



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)

Unknown Respondents

)

MUR 6429

STATEMENT OF REASONS

**Vice Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN**

This matter arose from a complaint alleging that someone (whom the complainant identifies as an unknown political committee) violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by failing to include disclaimers on several mailers critical of Martha Roby, a House candidate for Alabama’s 2nd Congressional District, and by failing to include disclaimers in automated phone calls that expressly advocated the defeat of Martha Roby. The complaint also alleged that the mailers and phone calls may have been coordinated with Roby’s opponent in the general election. The Office of General Counsel (“OGC”) recommended that we authorize an investigation into the identity of the entity responsible for the mailers in order to determine whether it was a political committee that was required to include disclaimers on the mailers, and whether it was responsible for the alleged automated phone calls.¹

We voted to reject OGC’s recommendations for the following reasons.² First, the mailers at issue did not contain express advocacy, so unless they were paid for by a political committee, a disclaimer was not required. The complaint failed to provide evidence, but merely speculated, that the entity responsible for the mailers was a political committee or that it coordinated with Roby’s opponent. Finally, we disagreed with the basic premise underlying OGC’s recommendation – 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. Thus, there was no basis upon which to find reason to believe that the Act or Commission regulations required a disclaimer on the mailers.

¹ MUR 6429 (Unknown Respondents), First General Counsel’s Report (“FGCR”) at 6.

² *Id.*, Certification dated Apr. 26, 2011.

11044293607

I. BACKGROUND

The complaint in this matter alleged that an unknown political committee sent three mailers attacking Martha Roby to voters in Alabama's 2nd Congressional District within a week of the November 2, 2010, General Election.³ None of the mailers included a disclaimer or any other identifying information. However, the mailers were sent *via* bulk mail and included the same postage mark: "PRSRT STD U.S. POSTAGE PAID WC MLG 10314," which, according to the complaint, indicates they may have been sent by the same person or persons.

The first mailer stated, on the front side, "Alabama has been hit especially hard by illegal immigration... So why isn't Martha Roby fighting back?" The back side of the mailer states "Martha Roby: What part of Illegal Immigration Doesn't She Understand?" Underneath that statement is a paragraph that states:

Martha Roby believes we should only deport those illegal immigrants who have committed a crime. She doesn't think illegal immigrants should be deported until after they are convicted criminals and receive final deportation orders. Isn't it a crime to cross the border illegally? Taxpayers shouldn't have to pay for their stay, Martha.

The second mailer, on the front page, stated, "What is Martha Roby spending our taxpayer money on?" The second page stated:

Martha Roby has criticized "Slush Fund" spending, but as a Montgomery City Council Member, she spent \$660,000 of taxpayer money over three years—on whatever she wanted! Does that sound like the right way to reduce wasteful spending? Call Martha Roby: (334) 239-8660. Tell her to say NO to wasteful slush fund spending.

The third mailer stated, on the front page, "Shouldn't all illegal immigrants be deported?" The back of the mailer stated:

Not according to Martha Roby. Martha Roby says only illegal immigrants with criminal convictions should be deported. Martha Roby thinks we should only deport illegal immigrants if they are convicted of a crime and have final deportation orders. Great idea, Martha: wait until they commit a crime. Then we can pay for: the lawyer, the trial, the appeal, the stay in jail, the immigration hearing, the appeal of the deportation order, and the trip home. Being in this country illegally is a crime, Martha. That should be enough. Call Martha Roby: (334) 239-8660. Tell her to get tough on Illegal Immigration.

³ MUR 6429 (Unknown Respondents), Complaint at 1.

11044293608

In addition to the mailers, the complaint also alleged that “several automated calls expressly advocating against Martha Roby were sent to voters in the district lacking the proper disclaimer.”⁴ However, the complaint did not provide a recording or any other information about the calls.

Finally, the complaint alleged that, because the mailers failed to include a disclaimer, there was “no way to determine” whether the person(s) responsible for the mailer properly reported the mailers as expenditures or whether the mailers were coordinated with Roby’s opponent in the general election.⁵

OGC determined that the mailers did not contain express advocacy because they “contain no exhortation to vote and are devoid of electoral references.”⁶ Thus, OGC correctly concluded “no disclaimer was required in the mailers if an entity other than a political committee paid for them.”⁷ Nonetheless, OGC recommended that we find reason to believe because (1) the entity may have been a political committee that failed to include a disclaimer on the mailers, and (2) the entity may have coordinated the mailers with a candidate or party resulting in an impermissible coordinated expenditure. OGC recommended that we authorize a limited investigation to determine if the holder of the bulk mail permit was, in fact, a political committee that failed to include disclaimers on its mailers.⁸ If so, OGC would determine the “cost and distribution of the communications and return to the Commission with appropriate recommendations.”⁹ If the investigation revealed that the entity was not a political committee, and OGC did not uncover any evidence that the mailers were coordinated, then OGC would recommend that the Commission close the matter.¹⁰ We voted against OGC’s recommendations.

