STATE OF MINNESOTA CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD

PROBABLE CAUSE DETERMINATION

IN THE MATTER OF THE COMPLAINT OF THE MINNESOTA DFL REGARDING THE NORTH STAR LIBERTY ALLIANCE AND REPRESENTATIVE ERIK MORTENSEN

Background

On March 29, 2021, the Campaign Finance and Public Disclosure Board received a complaint submitted by the Minnesota DFL regarding the North Star Liberty Alliance (NSLA) and Representative Erik Mortensen. The NSLA is a Minnesota nonprofit corporation that is exempt from federal income tax under Internal Revenue Code section 501(c)(4). Representative Mortensen represents District 55A in the Minnesota House of Representatives.

The complaint alleges that the NSLA is a political committee and violated Minnesota Statutes section 10A.14, subdivision 1, by failing to register with the Board. The complaint refers to and includes screenshots of portions of the NSLA's website. The NSLA describes itself on its website as "a Minnesota non-profit organization created for the purpose of advancing the cause of liberty in the state of Minnesota" that is "focused on educating Minnesotans on liberty issues including Constitutional Carry and other civil liberties issues, government taxing and spending, and property rights," and conducts "candidate surveys during election seasons to inform voters where candidates stand on key issues." The screenshots included with the complaint reflect that the NSLA published blog posts regarding a variety of legislative issues including penalties for violating executive orders, a bill that would require face coverings under certain circumstances, the proposed repeal of the governor's emergency powers, a proposed resolution impeaching Governor Walz, the state budget, business closures, and plans to stimulate the economy.

Many of the blog posts criticize particular public officials. Some of the posts refer to certain officials as "far-left," "radical leftists," "socialist," "RINO," "phony conservatives," or "fake conservatives," while addressing actions or inaction regarding a particular policy issue. A few of those posts appear to highlight the NSLA's efforts to influence the opinions of voters. One post recaps the NSLA's efforts over the course of 2020, including "28,000 pieces of mail to stop anti liberty legislation," over 21,000 phone calls, "tens of thousands of voters" contacted, approximately 3.2 million views via digital media, and 3,499 new activists recruited.¹ Another post similarly recaps the NSLA's efforts in 2020, stating that "[t]housands of calls, advertisements, and flyers were directed at legislators who neglect their duties" and "[i]n total, we were able to inform more than 400,000 voters about these negligent policy-makers."² The post implies that those efforts prompted some legislators to support ending the exercise of emergency powers by Governor Walz. The post also says that:

¹ www.northstarlibertyalliance.com/2020_rundown_12_23

² www.northstarlibertyalliance.com/stop_the_tyranny_12_28

your Alliance dug up the worst of the liberal's records and ensured the voters knew exactly how far-left some of these legislators had gone. When these farleft radicals could no longer hide behind the 'moderate' label voters marched them out of office. 5 of the most radical liberals were given the boot, and Minnesota also earned the conservative champion it needs. Fully-informed on his principled conservative pledges by your Alliance, voters ushered Rep-Elect Erik Mortensen into the MN House to lead the charge to stop Walz.

The complaint includes a copy of a fundraising letter signed by Representative Mortensen seeking donations to the NSLA. The letter decries actions taken by Governor Walz and other unnamed elected officials. The letter states:

We will not sit back and take it. What we will do is take back the power that is rightfully ours, put Radical Left politicians back in their place, and reassert our RIGHTS to live our own lives as we see fit.

The letter states that the NSLA seeks to end the exercise of emergency powers by Governor Walz, repeal the statutes undergirding those emergency powers, stop forced vaccinations, stop tax hikes, and expose "Republicans in Name Only" politicians. The letter explains that donations will be used to pay for communications "to alert citizens about key votes and direct them to contact their lawmakers," advertisements "that inspire Minnesotans to call the legislature in support of our liberty-preserving agenda," and other lobbying efforts.

