



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Indiana Democratic Party

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)
) MUR 6434
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**STATEMENT OF REASONS
OF CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONER ELLEN L. WEINTRAUB**

At the heart of this matter are approximately 20,000 mailers distributed by the Indiana Democratic Party ("IDP") that appeared – inaccurately – to have been authorized by the campaign of the Libertarian candidate, Mark Vogel. The complainant alleges that the mailing violated the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations because the IDP failed to include a disclaimer stating that it was not authorized by the Vogel campaign. In response, the IDP contends such a disclaimer was unnecessary because its mailing qualified for the statutory "volunteer materials" exemption. *See* 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii). Because the record does not show the substantial volunteer involvement necessary for the mailing in question to qualify for the exemption, we could not support OGC's recommendation that the Commission should not find reason to believe that the IDP violated the Act.¹

Background

Complainant, a representative of Vogel for Congress, the principal campaign committee of Libertarian candidate for Indiana's 2nd Congressional District Mark Vogel, alleges that the IDP distributed up to 20,000 mailers in the days before the election that could have inaccurately led readers to believe that the mailers were authorized by the Vogel campaign. Complaint at 1. On one side, the mailer states "VETERAN MARK VOGEL. THE TRUE CONSERVATIVE FOR CONGRESS," and "ON TUESDAY, NOV. 2, SUPPORT THE TRUE CONSERVATIVE. VOTE MARK VOGEL FOR CONGRESS." *See* Complaint, Attachment unnumbered 1. There is a picture of Mark Vogel with an American flag in the background. The other side of the mailer contains text describing Mark Vogel's position on several public issues, including his desire to "[e]nd government-run health care," "[c]ut government spending by 50%," and

¹ Commissioners Hunter, McGahn, and Petersen voted to find no reason to believe that the IDP violated the Act. Commissioners Bauerly and Weintraub dissented. Commissioner Walther did not vote. Thereafter, the Commission voted 5-0 to close the file. Certification in MUR 6434, dated October 20, 2011.

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“[a]bolish the IRS.” *Id.* Mark Vogel is again characterized as the “true Conservative” and the reader is twice asked to “[v]ote Mark Vogel for Congress.” While the top corner of the first page of the mailer includes a “Paid for by the Indiana Democratic Party” disclaimer, the bottom of each page displays the URL “www.Vogel4Congress.com,” which appears to be the Vogel campaign's official website. *Id.*

As explained below, the mailing does not appear to comply with the disclaimer requirements in the Act and Commission regulations. Nevertheless, the IDP asserts that these requirements are inapplicable because the mailing included substantial volunteer involvement due to volunteers having “sorted, bundled, and stacked the mail into trays.” In signed declarations by an employee and a volunteer, IDP also asserts that “although volunteers wished to transport the mail pieces to the post office, representatives of the mailing house utilized by the IDP informed the IDP that volunteers would be prohibited from doing so for insurance and legal reasons.” Response, Declaration of Cameron Raulford ¶ 3, dated January 20, 2011; Response, Declaration of Rohan Patel ¶ 3, dated January 20, 2011. The IDP's response also included black and white copies of eight photographs that appear to show four individuals handling mailers.

Legal Analysis

The Act and Commission regulations require that all public communications² made by a political committee contain disclaimers. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. Public communications that are not authorized by a candidate or the authorized committee of a candidate must include a disclaimer that “clearly state[s] ... that the communication is not authorized by any candidate or candidate's committee.” 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). However, several categories of communications are exempt from the requirement. 11 CFR § 110.11(c).

The IDP asserts that its mailing falls under the volunteer materials exemption, which provides that a payment for campaign materials by State or local party committees is not a contribution or expenditure provided that those materials are “used in connection with volunteer activities on behalf of any nominee(s) of such party” (and that certain other conditions are met). 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. Thus, in addition to being exempt from the disclaimer requirement, such payments are not subject to contribution or expenditure limits, and a state committee may donate an unlimited amount of qualifying materials to a Federal candidate.³ For the exemption to apply, such materials must be “distributed by volunteers and not by commercial or for-profit operations.” 11 C.F.R. § 100.87(d); 11 C.F.R. § 100.147(d). In prior enforcement matters, the Commission has applied the volunteer materials exemption where there was “substantial volunteer involvement”⁴ in the distribution of the mailing.

