



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Jeff Merkley for Oregon and Kevin Neely,	)	MUR 6037
in his official capacity as treasurer;	)	
Democratic Party of Oregon and Laura Calvo,	)	
in her official capacity as treasurer;	)	
Democratic Senatorial Campaign Committee and	)	
John B. Pnersch, Jr.,	)	
in his official capacity as treasurer	)	

STATEMENT OF REASONS

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

This matter involved allegations that the Democratic Party of Oregon, the Democratic Senatorial Campaign Committee, and the Merkley for Oregon U.S. Senate campaign (collectively, "Respondents") violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by, *inter alia*, coordinating two television ads that the party committees paid for, and in which then-prospective Senator Jeff Merkley appeared. The Office of General Counsel ("OGC") recommended, and we agreed, that the ads were not coordinated communications, and thus did not result in any excessive in-kind contribution.<sup>1</sup>

Nonetheless, OGC proposed that we find reason to believe ("RTB") that Respondents used the wrong type of disclaimer in the ads, and that we authorize an investigation to determine whether Senator Merkley "authorized" the ads, which in turn would determine whether use of the "stand by your ad" disclaimer was required. This we could not do, because the resolution of this matter involved solely a question of law, already resolved by Commission regulations. Under those regulations, because the advertisements did come within the reach of the Commission's coordination regulations, they had the proper disclaimer. To rule otherwise would, in our view, require rewriting the regulation, and as we have already stated, the enforcement process is not the place to

<sup>1</sup> OGC's analysis regarding the coordination and Federal funds issues are set forth in the First General Counsel's Report ("FGCR") in this matter, which is part of the public record. See <http://eqs.nictusa.com/eqs/searches>; see also "Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record," available at <http://www.fec.gov/agenda/2009/mtgdoc0972b.pdf>. We agree with the general conclusions, although not all of the specific reasoning, set forth in the FGCR in this matter regarding those two issues. Accordingly, we proceed in our analysis directly to the disputed disclaimer issue.

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make new law—let alone rewrite regulations *post hoc*.<sup>2</sup> Moreover, as a practical matter, OGC's theory would place Respondents in a Catch-22: use the "stand-by-your-ad" disclaimer, and thereby risk a far more serious coordination violation (where the disclaimer will inevitably be used by some to demonstrate impossible coordination), or choose the non-authorized disclaimer for ads that do not constitute coordinated communications at the risk of violating yet-unannounced extra-regulatory disclaimer requirements. The U.S. Supreme Court has already told the FEC it may not engage in such "heads I win, tails you lose" style enforcement.<sup>3</sup>

## I. FACTUAL BACKGROUND

This matter centers around two television advertisements produced and paid for by the Democratic Party of Oregon using Federal funds transferred from the Democratic Senatorial Campaign Committee ("DSCC"). The first ad, entitled "Respect," ran between July 1, 2008, and August 5, 2008, in major Oregon media markets, and featured then-Speaker of the Oregon House of Representatives Jeff Merkley, who was running for U.S. Senate.

In the 30-second advertisement, Merkley spoke into the camera and criticized Congress for voting for a pay raise for itself and cutting taxes but, in his view, not properly taking care of American troops in Iraq. He concluded, "I'm Jeff Merkley and our troops have done everything we ask with distinction. We need to start giving them the respect they deserve." The text on the screen urged viewers to "Call Congress and Tell Them to Respect our Veterans," and provided the main number for the U.S. Capitol switchboard. The ad featured an audio disclaimer that the Democratic Party of Oregon was responsible for its content, and the following visual disclaimer:

Paid for by the Democratic Party of Oregon. www.dpo.org. Not authorized by any candidate or candidate's committee. Democratic Party of Oregon is responsible for the content of this advertisement."

