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**BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON**

IN RE:

PDC CASE NO. 12-149

ORDER OF DISMISSAL

Americans for Prosperity, Americans for Prosperity Foundation, David Koch, Charles Koch, Tim Phillips, John Flynn, Kirby Wilbur, Richard Alvord, William R. Monkman, Ron Cohn, and Sarah Rindlaub,

Respondents.

This matter came before the Washington State Public Disclosure Commission on March 22, 2012 at the PDC Office, 711 Capitol Way, Room 206, Olympia, Washington. Those present included Barry Sehlin, Commission Chair; Jennifer Joly, Vice Chair; Jim Clements, Member; and Amit Ranade, Member.

In attendance were: PDC Director of Compliance Phil Stutzman and PDC Lead Political Finance Specialist Tony Perkins (representing PDC staff); PDC Executive Director Andrea McNamara Doyle; Senior Assistant Attorney General Linda Dalton; Nancy Krier, General Counsel for the Commission; and PDC staff member Jana Greer as recorder/reporter of the proceeding. No representatives of the Respondents were present or participated. The proceeding was open to the public and was recorded.

1 This case concerns allegations that the Respondents¹ failed to register with the PDC as
2 an in-state political committee, or in the alternative, as an out-of-state political committee;
3 failed to report contributions, including contributions pledged but not received; failed to report
4 expenditures, including payments, promises to pay, orders placed, debts, and obligations
5 related to political advertising, independent expenditures, and electioneering communications
6 allegedly sponsored in 2010; failed to correctly identify the sponsor of alleged independent
7 expenditure political advertising and/or electioneering communications, and failed to include
8 disclaimers and contributor listings for alleged independent expenditure political advertising
9 and electioneering communications.

10 The Commission was provided with a Report of Investigation dated March 14, 2012
11 (and exhibits); and an Executive Summary and PDC Staff Analysis. Mr. Stutzman and Mr.
12 Perkins made oral presentations to the Commission providing the staff recommendation for
13 dismissal of the allegations in the complaint.

14 The Commission hereby enters the following Findings of Fact, Conclusions of Law,
15 and Order.

16 I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

17 Jurisdiction

18 1. The Commission has jurisdiction to hear this matter as provided in RCW 42.17
19 and as recodified at RCW 42.17A (effective January 1, 2012).²

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23 _____
24 ¹ The citizen action letter referred to the Respondents collectively as "AFP." However, because no
evidence was presented or found that the Respondents acted in concert to execute any alleged violation, in this
Order the Respondents will be referred to collectively as "Respondents."

25 ² The allegations in the complaints arose under RCW 42.17 as the law existed in 2010. Therefore, the
26 allegations were investigated under RCW 42.17, and the statutory references used in this Order are as those laws
existed in 2010. Effective January 1, 2012, RCW 42.17 was recodified to RCW 42.17A.

1 **Findings of Fact**

2 2. Americans for Prosperity (AFP) is a national 501(c)(4) non-profit political
3 advocacy organization with headquarters in Arlington, Virginia. According to the
4 organization's website, AFP has 34 state chapters and affiliates. These include the Washington
5 State chapter, AFP-WA.

6 3. The AFP Foundation is a 501(c)(3) non-profit charitable organization associated
7 with AFP.

8 4. Charles Koch and David Koch are founders of the AFP-precursor group
9 Citizens for a Sound Economy. David Koch is currently the Chairman of the AFP Foundation.

10 5. Tim Phillips is president of AFP. John Flynn is AFP's Vice President and
11 General Counsel. In October of 2010, Kirby Wilbur was AFP's Washington State Director.

12 6. Richard Alvord, William R. Monkman, Ron Cohn and Sarah Rindlaub are
13 Washington State residents who donated to AFP in 2010.

14 7. At its January 26, 2012, regular meeting, the Commission acted to dismiss two
15 complaints against AFP-WA in PDC Case No. 11-019, the first filed on October 7, 2010 by
16 Carrie Dolwick, and the second filed on November 10, 2010 by Dwight Pelz. The complaints
17 concerned communications sponsored by AFP in October 2010 that identified thirteen
18 incumbent Washington State legislators who were candidates for election or re-election in
19 2010. In reaching its decision, the Commission considered staff's investigative reports and
20 exhibits, including additional information regarding whether there were any other AFP
21 communications directed to Washington residents during the two years prior to the timeframe
22 involved in the complaints, and legal briefing submitted by Respondents and staff.