² A “public communication” is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

³ For the purpose of § 100.147(a), direct mail is defined as “any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists.” In this case, an invoice provided by the respondent indicates that the 23,813 piece mailing was designed and sent by a commercial vendor.

⁴ See Factual and Legal Analysis in MUR 5841 (Arizona Democratic Party) (describing past enforcement matters as examining whether there was “substantial volunteer involvement” in the distribution of the materials); Statement of

The statute and regulations explicitly state that the volunteer materials exemption does not apply to direct mail. 2 U.S.C. § 431(9)(B)(viii)(1); 11 C.F.R. § 100.147(a). However, procedures for production, preparation and distribution of mailings have changed over the last thirty years and therefore the Commission has expanded its application of the exemption to include mailings bearing commercially printed labels and commercial postage stamps so long as the name and address information for the mailing labels were not obtained from commercial mailing lists, and provided that volunteer involvement in distributing the mailings remains substantial.⁵ This interpretation of the exemption is long-standing and relied upon by the regulated community.

Even under the Commission's current interpretation of the volunteer materials exemption, we do not believe that the IDP's mailer falls within the exemption based on the facts provided. "Substantial volunteer involvement" in the distribution of the materials may be demonstrated by a combination of activities, such as: bundling and sorting mailers, affixing address labels, placing bundled mail into mail bags, and loading mailers into trucks for delivery, provided that these activities are necessary for the mailing to be distributed. OGC has stated (and we agree) that "the touching of each mailer by an individual volunteer" is insufficient to transform a commercial operation into exempt activity, and that such an approach would be "squarely at odds with the legislative intent envisioning significant volunteer participation." MUR 2288, General Counsel's Report dated May 2, 1989, at 10-11. The IDP states that volunteers "sorted, bundled, and stacked the mail into trays." Based on the documents and photos submitted by the IDP, these activities would not have required volunteers even to handle separately each piece, which would be the case if volunteers were affixing postage, address labels or bulk mail permits. Instead, the documents provided indicate that at least four volunteers were involved in taking mailers from machines and placing them into postal bins in stacks. The activities in this matter are insufficient to turn an otherwise commercial mailer into one that includes substantial volunteer involvement in the distribution of the material and thus qualify for the exemption.⁶

In MUR 2288 (Utah Republican Party), volunteers stamped the non-profit mail seal on each mailer, bundled, and delivered mailers to a direct mail firm. These activities were insufficient to "convert an essentially commercial operation into the type of exempt activity

Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Ellen L. Weintraub in MUR 5837 at 4 (Missouri Democratic State Committee) (observing that in past matters the Commission has emphasized that "substantial volunteer involvement" is required for the exemption to apply); Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason, and Commissioner Ellen L. Weintraub in MURs 5824/5825 at 5-6 (Pennsylvania Democratic State Committee) (observing that the exemption applied where there was "substantial amount of volunteer involvement").

⁵ See Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason, and Commissioner Ellen L. Weintraub in MURs 5824 and 5825 (Pennsylvania Democratic State Committee) and Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Ellen L. Weintraub in MUR 5837 (Missouri Democratic State Committee).

⁶ IDP states that "volunteers wished to transport the mail pieces to the post office" but were "prohibited from doing so for insurance and legal reasons." The Commission has never provided the benefit of the volunteer materials activity exemption to a party committee on the basis of work that volunteers were willing to but did not perform.

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envisioned by the Act.”⁷ The Utah Republican Party ultimately entered into a conciliation agreement and agreed to pay a civil penalty.⁸ In this matter, the volunteers did not stamp each mailer or deliver the mailers, and therefore the volunteer activity is even less substantial than in MUR 2288. Accordingly, we do not believe that the volunteer activity in connection with IDP’s mailers was substantial enough to qualify for the volunteer materials exemption.⁹

Disclaimers are an important part of our system of disclosure. They “insure that the voters are fully informed’ about the person or group who is speaking.” *Citizens United v. FEC*, — U.S.—, 130 S.Ct. 876, 915 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)). Additionally, the “authorized by” portion of the disclaimer requirement protects candidates by making it clear which messages they are responsible for and which messages they have not authorized. In this case in particular, where the mailer may have misleadingly suggested that Mark Vogel was responsible for its contents, the disclaimer would have helped to alleviate possible confusion as to who actually paid for it.