The second advertisement, entitled "Back to Basics," ran between July 8, 2008 and August 5, 2008. In that advertisement, Merkley touted his state legislative record on protecting children from Internet predators, sex offenders, and methamphetamines. He concluded, "We need to do a better job of protecting our children." Similar to the first ad, the text on the screen urged viewers to "Call Congress and Tell Them to Protect Our

<sup>2</sup> See MURs 5835 (Quest Global Research Group, Inc. / DCCC), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn, 5541 (The November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn; see also MURs 5642 (George Soros), 5937 (Romney for President, Inc.), 5712 and 5799 (Senator John McCain), and Report of the Audit Division of Missouri Democratic State Committee, *Agenda Document 08-36* (Dec. 4, 2008), and Report of the Audit Division of Friends of Weiner, *Agenda Document 09-26* (May 14, 2009).

<sup>3</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

11044310146

Children” and provided the Capitol switchboard number. The ad contained the same audio and visual disclaimers as the first.

The campaign of Merkley’s rival, then-Senator Gordon Smith, filed this complaint, alleging that: (1) Merkley’s campaign accepted excessive in-kind contributions from the Respondent Democratic party committees in the form of coordinated television ads; (2) the party committees may have impermissibly used non-federal funds to pay for the ads; and (3) the ads failed to include a disclaimer that they were authorized by the candidate.

We agreed with OGC’s recommendation that the Commission find no reason to believe that the ads were coordinated excessive in-kind contributions or funded impermissibly with non-Federal funds. However, we could not agree that the ads failed to include the proper disclaimer. Accordingly, we voted to reject OGC’s recommendations and to close the file.<sup>4</sup>

## II. ANALYSIS

The Act provides that whenever a political committee sponsors a public communication such as the television ads at issue here, it must include the following disclaimer:

- (1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or
- (2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;
- (3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate’s committee.<sup>5</sup>

If a television ad is authorized by a candidate, the Act also requires the ad to include “a statement [by the candidate] that identifies the candidate and states that the candidate has approved the communication”<sup>6</sup>—the so-called “stand by your ad” requirement.

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<sup>4</sup> MUR 6037, Certification dated November 17, 2009.

<sup>5</sup> 2 U.S.C. § 441d(a).

<sup>6</sup> 2 U.S.C. § 441d(d)(1)(B).

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Under Commission regulations, party committees generally use one of three disclaimers on their public communications. First, if the communication is coordinated with a candidate,<sup>7</sup> the disclaimer must identify the party committee that paid for the communication and state that the communication is authorized by the candidate or candidate's committee.<sup>8</sup> Second, if the communication is an independent expenditure (*i.e.*, a communication containing express advocacy), the disclaimer must identify the party committee that paid for the communication and state that communication is not authorized by any candidate or candidate's committee.<sup>9</sup>

Finally, if the communication is something other than a coordinated communication or independent expenditure (*e.g.*, an issue advertisement, fundraising solicitation, event invitation, press release, etc.), the general disclaimer requirements found at section 110.11(b) apply. Section 110.11(b)(2) is identical to the party coordinated communication disclaimer described above, and requires that a communication authorized by a candidate or candidate's committee contain a statement indicating who paid for the communication and that it was authorized by the candidate.<sup>10</sup> Similarly, Section 110.11(b)(3) is identical to the party independent expenditure disclaimer described above, and requires a communication not authorized by a candidate to include a disclaimer stating who paid for the communication and that it is not authorized by any candidate or candidate's committee.

**A. The Commission Already Has Decided This Issue in a Prior Matter**

In MUR 6044 (Musgrove), the Commission voted unanimously not to find reason to believe that the respondents had violated the same disclaimer requirements as those at issue in this matter.<sup>11</sup> The circumstances in the Musgrove matter were indistinguishable in all material respects, and, thus, this matter merited the same result.<sup>12</sup>

In MUR 6044, the DSCC created and paid for a television ad in which Ronnie Musgrove, a candidate in the 2008 U.S. Senate race in Mississippi, appeared. The complaint, like the one in this matter, alleged the DSCC ad was coordinated with Musgrove and, thus, constituted an excessive in-kind contribution to Musgrove. The complaint, like the one here, also alleged the DSCC ad lacked the stand-by-your-ad

<sup>7</sup> The Commission has completed a rulemaking to revise the coordination regulations, including this provision, pursuant to the court's decision in *Shays v. FEC*, 528 F.3d 914 (DC Cir. 2008) ("*Shays III*").

