FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6578
Doug LaMalfa Committee, *et al.*	)	

STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN

As the Commission notes in dismissing the complaint in this case, "this matter raises complicated questions of law and fact."[1] I write separately to emphasize the important issues presented concerning the extent to which an individual compensated or employed by a campaign or political committee retains the right to engage in his own political speech over the Internet free from regulation by the Commission.

Mark Spannagel served in a part-time capacity as an independent contractor to the Doug LaMalfa Committee (the "Committee"),[2] the principal campaign committee for then-congressional candidate Doug LaMalfa.[3] Spannagel's working title for the campaign was that of "Campaign Director," but he was retained only to provide "political consulting" services to the Committee.[4] In mid-April 2012, while under contract with the Committee, Spannagel created and launched a website that attacked the credentials of one of LaMalfa's opponents in the upcoming Republican primary election, Dr. Samuel M. Aanestad.[5] Spannagel used his own money and his own computer to create the website during his free time, and he did so without any permission from or knowledge of the Committee.[6] The website did not include a disclaimer identifying its source, but it did contain a text block at the foot of the cover page that read "FREE THINKERS FOR

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1 Factual & Legal Analysis at 7.

2 Spannagel was not an employee of the Committee; his consulting contract specified, "Consultant [(i.e., Spannagel)] will not become an employee of the Committee while this agreement is in effect." Response, Attachment 1 (Declaration of Mark Spannagel) [hereinafter "Spannagel Declaration"] ¶ 7.

3 At the time, LaMalfa was a state senator in California, and Spannagel was employed full time as his Chief of Staff, holding duties in that office commensurate with such a title. *Id.* ¶ 4.

4 *Id.* ¶ 9. The Committee, in fact, retained a full-time campaign manager who held responsibility for running the Committee's day-to-day activities. *Id.* ¶ 5.

5 *See Id.* ¶¶ 8, 15–21.

6 *Id.* ¶¶ 10–13.

D'ACQUISTO," apparently a reference to Michael Dacquisto, a third candidate in the primary election who had no knowledge of Spannagel's website.[7]

In May 2012, Aanestad filed a complaint with the Commission, alleging that the Committee and Spannagel (collectively, "Respondents") violated the Federal Campaign Act of 1971, as amended (the "Act" or "FECA"), by (1) failing to include a disclaimer on the website; (2) failing to file an independent expenditure report; (3) failing to register as a political committee; and (4) fraudulently misrepresenting the site as a communication from Michael Dacquisto.[8] Respondents dispute Aanestad's accusations. They argue that Spannagel's activities in creating the website in question "were not reasonably within the ambit of [his] contractual duties."[9]

I agree with Respondents. Regardless of one's opinion of the appropriateness of Spannagel's actions,[10] the facts before the Commission reflect that his conduct in creating and posting the website fell outside the scope of his authority as a part-time independent contractor to the campaign. He was acting as a private citizen engaged in personal speech on the Internet. Campaign employees and contractors retain the right to engage in their own unfettered political speech during their private time. And nowhere has the Commission made this clearer than in its regulations governing activity over the Internet.

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7 Complaint at 2; *see also* Spannagel Declaration ¶ 22 ("The tag line at the end of the page, 'Free Thinkers for D'Aqusto' was not intended by me to indicate a 'paid for or authorized by' purpose.").

8 *See generally* Complaint at 3–6.

9 Response at 7 (italics omitted). The Response further denies the Complaint's other accusations, stating that there is "no factual basis to proceed with allegations pertaining to the alleged independent expenditure" in light of the Committee subsequently reporting expenses associated with the website as an in-kind contribution, that the total cost of the webpage was well below the $1,000 statutory threshold for political committee status, and that Spannagel's actions could not constitute fraudulent misrepresentation under the Act because he was not acting as "an employee or agent" of a candidate when he created the website. *Id.* at 3–11.

