



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6348
David Schweikert for Congress)
and Joyce Schweikert, in her official)
capacity as treasurer)

**STATEMENT OF REASONS
CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONERS STEVEN T. WALTHER AND
ELLEN L. WEINTRAUB**

In August 2010, the Federal Election Commission (“the Commission”) received a complaint alleging that David Schweikert for Congress (“the Committee”), the principal campaign committee of Arizona 5th District Congressional candidate David Schweikert, deliberately obscured the required disclaimer on a mailer that attacked Jim Ward, his opponent in the Republican primary election. Because we believe the disclaimer on this mailer violates the statutory and regulatory requirements, we supported the recommendation of the Office of General Counsel (“OGC”) to find reason to believe that the Committee violated 2 U.S.C. § 441d(c) and 11 CFR § 110.11(c) and to authorize pre-probable cause conciliation with the Committee. The motion to approve OGC’s recommendations failed by a vote of 3-3.¹

This mailer, attached, was distributed during the last week of July 2010. The mailer attacks Ward’s stance on immigration and the timing of his move to Arizona. The complaint alleges that the Committee obscured the disclaimer on the mailer in an attempt to escape accountability for the negative message of the mailer, in violation of the requirements for a “clear and conspicuous” disclaimer contained in the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations. See 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c). The Committee’s response asserts that the disclaimer satisfies the requirements of 11 C.F.R. § 110.11(c).

We agree with the complainant that this mailer seems plainly designed to conceal the disclaimer and thereby hide the connection between the Committee and the negative attack on a

¹ Chair Bauerly and Commissioners Walther and Weintraub voted affirmatively. Vice Chair Hunter and Commissioners McGahn and Petersen dissented. Thereafter, the Commission closed the file in this matter. Certification in MUR 6348, dated February 1, 2011.

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campaign opponent. Candidates have a right to distribute campaign advertisements, including negative attacks on their opponents. The public also has a right to know who is responsible for such advertisements. The public should not be required to engage in a game of "Hide-and-Seek" to discover the disclaimer on campaign materials.

All public communications made by a political committee must include disclaimers. 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1). Any communication through mass mailing paid for by a candidate or an authorized political committee of a candidate must clearly state that the communication has been paid for by that committee. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(b).²

The mailer contains the disclaimer "Paid for by Schweikert for Congress" printed sideways in small amber type on the upper right side of the mailer over a photograph of San Francisco viewed from the Golden Gate Bridge. The disclaimer meets some of the requirements of the Act and Commission regulations – it states that it is paid for by Schweikert for Congress, it is printed in what appears to be 12-point font, and it is contained in a printed box. See 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c). However, the disclaimer fails to meet other requirements of the Act and Commission regulations. These requirements are not onerous.

First, the disclaimer is not printed with the required "reasonable degree of color contrast between the background and the printed statement." 2 U.S.C. § 441d(c)(3). Other text in the mailer is printed in black or bold red type with white shadow setting off the text from the yellow background. The disclaimer in contrast is printed in amber type over a multi-colored photograph, causing some of the printing to blend in with the background. The amber print of the disclaimer is difficult to read over the dark blue of the water, the light and dark city buildings, and the dark blue of the sky in the photograph.

Second, the disclaimer is not "contained in a printed box set apart from the other contents of the communication." 2 U.S.C. § 441d(c)(2). The outline of the box around the disclaimer is printed to line up with the cables of the bridge in the background photograph, making the box quite difficult to distinguish from the background. The failure to set the box apart is particularly significant since the disclaimer itself blends in with the background photograph, making it even more difficult to catch one's eye.

² Public communications include any mass mailing to the general public or any other form of general public political advertising. 11 C.F.R. § 100.26. A mass mailing is defined as more than 500 pieces of substantially similar mail within any 30-day period. 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. Although the complaint and the response do not address the number of mailers distributed, the Committee's disclosure reports include contemporaneous payments to printing vendors ranging from approximately \$5,000 to \$26,000. It is thus likely that the Committee distributed over 500 mailers, and, therefore, that the disclaimer requirements apply. If the Commission were to find reason to believe a violation occurred and authorize pre-probable cause conciliation, and during the course of conciliation respondents produced information demonstrating that fewer than 500 mailers were distributed, the Commission would drop the matter at that time.

Third, “[a] disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.” 11 C.F.R. § 110.11(c)(1). The disclaimer is difficult to find and read because it is printed sideways – perpendicular to all the other text in the mailer – on the upper right side of the mailer and blends in with the background photograph. Indeed, its placement within the bridge cables makes it very easy to overlook.

Finally, neither of the safe harbor standards for color contrast in the regulations is met because the disclaimer is not printed in black text on a white background and the largest text in the communication is printed at a much higher contrast from the background color. 11 C.F.R. § 110.11(c)(2).