23 8. On February 8, 2012 the Commission's Order of Dismissal was entered in PDC
24 Case No. 11-019. The Order found and concluded that AFP was not a political committee
25 during the period leading up to the 2010 election, and therefore had no political committee
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1 reporting obligations; and that AFP's communications did not meet the legal definitions of
2 "political advertising," "independent expenditures," or "electioneering communications" and
3 therefore were not subject to the sponsor identification or related reporting requirements
4 applicable to those types of communications.

5 9. On January 24, 2012, the Washington Attorney General's Office received a 45-
6 day citizen action letter under RCW 42.17.400(4) from Charles Kimbrough, submitted by his
7 attorney, Knoll Lowney (hereafter the "citizen action letter" or "letter"). The letter alleged
8 violations of RCW 42.17 by AFP, the AFP Foundation, Charles Koch, David Koch, Tim
9 Phillips, John Flynn, Kirby Wilbur, Richard Alvord, William R. Monkman, Ron Cohn and
10 Sarah Rindlaub. The letter alleged that the entities and individuals named in the letter acted in
11 concert in committing the alleged violations.

12 10. The citizen action letter alleged that the Respondents were a "political
13 committee" as defined in RCW 42.17.020(39) and relevant case law in the period leading up to
14 the 2010 general election, and failed to register as such under RCW 42.17.040; that the
15 Respondents failed to report contributions, including contributions pledged but not received,
16 and payments or promises to pay for reportable activity, as required under RCW 42.17.080,
17 RCW 42.17.090, and RCW 42.17.565; alternatively, if the Respondents were not an in-state
18 political committee, that they constituted an out-of-state political committee, and failed to
19 disclose contributions and expenditures as required under RCW 42.17.093; that the
20 Respondents' activity constituted independent expenditures, political advertising, and/or
21 electioneering communications, and the Respondents failed to disclose this activity as required
22 under RCW 42.17.100, RCW 42.17.103, and RCW 42.17.565; and that the Respondents failed
23 to correctly identify the sponsor of alleged independent expenditure political advertising and/or
24 electioneering communications, and failed to include the disclaimers and contributor listings
25 required under RCW 42.17.510.
26

1 11. By letter dated January 25, 2012, the Attorney General's Office referred the
2 citizen action letter to the PDC for review and possible action. PDC staff reviewed the letter
3 and found that its allegations were substantially similar those in the earlier complaints against
4 AFP-WA in PDC Case No. 11-019. The letter did not include any documentary evidence or
5 identify any specific information to distinguish the complainant's allegations from those
6 dismissed in the earlier case.

7 12. PDC staff contacted the complainant through his legal counsel. Counsel stated
8 that his client possessed no evidence not considered by the Commission in PDC Case No.
9 11-019, and had no additional new or factual information to support the allegations in the
10 letter. Counsel stated that his client disagrees with the Commission's legal conclusions
11 regarding the facts previously investigated.

12 13. To the extent that the allegations in the citizen action letter differed from those
13 in PDC Case No. 11-019, they did so in two ways. First, the letter added an alternative
14 allegation that if the Respondents are not a political committee as defined at RCW
15 42.17.020(39), then they constitute an out-of-state political committee required to report under
16 RCW 42.17.093. Second, the letter named AFP, the AFP Foundation, and several individuals
17 who were not named as Respondents in the earlier complaints and alleged that they acted in
18 concert with AFP in committing the alleged violations.

19 14. The citizen action letter provided no evidence, and staff found no evidence, that
20 the Respondents, including AFP, qualified to report as an out-of-state political committee or
21 that the Respondents made expenditures that supported or opposed a candidate that would be
22 reportable under RCW 42.17.093. To qualify as an out-of-state political committee eligible to
23 report on PDC form C-5, an entity must, among other things, be a political committee
24 registered and actively filing campaign disclosure reports in one or more other states for the
25 preceding two years and be originally formed and currently organized for the purpose of
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1 soliciting contributions or making expenditures in another state's election campaigns. WAC
2 390-16-049. No information was provided by complainant or found by staff that AFP met
3 these requirements. Although the complaint referred to AFP's reported federal campaign
4 activity, staff found that AFP is not registered or reporting as a political committee with the
5 Federal Election Commission.

