "LOUISIANA BAYOU WEEKEND" FLYER

Commission regulations define a "solicitation" as an explicit or implicit "oral or written communication . . . that contains a clear message asking, requesting, or recommending that another person make a contribution."[38] The regulation states that the communication should be "construed as reasonably understood in the context in which it is made."[39] The communication's "context" includes "the conduct of the persons involved in the communication."[40] A solicitation

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[36] Fund Resp. at 2-3, 7-8.

[37] Indeed, the definition of "independent expenditure" requires that a candidate be identified. *See* 11 C.F.R. § 100.16 (defining "independent expenditure" as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . . ."); 11 C.F.R. § 100.17 ("The term *clearly identified* means the candidate's name, nickname, photograph . . . .").

[38] 11 C.F.R. § 300.2(m); *see also* Definitions of "Solicit" and "Direct," 71 Fed. Reg. 13926, 13927 (Mar. 20, 2006).

[39] 11 C.F.R. § 300.2(m).

[40] *Id.*; *see also* 71 Fed. Reg. at 13929.

must always be "clear."[41] This test is objective; it does not turn on the subjective interpretations of the speaker or the recipients.[42] The Commission has explained that this objective standard "hinges on whether the recipient should have reasonably understood that a solicitation was made."[43]

The Act and Commission regulations also provide that federal candidates may attend, speak, or be a featured guest at non-federal fundraising events.[44] Moreover, pre-event publicity for a soft money fundraiser may incorporate "the name or likeness of a federal candidate or officeholder," even when the pre-event publicity includes a solicitation, "if the candidate or officeholder is identified as a special, honored, or featured guest, or as a featured or honored speaker, 'or in any other manner not specifically related to fundraising.'"[45]

Here, the Flyer publicized a soft money event and specifically identified Vitter as a "special guest," as provided in Commission regulations. Moreover, the only "clear" solicitation of funds in the Flyer was for $5,000 per person, an amount within the limits of the Act for a nonconnected committee. Although the Flyer did indicate, consistent with state law, that the super PAC could accept donations of up to $100,000 per election cycle from individuals, corporations, and other organizations, that statement appeared only in fine print, in noticeably smaller font than the rest of the Flyer, and surrounded by an assortment of similarly fine-print legalese concerning such topics as the non-deductibility of super PAC donations under federal tax law; the inability of the super PAC to accept contributions from foreign nationals; and the super PAC's registration with state and federal officials.[46]

On these facts, and absent any evidence to the contrary, we considered it highly unlikely that recipients of the flyer were misled as to the amount that was being solicited to attend the three-day "Louisiana Bayou Weekend" that was the subject of the flyer or the identity of the entity making the solicitation. Accordingly, we did not believe that the matter warranted the use of further Commission resources.

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41 *See Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *see also* 71 Fed. Reg. at 13927.

42 71 Fed. Reg. at 13928.

43 *Id.* at 13929.

44 52 U.S.C. § 30125(e)(3);11 C.F.R. § 300.64(a), (b)(1); Advisory Opinion 2015-09 at 8 (Senate Majority PAC) (concluding that federal candidates may "attend, speak, or be a featured guest" at nonfederal fundraising events).

45 AO 2015-09 at 8 (Senate Majority PAC).

46 *See id.* ("Federal candidates also may solicit federal funds at such events, provided that the solicitation is limited to funds that comply with the Act's amount limitations and source prohibitions.") (citing 11 C.F.R. § 300.64(b)).

III. CONCLUSION

The Commission's definition of "agent" provides that a principal can be held liable for the acts of an agent only when (1) the principal has given the agent actual authority, and (2) the agent is acting on the principal's behalf. The complaint provided no information indicating that Vitter instructed Guastella or Spies to solicit, receive, direct, transfer, or spend soft money on his behalf while they were working as agents of the super PAC. In fact, the information in the record indicates that the opposite was true: Guastella and Spies did *not* have actual authority to act on Vitter's behalf while acting as agents of the super PAC. Accordingly, we did not vote to find reason to believe that the respondents violated the Act.

Matthew S. Petersen
Vice Chairman

8/30/2019
Date

Caroline C. Hunter by csc
Caroline C. Hunter
Commissioner

8/30/2019
Date