⁴ *Id.* at 1.

⁵ *Id.* at 2.

⁶ MUR 6429, First General Counsel’s Report (“FGCR”) at 4, n.3 (acknowledging that the three mailers did not fall within the regulatory definition of express advocacy at 11 C.F.R. § 100.22).

⁷ *Id.*

⁸ MUR 6429, FGCR at 6.

⁹ *Id.*

¹⁰ *Id.*

11044293609

II. LEGAL ANALYSIS

Persons remain generally free to exercise their First Amendment rights anonymously.¹¹ Under the Act, though, political committees are required to include disclaimers on all public communications.¹² However, entities that are not political committees are only required to include disclaimers on communications that contain express advocacy.¹³

While political committees may be required to include disclaimers on all public communications, regardless of whether they contain express advocacy, there was no evidence that a political committee was responsible for the mailers in this matter. Likewise, the complaint provided no evidence that the mailers were coordinated with any candidate or candidate's committee. As we have repeatedly stated, the Act and Commission regulations preclude a reason to believe determination when a complaint fails to allege specific, documented facts that a violation has occurred or is about to occur.¹⁴ Moreover, the Commission has routinely dismissed prior enforcement matters involving alleged disclaimer violations. Thus, we rejected OGC's recommendation to pursue these allegations further.

A. **The Complaint Was Speculative and Did Not Meet the Reason-To-Believe Threshold**

As OGC correctly concluded, the mailers at issue did not contain express advocacy. Thus, unless the entity who paid for the mailers was a political committee, no disclaimer was required as a matter of law.¹⁵ The complaint merely speculated that the entity was a political committee, but did not provide any evidence of a "contribution" or

¹¹ *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 357 (1995) (the Supreme Court struck down an Ohio law prohibiting the distribution of anonymous campaign literature, stating "under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.").

¹² 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1).

¹³ 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(2).

¹⁴ See MUR 6056 (Protect Colorado Jobs), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen; MUR 6296 (Kenneth R. Buck, *et al.*), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen. See also MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas.

¹⁵ The Act and Commission regulations require that all public communications made by a political committee, including electronic mail of more than 500 substantially similar communications, and all Internet websites of political committees must include a disclaimer. 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1). This requirement applies regardless of the content of the communication, including whether or not it contains express advocacy. Similarly, public communications made by any person other than a political committee must include a disclaimer *only if* the communication (1) contains express advocacy; (2) solicits contributions; or (3) is an electioneering communication. 2 U.S.C. § 441d; 11 C.F.R. § 110.1(a)(2-4). Thus, persons or entities that are *not* political committees are *not* required to include a disclaimer on public communications that do not contain express advocacy.

11044293610

an “expenditure” under the Act. Similarly, it did not include any evidence of coordination. Thus, we are precluded under the Act and Commission regulations from finding reason to believe on such an inadequate basis.

The Act and Commission regulations state that a complaint must “be in writing, signed and sworn.”¹⁶ In addition, a complaint should:

- clearly identify as a respondent each person or entity who is alleged to have committed a violation;
- be accompanied by an identification of the source of information which gives rise to the complainant’s belief in the truth of statements if not based upon personal knowledge;
- contain a clear and concise recitation of the facts which describe a violation of statute or regulation; and
- be accompanied by any documentation supporting the facts alleged.¹⁷

Applying that regulatory standard here, there was no basis to support OGC’s recommendation to launch an investigation. It is undisputed that the complainant did not know who was responsible for the mailers at issue,¹⁸ but merely speculated that it must have been a political committee,¹⁹ and therefore subject to the Act’s disclaimer requirements. The only fact that the complaint provided in support of its allegation was that the mailers were sent using the same bulk mail permit. But that is too speculative; the Commission has already been warned that “mere ‘official curiosity’ will not suffice

¹⁶ 2 U.S.C. § 437g(a).

¹⁷ 11 C.F.R. § 111.4(d). At the Commission’s January 2009, hearing on agency procedures, one commenter asserted that these pleading requirements should be mandatory. Comments of Jan Witold Baran, Wiley Rein LLP Election Law and Government Ethics Group, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008) at 2 (“The Commission should make compliance with these factors mandatory and should not accept complaints that fail to satisfy them.”). We agree.

¹⁸ MUR 6429, Complaint at 2 (acknowledging that “[t]he identity of the Committee is absolutely unknown”).

¹⁹ The Act defines “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). The Supreme Court has limited the scope of the term “expenditure” to “reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but “earmarked for political purposes.” *Id.* at 23 n.24, 24, 78. Additionally, the Court has construed “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* at 79-80.