6 15. The citizen action letter provided no information establishing a relationship
7 between any of the named individuals and AFP that would lead to a conclusion that they "acted
8 in concert" to commit any violations. Staff's investigation showed that some of the named
9 individuals (Ron Cohn and Richard Alvord) had no formal or on-going relationship with AFP
10 or the AFP Foundation, and no role in directing or participating in AFP's activities other than
11 as donors to AFP. Fundamentally, the complainant provided no new evidence or information,
12 and staff found no new evidence, tending to establish Respondents' violations of RCW 42.17
13 as alleged, either by AFP or by any of the named individuals, either separately or collectively.

14 Conclusions of Law

15 16. RCW 42.17.020 provided definitions for "political committee," "political
16 advertising," "independent expenditure," and "electioneering communication."

- 17
- 18 a. RCW 42.17.020(38) defined "political advertising" to include "any advertising
19 displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers,
20 letters, radio or television presentations, or other means of mass communication,
21 used for the purpose of appealing, directly or indirectly, for votes or for financial
22 or other support or opposition in any election campaign."
- 23 b. RCW 42.17.020(28) defined "independent expenditure" as an expenditure that
24 meets several specified criteria, including that it pays in whole or in part for
25 political advertising that either specifically names the candidate supported or
26 opposed, or clearly and beyond any doubt identifies the candidate without using
the candidate's name.
- c. RCW 42.17.020(20) defined an "electioneering communication" as any
broadcast, cable, or satellite television or radio transmission, United States postal
service mailing, billboard, newspaper, or periodical that (a) clearly identifies a

1 candidate for a state, local, or judicial office either by specifically naming the
2 candidate, or identifying the candidate without using the candidate's name; (b) is
3 broadcast, transmitted, mailed, erected, distributed, or otherwise published within
4 sixty days before any election for that office in the jurisdiction in which the
5 candidate is seeking election; and (c) either alone, or in combination with one or
6 more communications identifying the candidate by the same sponsor during the
7 sixty days before an election, has a fair market value of five thousand dollars or
8 more.

9 d. RCW 42.17.020(39) defined a "political committee" as "any person (except a
10 candidate or an individual dealing with his or her own funds or property) having
11 the expectation of receiving contributions or making expenditures in support of,
12 or opposition to, any candidate or any ballot proposition."

13 17. RCW 42.17.040 required every political committee to timely register with the
14 Commission.

15 18. RCW 42.17.080 and 42.17.090 required political committees to file timely,
16 accurate reports of contributions, including contributions pledged but not received, and
17 expenditures, including orders placed, debts, and obligations.

18 19. RCW 42.17.093 required an out-of-state political committee organized for the
19 purpose of supporting or opposing candidates or ballot propositions in another state that is not
20 otherwise required to report under RCW 42.17.040 through 42.17.090 to report with the
21 commission when the committee makes an expenditure supporting or opposing a Washington
22 state candidate or political committee.

23 20. WAC 390-16-049 establishes the criteria for a political committee to disclose its
24 expenditures in support of or opposition to a Washington State candidate or ballot proposition
25 as an out-of-state committee, on PDC form C-5. Among other criteria, to report as an out-of-
26 state committee, a political committee must "Be currently registered and actively filing
campaign disclosure reports in one or more other states and has been so filing for the preceding
two years" and must "Have organizational documents showing it was originally formed and is
currently organized for the purpose of making expenditures in another state or soliciting
contributions for use in another state's election campaigns."

1 21. RCW 42.17.565 required disclosure of payments or promises to pay for any
2 electioneering communication. The law required sponsors of electioneering communications
3 to electronically file special reports with the Commission within 24 hours of, or on the first
4 working day after, presenting a qualifying communication to the public.

5 22. RCW 42.17.510(2) required independent expenditures and electioneering
6 communications sponsored by any person other than a bona fide political party to include the
7 statement, "No candidate authorized this ad. It is paid for by (name, address, city, state)." In
8 addition, if the advertisement or communication is sponsored by a political committee, it must
9 include the statement "Top Five Contributors," followed by a listing of the names of the five
10 persons or entities making the largest contributions in excess of seven hundred dollars
11 reportable under RCW 42.17 during the twelve-month period before the date of the
12 advertisement or communication.