The complaint also includes a copy of a flier titled "2021 Legislative Session Roadmap." The flier describes lobbying efforts and advertising strategies the NSLA plans to use to achieve the goals stated in the fundraising letter, including the impeachment of Governor Walz.

The complaint argues that the "NSLA is a hyper-partisan organization" focused "on attacking political opponents" that engages in "partisan attacks on Democrats and RINOs alike" in an attempt to influence elections. The complaint alleges that the "NSLA is hiding behind the artifice of issue advocacy in order to shield its overtly political conduct from disclosure and scrutiny."

In addition to asserting that the NSLA is a political committee, the complaint alleges that Representative Mortensen violated Minnesota Statutes section 10A.105, subdivision 1, which prohibits a candidate from forming or controlling a political committee aside from the candidate's own principal campaign committee. In support of that allegation the complaint refers to the NSLA's fundraising letter signed by Representative Mortensen, which states that Representative Mortensen is "partnering with North Star Liberty Alliance." The letter asks recipients to return the "2021 Legislative Roadmap Support Statement back to me" along with a donation to the NSLA. Based on the content of the letter the complaint asserts that "[i]t is apparent that Rep. Mortensen considers himself to be part of NSLA and this evidences the fact that, at a minimum, he exercises indirect control over the Committee." On April 5, 2021, the Board chair determined that the complaint stated prima facie violations of Minnesota Statutes sections 10A.14 and 10A.105, subdivision 1. The complaint and the prima facie determination were provided to the respondents on April 7, 2021.

On May 7, 2021, counsel for the NSLA responded to the complaint. The response states that the NSLA is not a political committee and "does not attempt to engage in express advocacy regarding state candidates." The response explains that "the NSLA does not work to elect or defeat candidates. The NSLA's focus is to keep citizens informed on actions of current elected officials on matters of public concern related to the mission of the NSLA, including but not limited to the positions taken by Minnesota elected officials." The response argues that the Board may only consider communications that use words or phrases of express advocacy when determining whether an association's "major purpose is to influence the nomination or election of one or more candidates," thereby satisfying the definition of a political committee under Minnesota Statutes section 10A.01, subdivision 27. The response argues that the communications referenced in the complaint do not contain express advocacy, as that term has been construed by the United States Supreme Court in *Buckley v. Valeo*,³ by the Minnesota Supreme Court in *Minnesota Citizens Concerned for Life, Inc. v. Kelley*,⁴ and by the Board in Advisory Opinion 428.⁵

With respect to the allegation that Representative Mortensen is exerting control over the NSLA, the response states that "Representative Mortensen is not a member of the NSLA Board of Directors, has no official position with the NSLA, is not a paid consultant, and has no vote of any kind regarding the operation, policy decisions, or objectives of the NSLA. The independent three-member NSLA Board has sole and exclusive control over the NSLA." The response also states that although Representative Mortensen "agreed to draft a letter in support of the NSLA, Minnesota laws do not prevent legislators from helping to raise money to support nonprofit organizations."

On May 21, 2021, Board staff sent a letter to the NSLA's attorney asking the NSLA to address whether 13 specific Facebook advertisements contained express advocacy.⁶ The advertisements ran via the NSLA's Facebook page,⁷ with five of the advertisements displayed during the week prior to the 2020 primary election and the other eight advertisements displayed within the month prior to the 2020 general election. The advertisements each included an image containing a picture of a state legislative candidate, displayed beside text stating the name of the candidate, the office sought by the candidate, and the claim that the candidate either "pledges to vote 100% pro-liberty," "opposes any and all tax hikes," or "pledges to never raise taxes." For example, one advertisement included an image with a picture of Erik Mortensen displayed beside the following text:

³ Buckley v. Valeo, 424 U.S. 1 (1976).

⁴ Minnesota Citizens Concerned for Life, Inc. v. Kelley, 698 N.W.2d 424 (Minn. 2005).