<sup>8</sup> 11 C.F.R. § 110.11(d)(2). Additionally, if the communication is a television or radio advertisement it must include the "stand by your ad" requirements at 11 C.F.R. § 110.11(c)(3).

<sup>9</sup> 11 C.F.R. § 110.11(d)(3).

<sup>10</sup> The communication would also be required to include the "stand by your ad" disclaimer requirements found at 11 C.F.R. § 110.11(c).

<sup>11</sup> MUR 6044, Certification dated May 18, 2009 (Commissioner Weintraub recused).

<sup>12</sup> See, *e.g.*, *Getsy v. Strickland*, 577 F.3d 320, 333 (6th Cir. 2009) ("basic notions of justice require treating like cases alike" (citing Aristotle, *Ethica Nichomachea*, in *The Works of Aristotle* V.3.1131a-1131b, V.5.1132b (W.D. Ross ed. & trans.1954))).

11044310148

disclaimer. And similarly, OGC concluded, and the Commission agreed, that the DSCC ad in MUR 6044 was not coordinated.<sup>13</sup>

In Musgrove, the Commission concluded that the DSCC did not violate the Act or Commission regulations by using the Section 441d(a)(3) disclaimer for ads that are not authorized by any candidate<sup>14</sup> – the same disclaimer that Respondents used in this matter. As the Commission stated in the Musgrove matter, “Respondents state that the ad was created, produced and aired by the DSCC. There is no basis on which to determine that Musgrove authorized the advertisement.”<sup>15</sup> Similarly, in this matter, the ad was created, produced, and aired by the Democratic Party of Oregon using funds transferred from the DSCC, and accordingly, there is no basis to determine that Merkley authorized the advertisement.

Furthermore, in Musgrove, there was no indication that the candidate reviewed or approved the advertisement before it was aired, though “Musgrove consented to be filmed and willingly participated in the filming of the advertisement.”<sup>16</sup> Similarly, in this matter, there is no indication that Merkley either reviewed or approved the ad in this matter in the time between when the ad was shot and when it was aired.<sup>17</sup>

While it is true that Musgrove did not speak in the ad in MUR 6044, the mere fact that Merkley spoke directly to the camera is a distinction without a difference. Speech is merely another form of “participat[ing] in the filming of the advertisement.”<sup>18</sup> Therefore, we concluded that this matter warranted the same result as that in MUR 6044.

**B. Neither the Act Nor Commission Regulations Requires That a Non-Coordinated Communication Produced and Sponsored By a Party Carry a Candidate Authorization Disclaimer**

Though some argue that the Act and Commission regulations require an “authorized by” disclaimer for a non-coordinated party committee advertisement simply because it features a candidate speaking to the camera, such a distinction lacks a statutory or regulatory basis.<sup>19</sup> As stated above, party committees have three regulatory “buckets” into which their communications may be placed – coordinated communications,

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<sup>13</sup> MUR 6044, FGOR; Statement of Reasons of Chairman Steven Walther, Vice Chairman Matthew S. Petersen, and Commissioners Cynthia L. Bauerly, Caroline C. Huster, and Donald F. McGahn (*hereinafter* “MUR 6044 SOR”).

<sup>14</sup> *Id.*

<sup>15</sup> MUR 6044 SOR at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Use of candidate footage by campaign committees and party committees is a common practice—a point the Commission has been well aware of. See Transcript from Public Hearing on Proposed Rulemaking on Coordinated and Independent Expenditures, Oct. 23, 2002 at 143.

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independent expenditures, and all other communications. Since the advertisements at issue here were not coordinated communications, section 110.11(d)(2)—which requires an “authorized by” disclaimer—was inapplicable. Nor were the advertisements independent expenditures since they did not contain express advocacy; therefore, section 110.11(d)(3) clearly would not apply.<sup>20</sup> Consequently, the Respondent’s communications were governed by the general disclaimer requirements found at section 110.11(b)(2) and (3)—and, thus, the Respondent had to select between the “authorized by” disclaimer or the “not authorized by” disclaimer.