13 23. WAC 390-05-505 excludes from the definition of electioneering
14 communication "in-person leaflet/pamphlet drops at street addresses," as well as
15 "Communications conveyed in a manner not specified in RCW 42.17.020(20)."

16 24. A person is a political committee if that person becomes a "receiver of
17 contributions" to support or oppose candidates or ballot propositions, or if expenditures to
18 support or oppose candidates or ballot propositions become one of the person's primary
19 purposes. *State v. Dan Evans Committee*, 86 Wn.2d 503, 546 P.2d 75 (1976); and, *Evergreen*
20 *Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586 (2002), *rev.*
21 *denied* 148 Wn.2d 120 (2003); AGO 1973 No. 14.

22 *Political Committee*

23 25. The Respondents, collectively and separately, were not a political committee as
24 defined at RCW 42.17.020(39) during the periods at issue in this case. The Respondents did
25 not have the expectation of receiving contributions or making expenditures in support of, or
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1 opposition to, any candidate or any ballot proposition in Washington during these time periods
2 reviewed.

3 26. First, under the "contributions" test (of what qualifies as a political committee),
4 no evidence showed that the Respondents received campaign contributions to support or
5 oppose candidates or ballot measures in Washington's 2010 election. Therefore, the
6 Respondents did not become a political committee under this test.

7 27. Second, under the "expenditures" test (of what qualifies as a political
8 committee), no evidence showed that the Respondents made expenditures that supported or
9 opposed a candidate or ballot proposition in Washington's 2010 election. Accordingly,
10 conducting the next step of that test, the "primary purpose" analysis, is not necessary.
11 Therefore, the Respondents did not become a political committee under this test.

12 28. Because the Respondents were not a political committee, they were also not
13 required to report under RCW 42.17.040, RCW 42.17.080 or RCW 42.17.090.

14 *Out-of-State Political Committee*

15 29. The Respondents, including AFP, did not make an expenditure supporting or
16 opposing a Washington State candidate or political committee and were not an out-of-state
17 political committee organized for the purpose of supporting or opposing candidates or ballot
18 propositions in another state. Therefore, they had no requirement to report under RCW
19 42.17.093 as further provided in WAC 390-16-049.

20 *Political Advertising/Independent Expenditures*

21 30. The Respondents' activity in Washington State during 2010, including AFP's
22 communications identifying thirteen incumbent Washington State legislators who were
23 candidates for election or re-election in the 2010 election, did not constitute "political
24 advertising" as defined at RCW 42.17.020(38). The communications at issue in this case did
25 not support or oppose a candidate in an election campaign; that is, they were not used for the
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1 purpose of appealing, directly or indirectly, for votes or for financial or other support or
2 opposition in any election campaign as defined by statute and case law interpreting the statutes.

3 31. The Respondents' activity in Washington State during 2010, including AFP's
4 communications identifying thirteen incumbent Washington State legislators, did not constitute
5 "independent expenditures" as defined at RCW 42.17.020(28). Among other criteria, that
6 definition requires that an expenditure pay for political advertising and as found in paragraph
7 30, the communications did not constitute political advertising.

8 32. The Respondents, including AFP, were not required to provide disclosure of the
9 top five contributors as required at RCW 42.17.510(2) because AFP's communications were
10 not independent expenditures, as provided in paragraphs 30 and 31.

11 *Electioneering Communications*

12 33. The Respondents' activity in Washington State during 2010, including AFP's
13 communications identifying thirteen incumbent Washington State legislators, did not constitute
14 "electioneering communications" as defined at RCW 42.17.020(20). The communications at
15 issue in this case were not valued at \$5,000 or more (the spending disclosure threshold in effect
16 in 2010) in the aggregate for each official. In addition, hand-distributed cards are not
17 electioneering communications under RCW 42.17.020(20), and are explicitly excluded from
18 consideration as electioneering communications by WAC 390-05-505.

19 34. The Respondents, including AFP, were not required to provide disclosure of the
20 top five contributors as required at RCW 42.17.510(2) because as identified in paragraph 33
21 AFP's communications were not electioneering communications.

22 35. The Respondents, including AFP, were not required to file special reports under
23 RCW 42.17.565 because as identified in paragraph 33 AFP's communications were not
24 electioneering communications.