⁵ Advisory Opinion 428 (Aug. 7, 2012).

⁶ Copies of these advertisements are provided in Exhibit 1 and the NSLA's other Facebook

advertisements may be viewed via Facebook's Ad Library.

⁷ The NSLA's current Facebook page is facebook.com/NSLA2021.

ERIK MORTENSEN CANDIDATE FOR STATE HOUSE DISTRICT 55A OPPOSES ANY AND ALL TAX HIKES

The letter to the NSLA's attorney sought an explanation of what distinguishes text including the name of a candidate followed by the office sought by that candidate from a particular example of express advocacy stated in *Buckley*, which is the phrase "Smith for Congress."⁸

On June 4, 2021, counsel for the NSLA responded to the letter from Board staff. The response states that none of the advertisements "used the magic words laid out in *Buckley* that indicate express advocacy," without explaining the distinction between "Smith for Congress" and the language used within the 13 Facebook advertisements in question. The response states that the NSLA considers the advertisements to be "issue ads" and argues that the "deliberate decision to avoid magic words demonstrates the NSLA is committed to its mission of educating and informing the public."

On July 22, 2021, the Board received a written response to the complaint from Representative Mortensen. In his response Representative Mortensen states "I am not a member of NSLA's board. I have never attended any of their board meetings and I have not and do not provide any direction whatsoever as to what actions NSLA may or may not take. The use of the word 'we' in the letter that's been cited simply refers to the fight for liberty within Minnesota and all of the like-minded people like myself that are standing up for our individual rights."

At its meeting on July 28, 2021, the Board considered this matter and counsel for both the NSLA and the Minnesota DFL appeared before the Board.

Analysis

When the Board chair makes a finding that a complaint raises a prima facie violation, the full Board then must determine whether probable cause exists to believe an alleged violation that warrants an investigation has occurred. Minn. Stat. § 10A.022, subd. 3 (d). A probable cause determination is not a complete examination of the evidence on both sides of the issue. Rather, it is a determination of whether, given the evidence available, there is sufficient justification to initiate a formal Board investigation of the allegations in the complaint. Minnesota Statutes section 10A.022, subdivision 3, paragraph (d), directs the Board to make the probable cause determination within 45 days of the prima facie determination. However, the Board did not have a quorum from April 23, 2021, through July 19, 2021.⁹ Notice of the Board meeting then had to be given under the open meeting requirements in Minnesota Statutes section 13D.04.

⁸ See 424 U.S. at 44 n.52.

⁹ The Board did not have a quorum because the terms of three members ended on April 23, 2021, when the legislature did not confirm those members by the 45th legislative day after the effective date of their appointments. The Board had a quorum again on July 19, 2021, when members were appointed to fill the three vacant positions.

Consequently, the Board could not act on the probable cause determination until the July 28, 2021, meeting.

Registration

Generally, an association must register a political committee or a political fund within 14 days of receiving contributions, or making expenditures, that exceed \$750.¹⁰ The term political committee is defined as "an association whose major purpose is to influence the nomination or election of one or more candidates or to promote or defeat a ballot question, other than a principal campaign committee or a political party unit."¹¹ Whether an association's major purpose is to influence the nomination or election of candidates must be determined on a case-by-case basis and the association's public statements about its purpose may be considered.¹² The term political fund is defined as "an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit, if the accumulation is collected or expended to influence the nomination or election of one or more candidates or to promote or defeat a ballot question."¹³ Money accumulated by an association constitutes a political fund only if that money is collected or expended to pay for express advocacy communications, ballot question expenditures, or contributions made to candidates or other entities for the purpose of influencing elections.¹⁴

Major Purpose Test

"An analysis of an association's purpose may begin with statements that the association makes about itself." The NSLA describes itself as an organization "focused on educating Minnesotans on liberty issues" that also conducts "candidate surveys during election seasons to inform voters where candidates stand on key issues." That description is supported by the content on the NSLA's website, the fundraising letter signed by Representative Mortensen, and the NSLA's 2021 Legislative Session Roadmap. The complaint asserts that the NSLA is a political committee because it engages in "overtly political conduct" including "partisan attacks on Democrats and RINOs." However, communications that may be characterized as partisan but that are intended to influence public policy either by providing information or by prompting constituents to engage with elected officials, are often not campaign expenditures under Chapter 10A.