For these reasons, we voted against the recommendation not to find reason to believe that the IDP violated the Act. Congress intended the volunteer materials exemption to encourage volunteers to work with state and local political parties,¹⁰ but explicitly limited the exemption to exclude direct mail. To balance these two congressional directives in light of changing methods for producing mailers, the Commission established the substantial volunteer involvement threshold for applying the exemption. Based on these facts, we do not believe that the IDP has met the required threshold here and shown that its activity falls within the volunteer materials exemption to the disclaimer requirements.

11/21/2011
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Chair

11/21/11
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

⁷ MUR 2288, General Counsel’s Report dated May 2, 1989, at 10-11.

⁸ See MUR 2288, Certification dated February 2, 1990; Conciliation Agreement, dated February 7, 1990.

⁹ We also question whether the mailers were “on behalf of” the Democratic nominee, Representative Joe Donnelly. See 2 U.S.C. § 431(9)(B)(viii); 11 C.F.R. § 100.147. The Commission has not previously considered whether a mailing that ostensibly supports an opponent of a party’s nominee can still be “on behalf” of that nominee. IDP relies on Advisory Opinion 2008-06 (Democratic Party of Virginia), which states that “the content of campaign material is not restricted under this exemption.” AO 2008-06 at 5. However, that statement merely sought to distinguish the volunteer materials exemption from the “slate card exemption,” which provides specific criteria for what content can be included on qualifying material. See *id* at 3. The question of whether the mailers were on behalf of the party was not before the Commission in AO 2008-06.

¹⁰ See H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9.

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BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of)
) MUR 6434
Indiana Democratic Party: Case Closure)
(EPS))

CERTIFICATION

I, Shelley E. Garr, recording secretary of the Federal Election Commission executive session, do hereby certify that on October 18, 2011, the Commission took the following actions in the above-captioned matter:

1. Failed on a vote of 3-2 to:
 - a. Find no reason to believe that the Indiana Democratic Party violated the Federal Election Campaign Act of 1971, as amended.
 - b. Close the file.
 - c. Approve the appropriate letters.

Commissioners Hunter, McGahn II, and Petersen voted affirmatively for the motion.

Commissioners Bauerly and Weintraub dissented. Commissioner Walther did not vote.

2. Decided by a vote of 5-0 to:

- a. Close the file.

Commissioners Bauerly, Hunter, McGahn II, Petersen, and Weintraub voted affirmatively for the decision. Commissioner Walther did not vote.

Attest:

10/20/11
Date

Shelley E. Garr
Shelley E. Garr
Deputy Secretary of the Commission

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Ray Wolff
Media Coordinator
Vogel for Congress
PO Box 689
La Porte, IN 46352

NOV - 2 2011

RE: MUR 6434

Dear Mr. Wolff:

The Federal Election Commission reviewed the allegations in your complaint received on November 24, 2010. On October 18, 2011, based upon the information provided in the complaint, and information provided by the respondent, the Commission decided to close its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the dispositive General Counsel's Report is enclosed for your information. In addition, a Statement of Reasons further explaining the basis for the Commission's decision will follow. The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g (a)(8).

Sincerely,

Anthony Herman
General Counsel

BY: Jeff S. Jordan
Supervisory Attorney
Complaints Examination and
Legal Administration

Enclosure
General Counsel's Report

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Neil P. Reiff, Esq.
Sandler, Reiff & Young, PC
300 M Street, SE, Suite 1102
Washington, DC 20003

NOV - 2 2011

RE: MUR 6434
Indiana Democratic Party

Dear Mr. Reiff:

On December 2, 2010, the Federal Election Commission ("Commission") notified your client, the Indiana Democratic Party, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("Act").

On October 18, 2011, the Commission closed its file in this matter.