10 The Act does not grant the Commission authority merely to judge the propriety of Spannagel's conduct. Although the Act contains a provision that combats fraudulent misrepresentations of campaign authority, 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)), that provision, as our Office of General Counsel ("OGC") observed, does not apply to the unique facts in this matter. *See* MUR 6578 (Doug LaMalfa Committee, *et al.*), First General Counsel's Report at 14–15. Section 30124 prohibits federal candidates and their employees or agents from fraudulently misrepresenting themselves or any other committee or organization under their control "as speaking or writing or otherwise acting for or on behalf of any other candidate or political party . . . on a matter which is damaging to such other candidate or political party." For this provision to be applicable here, Spannagel's website would have had to have misrepresented its source as Aanestad, since Aanestad was the target of the damaging communication. *Id.* Furthermore, to the extent the text posted on the website might have indicated sponsorship, it vaguely identified a group of third-party of "Free Thinkers For D'Acquisto," not Michael Dacquisto or his campaign.

I. REGULATION OF INDIVIDUALS' INTERNET ACTIVITY

Under the Act, "the term 'expenditure' includes . . . any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office."[11] Similarly, "the term 'contribution' includes . . . any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[12] The Act and Commission regulations, however, exclude from "the term "contribution," "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee."[13]

In 2006, the Commission adopted a set of parallel regulations, 11 C.F.R. §§ 100.94 and 100.155, "to extend explicitly the[se] existing individual activity exceptions to the Internet [and] remove any potential restrictions on the ability of individuals to use the Internet as a . . . means of civic engagement and political advocacy."[14] These regulations provide that "[w]hen an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in Internet activities for the purpose of influencing a Federal election" the following are excluded from the definitions of "contribution" and "expenditure": "(1) The individual's uncompensated personal services related to such Internet activities; [and] (2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services."[15] This is meant to create a "broad exemption from regulation for uncompensated Internet activity by individuals."[16] As a result, "Internet activities" are defined to include a wide range of activities, such as "blogging; creating, maintaining or hosting a Web site; . . . and any other form of communication distributed over the Internet."[17] Thus, if an individual blogs, develops and maintains a website, or engages in any other communication via the Internet, it does not constitute a "contribution" or "expenditure" under the Act — so long as that individual is not compensated by a campaign or political committee for doing so.

Consequently, if an individual is unaffiliated with a campaign or political committee and blogs or creates a political website, he necessarily does not have to report

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[11] 52 U.S.C. § 30101(9)(A)(i) (formerly 2 U.S.C. § 431(9)(A)(i)); *see also* 11 C.F.R. § 100.110.

[12] 52 U.S.C. § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)); *see also* 11 C.F.R. § 100.51.

[13] 52 U.S.C. § 30101(8)(B)(i) (formerly 2 U.S.C. § 431(8)(B)(i)); *see also* 11 C.F.R. § 100.74.

[14] *Explanation and Justification on Internet Communications*, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006).

[15] 11 C.F.R. §§ 100.94(a); 100.155(a).

[16] *Explanation and Justification on Internet Communications*, 71 Fed. Reg. at 18,603.

[17] 11 C.F.R. §§ 100.94(b); 100.155(b).

the money spent on such Internet activity as an independent expenditure.[18] And because his Internet communications cannot be imputed to a political committee, those communications do not require a disclaimer under Commission regulations. Disclaimers need only appear on "Internet websites of *political committees* available to the general public" and on certain forms of "public communications."[19] Internet communications, however, are not "public communications" under Commission regulations unless they are placed for a fee on another person's website.[20] Therefore, "[p]ersons other than political committees are not required to include disclaimers on their [own] websites."[21]

These rules apply equally to individuals who are compensated or employed by campaigns or political committees when they engage in their own personal political speech over the Internet. Indeed, there is an important distinction between Internet activities undertaken in return for pay from a political committee (and which thus reflect speech by the political committees) versus personal Internet activities (which constitute the individual's own political speech). As the Commission explained in its *Explanation and Justification on Internet Communications*, while "[c]ampaign employees . . . are not eligible for the exceptions in 11 CFR 100.94 and 100.155 for activities which are compensated," they "*are still within th[e] exemption when they engage in uncompensated Internet activities.*"[22] Thus, even if "a campaign pays a blogger for technical consulting services regarding the campaign's website, the blogger's activities on his or her own blog . . . remain eligible for the exceptions [to 'contribution' and 'expenditure'] in 11 CFR 100.94 and 100.55."[23] And if the individual's Internet activity falls outside the scope of authority granted to him by the committee, his website is not attributable to the committee and does not require a disclaimer. A political committee may be responsible

[18] For there to be an "independent expenditure" there must be an "expenditure" as defined by the Act and Commission regulations. *See* 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)) ("The term 'independent expenditure' means *an expenditure* by a person . . . ." (emphasis added)).