11044293611

as the basis for FEC investigations.”²⁰ Moreover, the complaint provided no examples of communications that would have constituted more than \$1,000 in contributions or expenditures. On the contrary, the only communications the complaint did provide were not expenditures because they did not contain express advocacy.

Even though it acknowledged that the mailers did not contain express advocacy (and therefore, the Act’s statutory thresholds for political status were not met), OGC argued that the lack of express advocacy was precisely the reason we should open an investigation. According to OGC, approving investigations *only* in express advocacy disclaimer cases would somehow prevent meaningful enforcement of the law, because political committees would be free to run non-express advocacy communications without disclosure, knowing that the Commission would not investigate.

We do not agree. As stated above, there is no evidence that a political committee actually made the communications at issue. Had evidence existed that a political committee was responsible for these ads, finding reason to believe would have been appropriate. Not adopting OGC’s recommendation in this case will not cause political committees across the spectrum to begin violating the Act’s disclosure requirements.²¹

OGC also argues that we should find reason to believe because of the high probability that they would be able to identify the Unknown Respondents by investigating the identity of the holder of the bulk mail permit. As support, OGC cites to MUR 5493 (Friends of Jeff Smith), where the Commission found reason to believe, and authorized a limited investigation to confirm the identity of an Unknown Respondent by using the bulk mail permit number on the postcard at issue, even though the postcard did not contain express advocacy.²²

In that matter, however, the complaint actually identified two authorized political committees it believed were responsible for the postcard and flyers, and provided specific

²⁰ *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Also for this reason, we refuse to launch an investigation into the identity of the respondent based on a speculative accusation that the mailers may have been coordinated with Roby’s opponent. The complaint provides no evidence or support for the allegation—in fact, the complaint does not actually go so far as to allege the mailers were coordinated, but simply states there is no way to know whether they were or not.

²¹ We also must be careful not to use the pretext of a disclaimer violation in order to investigate whether an entity should have been registered as a political committee, absent a contribution or expenditure in excess of \$1,000, as required by the Act. Here, because the only communications before us did not contain express advocacy, we have no evidence of an identifiable “contribution” or “expenditure” before us. And we have repeatedly refused to open investigations in matters where the statutory threshold of \$1,000 or more in contributions or expenditures has not been met. See MURs 5694 and 5910 (Americans for Jobs Security), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn; MURs 5977 and 6005 (American Leadership Project), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn; MUR 5842 (Economic Freedom Fund), Statement of Reasons of Vice Chairmae Matthew S. Petersen and Commissioner Caroline C. Hunter.

²² MUR 5493 (Friends of Jeff Smith), FGCR at 13. In addition to the postcard, the matter also involved the dissemination of “false and inflammatory information” in the form of three anonymous flyers.

11044293612

information in support of its allegations.²³ Those authorized committees were then given the opportunity to respond. After considering the complaint and responses, the Commission determined that there was reason to believe that an authorized committee and an unknown political committee violated the Act by failing to include the required disclaimers, and authorized an investigation into the identity of the holder of the bulk mail permit.²⁴ By contrast, the complaint in this matter provided no evidence to support the allegation that the entity who paid for the mailers was a political committee. The mere existence of a bulk mail permit, without more, does not render permissible an investigation into the identity of the holder of that permit.²⁵

The complaint in this matter was purely speculative, and such “mere speculation will not be accepted as true.”²⁶ Thus, we rejected OGC’s recommendation to find reason to believe Unknown Respondents violated the Act.

B. Our Decision in this Matter is Consistent with Prior MURs and the First Amendment

In prior MURs involving alleged disclaimer violations by unknown respondents, the Commission has declined to find reason to believe, and open an investigation into the unknown respondents’ identity. This is true even in instances where the communications allegedly contained express advocacy.

For example, in MUR 5275 (Unknown), OGC recommended that the Commission find reason to believe that unknown respondents violated the Act by failing to include a disclaimer on a letter that allegedly contained express advocacy; however, notwithstanding that recommendation, OGC also recommended that the Commission take no further action to determine the identity of the respondents and close the file.²⁷ The Commission voted 6-0 to reject OGC’s substantive recommendations to find reason to believe and instead, voted simply to take no action.²⁸ While a majority of Commissioners wrote separately to explain they disagreed with OGC’s conclusion that the letter contained express advocacy, all Commissioners agreed with OGC’s conclusion that any

²³ *Id.*, Complaint at 1-2.

²⁴ *Id.*, Certification dated Aug. 16, 2005. After conducting an investigation into the holder of the bulk mail permit, as well as investigating two authorized committees, OGC ultimately recommended that the Commission take no further action.