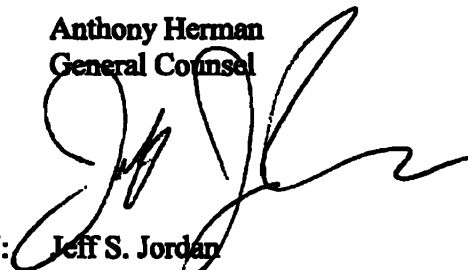
Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Enclosed please find the General Counsel's Report which more fully explains the Commission's vote. In addition, a Statement of Reasons further explaining the basis for the Commission's decision will follow.

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If you have any questions, please contact Frankie Hampton, the paralegal assigned to this matter, at (202) 694-1650.

Sincerely,

Anthony Herman
General Counsel

A handwritten signature in black ink, appearing to read 'Jeff S. Jordan', written over the typed name of the signatory.

BY: Jeff S. Jordan
Supervisory Attorney
Complaints Examination and
Legal Administration

Enclosure
General Counsel's Report

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FEDERAL ELECTION COMMISSION SECRETARIAT
BEFORE THE FEDERAL ELECTION COMMISSION
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FEDERAL ELECTION COMMISSION

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In the Matter of)
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MUR 6434) CASE CLOSURE UNDER THE
INDIANA DEMOCRATIC PARTY) ENFORCEMENT PRIORITY
) SYSTEM

GENERAL COUNSEL'S REPORT

11 Under the Enforcement Priority System ("EPS"), the Commission uses formal
12 scoring criteria to allocate its resources and decide which cases to pursue. These criteria
13 include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both
14 with respect to the type of activity and the amount in violation, (2) the apparent impact the
15 alleged violation may have had on the electoral process, (3) the legal complexity of issues
16 raised in the case, (4) recent trends in potential violations of the Federal Election Campaign
17 Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain
18 subject matters. It is the Commission's policy that pursuing low-rated matters, compared to
19 other higher-rated matters on the Enforcement docket, warrants the exercise of its
20 prosecutorial discretion to dismiss certain cases or, or in certain cases where the response
21 sufficiently rebuts the allegations, to make no reason to believe findings. For the reasons
22 set forth below, this Office recommends that the Commission make no reason to believe
23 findings in MUR 6434.

24 In this matter, complainant Ray Wolff, media coordinator of Vogel for Congress,
25 the campaign committee of Libertarian candidate Mark Vogel,¹ alleges that the Indiana
26 Democratic Party ("IDP") violated the Act and Commission regulations by distributing up
27 to 20,000 mailers that appeared to have been authorized by the Vogel campaign. According

¹ Mr. Vogel was an unsuccessful candidate from Indiana's Second Congressional District.

1 to the complainant, not only were the IDP mailers not authorized by the campaign, but they
2 allegedly misrepresented Mr. Vogel's positions on a variety of campaign issues. Therefore,
3 the complainant concludes that the IDP's fliers violated the Act and Commission
4 regulations because they failed to include disclaimers stating that they were not authorized
5 by the Vogel campaign. Appended to the complaint are several copies of the mailer, the
6 text of which reads: "VETERAN MARK VOGEL. THE TRUE CONSERVATIVE FOR
7 CONGRESS," and, among other statements, urges "ON TUESDAY, NOV. 2 SUPPORT
8 THE TRUE CONSERVATIVE. VOTE MARK VOGEL FOR CONGRESS." At the
9 bottom of the mailer is the following URL: "www.Vogel4Congress.com," which appears
10 to be the Vogel campaign's website.²

11 In response, the IDP contends that a disclaimer stating that the Vogel campaign had
12 not authorized the mailers was unnecessary because the IDP mailers qualified as "exempt
13 activity," as set forth in 11 C.F.R. §§ 100.147(d) and 110.11(e). Specifically, the IDP states
14 that the mailers, which were public communications, included the disclaimer required by
15 11 C.F.R. § 110.11(e): "Paid for by the Indiana Democratic Party," which is set off from
16 the surrounding dark background in an enclosed white box, see 11 C.F.R. §§ 110.11(c)(1)
17 and (2). The IDP's permanent street address is printed underneath the statement and box,
18 as required by 11 C.F.R. § 110.11(b)(3). Additionally, the IDP maintains that the mailing
19 was made on behalf of Representative Joe Donnelly, the Democratic nominee for Congress
20 from Indiana's Second Congressional District. Moreover, the IDP states that the mailers
21 were distributed by party volunteers and, thus, qualified as "exempt party activity."