[19] 11 C.F.R. § 110.11(a) (emphasis added); *see also Explanation and Justification on Internet Communications*, 71 Fed. Reg. at 18,600–02 (explaining that disclaimers are required only on a "public communication," as defined in 11 C.F.R. § 100.26, political committee websites, and certain forms of mass email distributions).

[20] *See* 11 C.F.R. § 100.26 (defining "[p]ublic communication"). "[A] communication through one's own website is analogous to a communication made from a soapbox in a public square[, and] [t]here is no evidence . . . of a Congressional intent to regulate individual speech simply because it takes place through online media." *Explanation and Justification on Internet Communications*, 71 Fed. Reg. at 18,594.

[21] *Id.* at 18,600.

[22] *Id.* at 18,604 (emphasis added).

[23] *Id.* at 18,605. When the Internet activities are uncompensated, the exemption applies even if the committee knows of the activities; the regulations "exempt Internet activity by individuals acting both with and without the knowledge or consent of a candidate, authorized committee, or political party committee." *Id.* at 18,604.

for a website only when it "pays the costs of setting up a website or controls the overall content."[24]

This legal analysis has guided the Commission's position in prior enforcement matters, and MUR 6244 (Charlie Crist for U.S. Senate, *et al.*) is particularly enlightening. In that matter, Richard Heffley, a paid consultant of the Republican Party of Florida, supported Charlie Crist's 2010 candidacy for U.S. Senate. Heffley and an "unnamed collaborator" launched a website attacking the candidacy of Crist's opponent Marco Rubio prior to Florida's 2009 Republican primary.[25] In creating the content of his website, Heffley was found by the Commission to have served as nothing more than an "unpaid blogger."[26] His activity related to the website was thus deemed to "fall[] squarely into the internet exemption."[27] The Commission further concluded that the website was protected by the exemption even if Heffley's unidentified collaborator turned out to be an employee of the Crist campaign.[28] And, notwithstanding that Heffley was a paid consultant of the Republican Party of Florida, the Commission found that the website was not imputable to the Republican Party of Florida — which had not paid any of the costs associated with launching the site — and thus it did not require a disclaimer.[29]

II. THE RECORD ESTABLISHES THAT SPANNAGEL'S ACTIVITY RELATED TO HIS WEBSITE FALLS SQUARELY INTO THE INTERNET EXEMPTION AND THAT THE WEBSITE DID NOT REQUIRE A DISCLAIMER

The facts in the record before the Commission indicate that Spannagel's actions in creating the website attacking Aanestad were solely of his own volition, outside the scope of his authority as a part-time contractor engaged by the Committee to provide political consulting services, and at his own expense. Spannagel's conduct therefore falls squarely within the Internet exemption and is not otherwise subject to Commission regulation.

Respondents represent that "[t]he Committee neither consented to any of the activities related to the Webpage which were undertaken by Spannagel, nor reasonably

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[24] *See id.* at 18,605. But "[i]f a campaign committee or other political committee reimburses an individual for any out-of-pocket costs that the individual may incur in performing Internet activities, such reimbursements do not constitute compensation under the final rules." *Id.* Therefore, "individuals may be reimbursed by political committees for any out-of-pocket expenses they incur in performing Internet activities and remain within the exemptions [from the definitions of 'contribution' and 'expenditure'] in 11 CFR 100.94 and 100.55." *Id.*

[25] MUR 6244 (Charlie Crist for U.S. Senate, *et al.*), First General Counsel's Report at 2–3.

[26] *Id.*, Factual & Legal Analysis for Respondent Richard J. Heffley at 4–5.

[27] *Id.* at 5.

[28] *Id.* at 5 n.3; *id.*, Factual & Legal Analysis for Respondents Charlie Crist for U.S. Senate & Frederick Carroll II at 4 n.2.

