



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Unknown Respondents)

) MUR 6429

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

The complaint in this matter alleged that an "Unknown Political Committee" disseminated mailers and made automated telephone calls in Alabama's 2nd Congressional District criticizing Martha Roby, the Republican candidate for Congress, during the week prior to the November 2010 general election. The complaint alleged that the mailers and calls failed to include any disclaimers or otherwise identify who paid for them. On April 26, 2011, the Federal Election Commission ("the Commission") failed, by a vote of 2-3, to approve the Office of General Counsel's recommendations to find reason to believe that the Unknown Respondents violated Section 441d of the Federal Election Campaign Act of 1971, as amended ("the Act").¹

We believe there is sufficient basis to open a limited investigation into this matter. Copies of each of three mailers criticizing Ms. Roby were included with the complaint. If these mailers were paid for by a political committee, as the complaint alleges, then they fail to contain the required disclaimer identifying who paid for them. Since the mailers were all sent with the same bulk mail permit, a limited investigation would likely be able to identify the holder of this permit and, therefore, who distributed and paid for them and in what quantity.² The Commission has successfully conducted such an investigation under very similar circumstances in the past. Contrary to our colleagues, we do not think that a complainant needs to provide conclusive evidence of a violation in order to begin an investigation. The purpose of an investigation is to find out whether a violation, alleged in a complaint and supported by relevant documents, actually occurred.

¹ Commissioners Bauerly and Weintraub voted affirmatively for the motion. Commissioners Hunter, McGahn II, and Petersen dissented. Commissioner Walther did not vote. Thereafter, the Commission closed the file in this matter. Certification in MUR 6429, dated April 28, 2011.

² If the described telephone calls were made by a political committee, then they too likely violate the Act. However, we agree with the Office of General Counsel that due to the lack of information provided in the complaint, an investigation would be unlikely to determine the source of these telephone calls. See First General Counsel's Report in MUR 6429 at 6.

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The Act requires that whenever a political committee finances any communication through any mailing or other type of general public political advertising, the communication must clearly state that the communication has been paid for by such political committee. 2 U.S.C. 441d(a). Such a communication would include a "mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. 100.26. A "mass mailing" means a mailing of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. 2 U.S.C. 431(23). A "telephone bank" is defined as more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. 2 U.S.C. 431(24). "Substantially similar" means communications that include substantially the same template or language, but vary in non-material respects. 11 C.F.R. 100.27 and 100.28.

In this case, the Commission does not know the quantity or cost of the mailers. Nonetheless, that the mailers all contain the same bulk mail permit suggests that they were paid for by the same entity. Furthermore, the permit indicates that the mailers were sent by Standard Mail, suggesting that a minimum of 200 pieces of each type of mailer was sent.³ It appears likely that the quantity requirements for a mass mailing were met. Thus, if the mailers were paid for by a political committee, then the Act would require the mailers to state clearly who paid for them.

In MUR 5493 (Friends of Jeff Smith), the Commission received a complaint very similar to the one at issue here. That complaint included a postcard criticizing a candidate in a Congressional primary that was sent by bulk mail and did not contain the proper disclaimer, as well as similar flyers. See First General Counsel's Report in MUR 5493 at 4. By a vote of 5-1, the Commission found reason to believe that the unknown political committee violated 2 U.S.C. 441d. Certification in MUR 5493, dated August 17, 2005. The investigation was able to find the holder of the bulk mail permit and then determine what entity paid for the postcards and in what quantity. See Second General Counsel's Report in MUR 5493 at 7. The entity was not a political committee, *id.* at 13-14, and the Commission therefore then voted to take no further action. Certification in MUR 5493, dated December 14, 2007. As in this case, in MUR 5493, there was insufficient information in the complaint to establish whether the payor was a political committee. MUR 5493, First General Counsel's Report, at 8 ("We cannot conclude definitively that a political committee was involved in the mailing of the postcard as well as the anonymous mailing of the flyers . . .") Of course, a payor attempting to obfuscate the source of a particular communication, would not include on the communication that it was paid for by a political committee.⁴ As in many other matters before us, our colleagues expect a case to be fully formed and ready for complete disposition based solely on information provided by a complainant – who is often one of the people from whom the respondent has attempted to conceal information.