The communications referenced in the complaint support the NSLA's contention that it is not a political committee because its major purpose is not to influence elections. Those

¹⁰ Minn. Stat. § 10A.14, subd. 1.

¹¹ Minn. Stat. § 10A.01, subd. 27.

¹² Advisory Opinion 405 (June 2, 2009); In the matter of the Complaint of Richard V. Novack regarding Minnesota Majority, (Dec. 3, 2008).

¹³ Minn. Stat. § 10A.01, subd. 28.

¹⁴ See generally In the matter of the Complaint of Richard V. Novack regarding Minnesota Majority, (Dec. 3, 2008); In the Matter of the Complaint by Ray Marshall regarding Catholics for Marriage Equality MN (Dec. 10, 2012); Advisory Opinion 428 (Aug. 7, 2012).

communications focus on public policy issues that were the subject of bills or resolutions introduced in the legislature, including the proposed impeachment of Governor Walz. The communications did not contain express advocacy and prompted readers to contact legislators regarding specific issues. Also, the Internal Revenue Service has determined that the NSLA is tax-exempt under section 501(c)(4) of the Internal Revenue Code, which is reserved for entities whose primary activity is something other than political activities. While none of those factors are necessarily determinative, taken as a whole they refute the assertion that the NSLA's major purpose is to influence elections. Consequently, there is not probable cause to believe that the NSLA violated the registration requirements in Chapter 10A by failing to register a political committee.

Definition of Expressly Advocating

The complaint and its exhibits do not reference communications containing the words or phrases of express advocacy enumerated in *Buckley*, which are "vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"¹⁵ The complaint and its exhibits also do not reference communications that appear to contain similar words.¹⁶ However, Facebook's Ad Library includes copies of advertisements that ran via the NSLA's Facebook page and some of those advertisements contain phrases nearly identical to the phrase "Smith for Congress," one of *Buckley*'s eight magic words. In 1986 the Court noted that the express advocacy requirement was adopted "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons."¹⁷

The Facebook advertisements in question each contain the name of a legislative candidate followed by the text "candidate for," immediately followed by the candidate's legislative district. That language differs from the phrase "Smith for Congress" because the word candidate appears immediately before the text identifying the office sought. The inclusion of the word candidate combined with the formatting of the text indicates that the language stating which legislative district would be represented by each candidate is a statement of fact, and is not an appeal or exhortation to vote for a particular candidate. The advertisements in question presented the featured candidates. However, the Board's authority to require registration and disclosure by political funds on the basis of paid communications regarding candidates is limited to associations that engage in express advocacy, and there is no express advocacy absent an appeal or exhortation to act in a particular manner to elect or defeat a candidate.

In 2008 the Board determined that under Chapter 10A, express advocacy is limited to *Buckley*'s magic words and "similar words."¹⁸ The Board reaffirmed that determination in 2012 and

¹⁵ 424 U.S. at 44 n.52.

¹⁶ See generally In the matter of the Complaint of Richard V. Novack regarding Minnesota Majority, (Dec. 3, 2008) (discussing whether communications included *Buckley*'s magic words or "similar words"); Advisory Opinion 428 (Aug. 7, 2012) (stating that whether a communication constitutes express advocacy depends on whether the communication contains "the magic words of *Buckley* (or similar words)").
¹⁷ FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

¹⁸ In the matter of the Complaint of Richard V. Novack regarding Minnesota Majority, (Dec. 3, 2008).