Because the “authorized by” disclaimer is identical to the party coordinated communications disclaimer, it would make little sense for Respondent (a party committee) to use that disclaimer on a non-coordinated advertisement.<sup>21</sup> Though the ads at issue also were not express advocacy communications, they were akin to independent expenditures since they did not constitute coordinated communications. Thus, since party independent expenditures require a “not authorized by” disclaimer,<sup>22</sup> Respondent made a well-founded choice to include this disclaimer on its ads. Indeed, the “not authorized by” disclaimer is routinely used by party committees on all communications that qualify as neither coordinated communications nor independent expenditures (such as written solicitations, press releases, invitations, email communications, etc). Moreover, to our knowledge, the Commission has not previously determined that speaking to the camera in a third-party advertisement constitutes authorization by a candidate. Therefore, we will not second-guess a reasonable interpretation of the regulations.

Finally, OGC consistently has recommended, and the Commission has agreed, to dismiss cases where a candidate appears in an ad that contains disclaimer language sufficient to avoid public confusion or misunderstanding regarding the ad’s sponsor, even if the disclaimer does not comply with every technical requirement.<sup>23</sup> Here, not only did the ad: (1) feature a candidate speaking directly to viewers, and (2) contain visual and audio disclaimers, but the disclaimers were fully compliant with the regulatory requirements for ads that are not authorized by candidates. Even if we assume *arguendo* that Respondents’ ads were technically “authorized” within the meaning of the Act, the proper disposition still would have been to dismiss this matter pursuant to our prosecutorial discretion, as we have done consistently in other such disclaimer matters.

<sup>20</sup> As noted above, independent expenditures are communications that contain “express advocacy.” 11 C.F.R. § 100.16. OGC concluded, and we agreed, these ads did not expressly advocate any Federal candidate. MUR 6044, FGCR at 12.

<sup>21</sup> To retrospectively require Respondents to use the “authorized by” and “stand-by-your-ad” disclaimers would have misled the public and called into question whether Respondents had, in fact, coordinated the advertisements in violation of the Commission’s coordinated communications regulations—questions Respondents clearly sought to avoid. To wit, both ads stopped running on August 5, 2008—precisely the day before the 90-day window in which the “content prong” would have applied to this advertisement. 11 C.F.R. § 109.21(c)(4)(1). And the ads avoided express advocacy, which would have triggered the “content prong” outside of the 90-day window. 11 C.F.R. § 109.21(c)(3).

<sup>22</sup> 11 C.F.R. § 110.11(d)(3).

<sup>23</sup> See, e.g., General Counsel’s Reports in MURs 6084 (Kennedy), 6109 (Durstun), 6116 (Cunha). ~

**III. CONCLUSION**

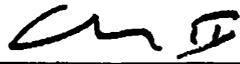
The Commission unanimously agreed with OGC that the Respondents' ads did not constitute coordinated communications. Thus, this matter was reduced only to a question about the technicalities of the "stand-by-your-ad" disclaimer requirements. Since this was solely a question of law, OGC's proposed factual investigation, however limited, was unnecessary. The Act does not require non-coordinated party committee communications to carry the "stand-by-your-ad" disclaimer, and nor do Commission regulations speak to the issue. The Commission decided such communications do not require "stand by your ad" disclaimers in a prior enforcement action whose logic dictated the same conclusion in this matter.

For these reasons, in addition to supporting a finding of no reason to believe on the coordination issue, we voted to take no further action in this matter and to close the file.

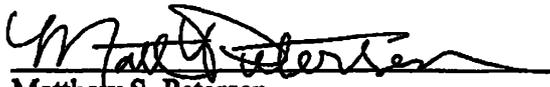
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Caroline C. Hunter  
Vice Chair

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Donald F. McGahn II  
Commissioner

12/13/11  
Date

  
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Matthew S. Petersen  
Commissioner

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