This matter falls into a different category from previously dismissed enforcement matters involving disclaimers. The Commission has dismissed enforcement matters in cases of omitted disclaimers due to inadvertent error followed by prompt remedial action or in cases in which the public could reasonably discern who was responsible for the advertisement from other information on the materials. *See, e.g.*, MUR 6316 (Pridemore for Congress) (Commission dismissed matter where a committee failed to include appropriate disclaimers on campaign materials but took prompt remedial action); MUR 6118 (Bob Roggio for Congress) (same); MUR 6329 (Michael Grimm for Congress) (same); MUR 6278 (Joyce B. Segers) (Commission dismissed matter where a committee failed to include a disclaimer on campaign materials but the public could reasonably discern that the committee produced the information from its contents and the committee took remedial action). The facts presented in these four MURs are not present here. Without a “clear and conspicuous” disclaimer on the mailer here, the public had no other way of knowing who was responsible for the mailer, since the mailer does not make any other reference to Schweikert or the Committee and only mentions the opponent it is attacking.

In this case, not only does the disclaimer fail to meet the requirements of the Act and regulations, but it appears that the Committee intentionally designed the mailer to make the disclaimer difficult to locate and read. There is plenty of blank space on the mailer where the disclaimer could have been put. Furthermore, there is a large amount of other text on the mailer that is “clear and conspicuous.” The only thing that is “conspicuous” about the disclaimer, however, is that it is conspicuously difficult to locate and read. We do not believe a dismissal is appropriate under such circumstances. We believe that to vote against “reason to believe” under the facts of this case ignores both the plain language and the spirit of the Act’s disclaimer requirements.

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We agree with the General Counsel's recommendation to open settlement negotiations with a low penalty offer. Nonetheless, in this case, and in cases like this in the future, the public has a right to know who is responsible for advertisements like this mailer. We fear that without enforcement of the Act's disclaimer requirements in this case, the opportunity for such knowledge is substantially diminished. For this reason, we voted to find reason to believe that the Committee violated 2 U.S.C. 441d(c) and 11 CFR § 110.11(c).

3/11/2011
Date

Cynthia Bauerly/sc
Cynthia L. Bauerly
Chair

3/11/11
Date

Steven T. Walther
Steven T. Walther
Commissioner

3/11/2011
Date

Ellen L. Weintraub/scB
Ellen L. Weintraub
Commissioner

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Meet Jim Ward

He came to town just last year

- Ward just registered to vote¹
- Ward has never voted in an Arizona primary²
- Ward has no real connection to Arizona

Jim Ward moved here from the San Francisco area just to run for Congress...

4110 N Goldwater Blvd. Suite 201
Scottsdale, AZ 85251

PRSR STD
US POSTAGE
PAID
PDMA

*****AUTO**5-DIGIT 85251
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And Jim Ward has some San Francisco ideas to solve Arizona's illegal immigration problem

Jim Ward believes the federal government should use our tax dollars for an taxpayer funded immersion program for most illegal immigrants instead of deporting them.³

Jim Ward wants to use our tax dollars to teach illegal immigrants how to use our banking system.³

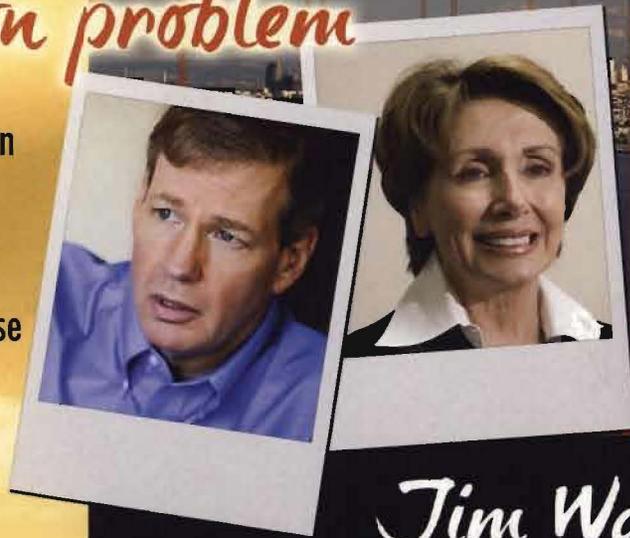
Jim Ward thinks that instead of deporting illegal immigrants, we should teach them English and let them stay here.³

THAT'S AMNESTY...AND THAT'S THE WRONG THING TO DO ABOUT ILLEGAL IMMIGRATION

¹Maricopa County voter records

²Marin County property records

³The Barry Young Show, June 17, 2010



Jim Ward

A candidate from the San Francisco area.
With San Francisco solutions to
illegal immigration.

Paid for by Schweikert for Congress