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1 *Summary*

2 36. Based upon the record herein, the Commission finds and concludes that the
3 Respondents (Americans for Prosperity, the Americans for Prosperity Foundation, Charles
4 Koch, David Koch, Tim Phillips, John Flynn, Kirby Wilbur, Richard Alvord, William R.
5 Monkman, Ron Cohn and Sarah Rindlaub) did not violate RCW 42.17 as alleged in the citizen
6 action letter and therefore the complaint should be dismissed.

7 **II. ORDER OF DISMISSAL**

8 By unanimous vote, the Commission dismisses each of the allegations against the
9 Respondents in the citizen action letter.

10 **III. APPEALS**

11 **RECONSIDERATION OF FINAL ORDER - COMMISSION**

12 Any party may ask the Commission to reconsider this final order. Parties must place
13 their requests for reconsideration in writing, include the specific grounds or reasons for the
14 request, and deliver the request to the Public Disclosure Commission Office within
15 **TWENTY-ONE (21) BUSINESS DAYS** of the date that the Commission serves this order
16 upon the party. WAC 390-37-150. Service by the Commission on a party is accomplished on
17 the date of mailing by U.S. mail if the order is mailed, or the date of personal service if
18 personal service is made. RCW 34.05.010(19). The Commission orders are generally mailed
19 via U.S. mail.

20 Pursuant to WAC 390-37-150, the Public Disclosure Commission is deemed to have
21 denied the petition for reconsideration if, within twenty (20) business days from the date the
22 petition is filed, the Commission does not either dispose of the petition or serve the parties with
23 written notice specifying the date by which it will act on the petition. Pursuant to RCW
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1 34.05.470(5), the Respondent is not required to ask the Public Disclosure Commission to
2 reconsider the final order before seeking judicial review by a superior court.

3 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

4 Pursuant to RCW 42.17A.755, a **final order** issued by the Public Disclosure
5 Commission is subject to judicial review under the Administrative Procedure Act, chapter
6 34.05 RCW. The procedures are provided in RCW 34.05.510 - .598. Pursuant to RCW
7 34.05.542(2), a petition for judicial review must be filed with the superior court in Thurston
8 County or the petitioner’s county of residence or principal place of business. The petition for
9 judicial review must be served on the Public Disclosure Commission and any other parties
10 within **30 days** of the date that the Public Disclosure Commission serves this final order on the
11 parties. RCW 34.05.542 (4) provides: “Service of the petition on the agency shall be by
12 delivery of a copy of the petition to the office of the director, or other chief administrative
13 officer or chairperson of the agency, at the principal office of the agency. Service of a copy by
14 mail upon the other parties of record and the office of the attorney general shall be deemed
15 complete upon deposit in the United States mail, as evidenced by the postmark.”

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18 If reconsideration is properly sought, the petition for judicial review must be served on
19 the Public Disclosure Commission and any other parties within thirty (30) days after the
20 Commission acts on the petition for reconsideration.
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22 **IV. ENFORCEMENT OF FINAL ORDERS**

23 If enforcement is required, the Commission may seek to enforce a final order in
24 superior court under RCW 42.17A.755 - .760, and recover legal costs and attorney’s fees, if a
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1 penalty remains unpaid and no petition for judicial review has been filed under chapter 34.05

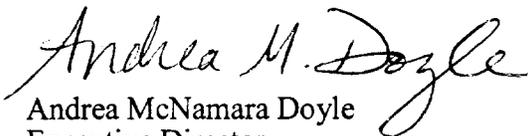
2 RCW. This action will be taken without further order by the Commission.

3 The Executive Director is authorized to enter this order on behalf of the Commission.

4 So ORDERED this 22nd day of March, 2012.

5
6 WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION

7 FOR THE COMMISSION:

8 
9 Andrea McNamara Doyle
10 Executive Director

11 *Copy of this Order of Dismissal to:*

12 Jason Torchinsky
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18 *Attorneys for Respondents*

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22 Richard Alvord
Ron Cohn
23 William R. Monkman
Sarah Rindlaub

24 *Respondents*

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8 *Attorney for PDC Staff*

9 I, JANA GLEER, certify that I mailed a copy of this order to the
10 Respondents and to their counsel at their respective addresses, postage prepaid, on the
11 date stated herein.

12 *Jana Gleer*
13 Signature

14 3-23-12
15 Date