²⁵ See MUR 6429, FGCR at 6 (OGC acknowledges that the holder of the permit may be a printing vendor that would be unwilling to produce information identifying its client without the use of a subpoena or interrogatory.).

²⁶ MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons, *supra* note 14 at 1 (internal citations omitted).

²⁷ MUR 5275 (Unknown), FGCR at 6.

²⁸ *Id.*, Certification dated Feb. 24, 2004.

11044293613

further investigation into the identity of the respondents would not be the best use of the Commission's resources.²⁹

In other instances, OGC has recommended that the Commission exercise its prosecutorial discretion to dismiss matters involving unknown respondents.³⁰ And even assuming a disclaimer was required, the Commission routinely dismisses similar allegations involving non-compliance with the Act's disclaimer requirements.³¹ Thus, in the alternative, we would have voted to exercise our prosecutorial discretion and dismiss this matter under *Heckler v. Chaney*, 470 U.S. 821 (1985).

Finally, we decline to "needlessly embroil the Commission in Constitutional issues."³² In *McIntyre*, the Supreme Court upheld, under the First Amendment, the right to publish and disseminate political communications anonymously. And in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, the Court held unconstitutional a city ordinance requiring speakers, including political speakers, to register with the local government before speaking on private property, in part because "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity."³³ To proceed in this matter, as OGC and our colleagues advocate, would

²⁹ *Id.*, Statement of Reasons of Chairman Bradley A. Smith, Vice Chair Ellen L. Weintraub, and Commissioners David M. Mason and Michael E. Toner (rejecting OGC's conclusion that "an appeal to support 'candidates who can win' in races other than Fink's amounts to express advocacy of Fink's defeat."); Statement of Reasons of Commissioners Scott E. Thomas and Danny Lee McDonald (stating they would have found the mailer to be "express advocacy" but nonetheless agreed that an investigation into who sent the mailers would be unsuccessful and voted to take no action and close the file).

³⁰ *See* MUR 6135 (Unknown Respondents) (OGC recommended that the Commission dismiss a matter involving automated phone calls that lacked a disclaimer and were allegedly "targeted to Republican voters in an attempt to suppress turnout, particularly in California's 'contested Fourth District.'"); MUR 5455 (Unknown in South Dakota) (OGC recommended that the Commission exercise its prosecutorial discretion and dismiss a matter involving alleged pre-recorded phone calls critical of a Congressional candidate's state senate record that lacked a disclaimer.). *But see* MUR 5493 (Friends of Jeff Smith) (discussed *supra* at page 6-7).

³¹ *See, e.g.*, MUR 6047 (Vernon Jones) (OGC recommended dismissal where respondent political committee failed to include disclaimer on campaign signs and emails); MUR 6068 (Arcuri for Congress) (OGC recommended dismissal where respondent political committee failed to include disclaimers on fundraising solicitation); MUR 6024 (William Russell for Congress) (OGC recommended dismissal where respondent political committee failed to include disclaimers on fundraising solicitation and website).

³² *See* MUR 5275 (Unknown), Statement of Reasons of Commissioner Bradley A. Smith at 3-4 (voting 6-0 with the Commission to reject OGC's recommendations to find reason to believe Unknown Respondents violated the Act's disclaimer requirements, but writing separately to explain that, in his view, the communications did not contain express advocacy; and moreover, "In light of *McIntyre*, the FEC should tread lightly around our fellow citizens who exercise their free speech rights under the 1st Amendment of our Constitution, at least in situations such as this, where there is no express advocacy, and where the expenditures appear to be at a very low level.").

³³ 536 U.S. 150, 166 (2002). There is the potential for an analogous public viewing here. Even though an entity that is not a political committee need not disclaim its identity on non-express advocacy communications, if the Commission were to undertake an investigation as suggested by OGC and determine that the entity was not a political committee, the entity's identity would be revealed when the

11044293614

create a regime in direct opposition to *McIntyre* and *Watchtower*: that speakers must tell the government who they are so the government can tell them whether they have the right to remain anonymous. Such an inversion of First Amendment principles is not appropriate.

III. CONCLUSION

For the foregoing reasons, we voted to reject the Office of General Counsel's recommendations to find reason-to-believe Unknown Respondents violated the Act.



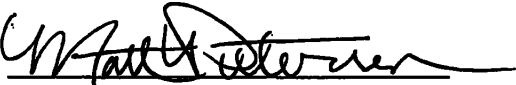
CAROLINE C. HUNTER
Vice-Chair

6/23/11
Date



DONALD F. McGAHN II
Commissioner

6/23/11
Date



MATTHEW S. PETERSEN
Commissioner

6/23/2011
Date

they play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure, *even if the documents reveal some confidential information.*) (emphasis added).

11044293615