explained that "an expanded interpretation of express advocacy should be promulgated through the rulemaking or legislative process rather than through the advisory opinion process."¹⁹ At that time Chapter 10A did not define the term expressly advocating, but defined the term independent expenditure to include only an expenditure "expressly advocating the election or defeat of a clearly identified candidate."²⁰ A definition of the term expressly advocating was added to Chapter 10A in 2013, meaning "that a communication clearly identifies a candidate and uses words or phrases of express advocacy."²¹

In 2013 and after, the Board has provided the Legislature with recommendations calling for express advocacy to be defined in a manner that includes communications susceptible of no reasonable interpretation other than as an appeal advocating the election or defeat of one or more clearly identified candidates.²² In the absence of approval of a more expansive definition of expressly advocating, the Board does not need to consider whether the NSLA's Facebook advertisements are the functional equivalent of express advocacy. Because the Facebook advertisements do not contain an appeal or exhortation to vote for or against a specific candidate, and there is no other evidence of express advocacy communications presently before the Board, there is not probable cause to believe that the NSLA has engaged in express advocacy. Consequently, there is not probable cause to believe that the NSLA violated the registration requirements in Chapter 10A by failing to register a political fund.

Single Committee Requirement

Minnesota Statutes section 10A.105, subdivision 1, provides that a "candidate may not authorize, designate, or cause to be formed any other political committee bearing the candidate's name or title or otherwise operating under the direct or indirect control of the candidate." Because there is not probable cause to believe that the NSLA is a political committee, the Board does not need to consider whether the NSLA has operated under the control of Representative Mortensen. Therefore, there is not probable cause to believe that Representative Mortensen controlled a political committee other than his own principal campaign committee.

¹⁹ Advisory Opinion 428 (Aug. 7, 2012). This advisory opinion was issued shortly after the Fourth Circuit Court of Appeals upheld the FEC rule defining "expressly advocating" to include communications that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." The rule was challenged on First Amendment and vagueness grounds and the United States Supreme Court later declined to review the Fourth Circuit's decision. ²⁰ See Minn. Stat. § 10A.01, subd. 18.

²¹ Minn. Stat. § 10A.01, subd. 16a.

²² Such recommendations were provided for the calendar years 2013, 2014, 2018, 2019, 2020, and 2021. Also, in 2009, 2010, 2013, 2014, 2015, and 2016 the Board recommended that the Legislature address what are known as electioneering communications.

Order:

- 1. The allegation that the North Star Liberty Alliance violated Minnesota Statutes section 10A.14, subdivision 1, by failing to register with the Board is dismissed without prejudice because there is not probable cause to believe that the North Star Liberty Alliance is a political committee or has an accumulation of money that constitutes a political fund.
- 2. The allegation that Representative Erik Mortensen controlled the North Star Liberty Alliance and thereby violated Minnesota Statutes section 10A.105, subdivision 1, is dismissed without prejudice because there is not probable cause to believe that the North Star Liberty Alliance is a political committee.

<u>/s/ Stephen Swanson</u> Stephen Swanson, Chair Campaign Finance and Public Disclosure Board Date: July 29, 2021

Ехнівіт 1





Inactive
 Aug 6, 2020 - Aug 11, 2020
 ID: 743058689852681

00 ...

North Star Liberty Alliance Sponsored • Paid for by North Star Liberty Alliance

Jeremy Munson pledges to vote 100% pro-liberty on all key issues on his North Star Liberty Alliance candidate survey

Jeremy has signed his name behind cutting government overreach, increasing transparency, rejecting cronyism, and so much more. Inactive
 Oct 11, 2020 - Nov 3, 2020
 ID: 769851743857118

00 ...

North Star Liberty Alliance Sponsored + Paid for by North Star Liberty Alliance

Erik Mortensen has signed the pledge to OPPOSE all tax hikes in Minnesota!

Press SHARE to ensure the people of Shakopee and beyond know where their candidates stand on the issues.



See Ad Details

See Ad Details