[29] *Id.*, Factual & Legal Analysis for Respondent Richard J. Heffley at 5–6.

anticipated they would be performed by Spannagel under the terms of [his contract with the Committee]."[30] Furthermore, they assert that: (1) "Spannagel paid for all of the expenses associated with the production of the Webpage"; (2) "The expenses were paid by Spannagel on his personal credit cards"; (3) Spannagel "performed all of his work on the Webpage from his personal residence"; and (4) "Spannagel performed the work on the Webpage during his personal time and not time during which he was on the payroll of the Committee."[31]

These assertions are supported by a signed and notarized declaration from Spannagel that represents the following:

- "[I]t was not within my general duties to produce content, maintain or administer to any of the activities on the Committee's website";
- "I did not advise, consult with, or inform LaMalfa, the Committee, or [the lead consultant to whom Spannagel reported] prior to, or during, the production and launching of the Website, about the Website or any language or component of the website";
- "[N]either LaMalfa, the Committee nor [the lead consultant to whom Spannagel reported] authorized, directed or requested that I, or any third party, develop, produce, launch or maintain the Website";
- "I personally paid for all of the expenses associated with the registration and development of the Webpage";
- "All of the expenses . . . associated with the Webpage . . . were paid by me using my personal credit card. . . . No other person or entity paid for or reimbursed me for any expense";
- "I used my personal computer to produce the Webpage";
- "I performed the work at my personal residence during my time when I was not working for the Committee or performing my duties as Chief of State in the State Senate office";
- "No assets, resources, goods or services of the Committee or the State Senate office were used in any fashion for the registration, production, posting, launching or maintenance of the Webpage"; and

30 Response at 8.

31 *Id.*

- "I produced [the Webpage] to reflect my own thoughts on the conservative credential issues."[32]

Respondents support these statements with documentary evidence,[33] and the statements are uncontroverted in the record.[34]

Taken together, this evidence shows Spannagel produced the website on his own time, in his own home, on his own personal computer, using his own resources, and to reflect his own views on the issues discussed thereon. The Committee neither compensated him for creating the website nor directed him to create the webpage as part of his duties as a part-time independent contractor. Therefore, Spannagel was not required to report expenses associated with the website as independent expenditures because those costs fall within the Internet exemption.[35] And, because his conduct in creating his own website cannot be appropriately imputed to the Committee, no disclaimer was required under 11 C.F.R. § 110.11(a).[36]

III. CONCLUSION

An individual does not surrender his personal rights under the First Amendment to express his own political views simply because he is paid by a campaign to perform certain services. Whatever one may think of the propriety of Spannagel's website and the content posted thereon, neither his failure to file an independent expenditure report with the Commission nor the omission of a disclaimer on the website violated the Act.

[32] *Id.*, Attachment 1 (Declaration of Mark Spannagel) ¶¶ 9–16. Mr. Spannagel's representations to the Commission are subject to the false statement provision of 18 U.S.C. § 1001.

[33] *See* Spannagel Declaration , Ex. B (presenting invoice of Spannagel's expenses relating to his website).

[34] In its First General Counsel's Report, OGC focused on Spannagel's title as "Campaign Director" as the most probative evidence in the record of his authority to create the website on behalf of the Committee. *See, e.g.* MUR 6578 (Doug LaMalfa Committee, *et al.*), First General Counsel's Report at 10, 12. But his title is a red herring. Indeed, campaign titles often are generic and thus not necessarily probative of one's actual role. For instance, Spannagel, despite being called the "Campaign Director," did not manage the day-to-day affairs of the Committee, as the Committee retained a full-time campaign manager to handle those responsibilities. *See* Spannagel Declaration ¶ 5. And given the uncontroverted evidence in Spannagel's declaration indicating that, notwithstanding his title, he was not employed to create the website for the Committee, it would be improper to elevate form over substance by blindly emphasizing his title.

[35] Spannagel reported an in-kind contribution to the Committee totaling $135, which the Committee in turn reported on its public disclosure report. *See* Spannagel Declaration ¶ 14. Yet no in-kind report was legally required for this exempt activity. And Spannagel's treatment of the expense as an in-kind contribution, although unnecessary, corroborates his representation that the website was his own creation and not a campaign-sponsored project.

[36] *See supra* notes 19–21 and accompanying text.

10/28/2014

LEE E. GOODMAN | Date
Chairman