² The Vogel for Congress Committee also posted an internet story about their complaint, at <http://vogel4congress.com/?p=256>.

1 The IDP further states that, as an “exempt party activity,” the disclaimers on the
2 mailers are not required to state whether the communication was authorized by a candidate.
3 11 C.F.R. § 110.11(e). In addition, the IDP states that materials distributed “in connection
4 with volunteer activities” are exempt from the definition of “contribution” and
5 “expenditure,” *see* 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii); *see also* 11 C.F.R.
6 §§ 100.87 and 100.147.

7 In response to the complainant's argument that the campaign mailers, which urge
8 “true conservatives” to vote for Libertarian candidate Mark Vogel, might reasonably, but
9 inaccurately, lead readers to believe that the Vogel campaign had authorized them, the IDP
10 instead characterizes the mailers as “information pieces about Mark Vogel.” Specifically,
11 the IDP cites to Advisory Opinion 2008-06 (Democratic Party of Virginia), which provides
12 that, “the content of campaign materials is not restricted under [the volunteer activity]
13 exemption; indeed, the application of this exemption is almost entirely contingent upon *who*
14 [emphasis in original] distributes the material, not what those materials say.”

15 Central to the IDP's response is the scope of the volunteer activity exemption. To
16 qualify for this exemption, the distributed materials must be, *inter alia*, distributed in
17 connection with volunteer activities and made on behalf of any nominee of a state party.
18 *See* 11 C.F.R. § 100.147. The Commission has looked at various factors when determining
19 whether volunteer activity is sufficient to qualify for the exemption, including whether the
20 volunteers sorted and bundled the mailers, stamped the mailers with the return address and
21 bulk mail indicia, affixed labels, and delivered the mailers to the post office. In its
22 response, the IDP asserts that the mailings included substantial volunteer involvement that
23 was sufficient to qualify as exempt activity: specifically, the volunteers sorted, bundled,

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1 and stacked the mails into trays that were sorted by zip code. Also, declarations signed
2 under penalty of perjury by IDP employees Cameron Radford and Rohan Patel, assert that
3 the mailing involved the use of volunteers to assist in its production, and that the volunteers
4 had sought to transport the mailers to the mail house, but were prohibited from doing so for
5 "insurance and legal reasons."

6 Finally, the IDP's response asserts that commercial mailing lists were not used in
7 preparing the mailers, noting that the complainant failed to provide information to the
8 contrary. It also asserts that the mailers were paid for with federal funds exclusively, but
9 not with funds designated for a particular candidate or with funds received from the
10 national committee. Appended to the IDP's response is an invoice, dated October 27, 2010,
11 that lists a "balance due" of \$10,751 for "Vogel Mail." This transaction is also reflected on
12 the 2010 Post-General Report of the Indiana Democratic Congressional Victory Committee,
13 which is registered with the Commission, as a \$10,751 disbursement to the "Baughman
14 Company" for "mail production" on October 28, 2010.

15 It appears that the IDP's mailers complied with the Act and Commission
16 regulations. In particular, the response and accompanying materials support the contention
17 that the mailers, which were distributed on behalf of the state party's candidate for
18 Congress in Indiana's Second Congressional District, involved significant volunteer
19 activity. Thus, this Office therefore recommends that the Commission find no reason to
20 believe that the Indiana Democratic Party violated the Federal Election Campaign Act of
21 1971, as amended.

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RECOMMENDATIONS

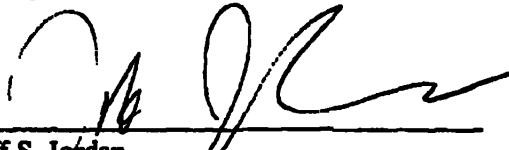
The Office of General Counsel recommends that the Commission find no reason to believe that the Indiana Democratic Party violated the Federal Election Campaign Act of 1971, as amended, close the file, and approve the appropriate letters.

Christopher Hughey
Acting General Counsel


3/10/11
Date

BY: 

Gregory R. Baker
Special Counsel
Complaints Examination
& Legal Administration



Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration



Donald E. Campbell
Paralegal Specialist

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