³ The United States Postal Service requires at least 200 pieces be sent in order to qualify for the Standard Mail bulk discount. See <http://pe.usps.com/businessmail101/getstarted/bulkmail.htm>.

⁴ The Statement of Reasons of Chair Smith, Vice Chair Weintraub, and Commissioners Mason and Toner in MUR 5275 (Unknown Respondents) does not support failing to pursue the allegations here. The sole purpose of the Statement in MUR 5275 was to explain that four Commissioners did not think a particular communication was a solicitation. All six Commissioners agreed with OGC's recommendation not to pursue potential violations against unknown respondents because the only possible lead with which to conduct an investigation was the postmark location of the letters.

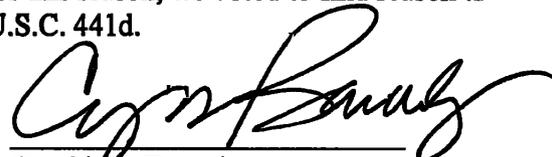
We see no reason to deviate from this precedent under the extremely similar circumstances here. The complaint alleges that these three mailers were sent by a political committee and offers evidence (the mailers themselves) showing that if the mailers were sent by a political committee in sufficient quantity, they clearly violate the Act's disclaimer requirements. This allegation and evidence are enough to open a limited investigation to verify whether, as the complaint suggests, the mailers were sent by a political committee.

Our colleagues assert that to find reason to believe would assume: "that speakers, in order to exercise their First Amendment right to remain anonymous, must first disclose their identity to the government so that the government can ensure that their anonymity is permissible."⁵ However, the Supreme Court has held repeatedly, and very recently, that the only exemption to FECA's disclosure requirements exists for an entity that demonstrates a reasonable likelihood that disclosure will cause the organization's members to suffer threats, harassment, or reprisals.⁶ *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 90-91 (1982) ("Since 1974 appellees have not disclosed the names of contributors and recipients but have otherwise complied with the statute"); *Buckley v. Valeo*, 424 U.S. 1, 69 (1976); *Citizens United v. FEC*, 130 S.Ct. 876, 916 (2010) (upholding the disclaimer and reporting requirements, noting that "Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation."). This limited exemption requires the entity to demonstrate the reasonable likelihood before refusing to disclose member or contributor information and does not absolve the entity from the requirement to disclose the communication to the public and to provide the recipient with a disclaimer.

There is a peculiar irony that allegations concerning a payor's failure to include identifying information should be dropped without a reason to believe finding precisely because we do not know who they are. This investigation would either provide enough evidence to move forward or the Commission would close the file. For this reason, we voted to find reason to believe that the Unknown Respondents violated 2 U.S.C. 441d.

6/29/2011
Date

6/27/11
Date


Cynthia L. Bauerly
Chair


Ellen L. Weintraub
Commissioner

⁵ MUR 6429 Statement of Reasons, Vice Chair Hunter, Commissioners Donald F. McGahn and Matthew S. Petersen, at 1.

⁶ The Supreme Court has protected anonymous electoral speech only in limited circumstances, in a case involving a single individual who distributed leaflets only to people attending a public meeting at one middle school and where the leaflets opposed an upcoming referendum on a school tax levy. *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 337 (1995). Moreover, the Court found the state statute at issue was "more intrusive" than FECA and explained that *Buckley* made clear that FECA rests on compelling state interests that are unique to candidate elections, where a danger of *quid pro quo* corruption exists. *Id.* at 356. In this instance, where unknown individuals likely produced a "mass mailing" about a federal candidate during the week of the election, we believe a limited investigation to locate the unknown respondents is appropriate. See, e.g. *Citizens United*, 130 S.Ct. at 915 ("the public has an interest in knowing who is speaking about a candidate shortly before an election).

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