



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
New Hampshire Republican Senate) MUR 6431
Majority Committee)

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

This matter concerns newspaper ads printed the day before the November 2010 general election that were paid for by the New Hampshire Republican Senate Majority Committee (“RSMC”) with funds that may not have complied with Federal requirements. The ads prominently featured a large picture of U.S. Senate candidate Kelly Ayotte on the left hand side of the ads.¹ In each of these ads, Ayotte’s name received top billing, above the names of two candidates for New Hampshire’s state senate.² A statement in small text asked readers to “join [Ayotte] in supporting” the state candidates, whose much smaller pictures appeared at the bottom of the ads. Ayotte’s photograph is approximately *twelve* times the size of each of the other candidates’ photographs. Finally, in large text – equal to the size of Ayotte’s name – the ads stated “Please Vote This Tuesday!” The advertisements appear to have been coordinated with the Ayotte campaign,³ and, in our view, did not qualify for the Commission’s regulatory endorsement safe harbor. 11 C.F.R. § 109.21(g)(1). Accordingly, we could not support the Office of General Counsel’s recommendation that the Commission should find no reason to believe that the ads were an excessive or prohibited in-kind contribution from RSMC to Ayotte.⁴

¹ Ayotte’s name appeared on the November 2010 general election ballot.

² Different versions of the ad were run in at least four New Hampshire newspapers. See Complaint in MUR 6431, dated November 1, 2010, at 6-8. An example is attached.

³ First General Counsel’s Report at 9-12, available at <http://eqs.nictusa.com/eqs/searcheqs>.

⁴ The complaint alleged that RSMC failed to register as a Federal political committee and that the ads did not include the appropriate disclaimer. Then-Vice Chair Hunter and Commissioners McGalen and Petersen voted to find no reason to believe that RSMC made excessive in-kind contributions, made disbursements for Federal election activity from funds not subject to the requirements of the Act, failed to include adequate disclaimers, or knowingly accepted or failed to report an excessive or prohibited in-kind contribution. Certification in MUR 6431, dated November 4, 2011 at 1. Then-Chair Bauerly and Commissioners Walther and Weintraub dissented. *Id.*

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The endorsement safe harbor provides an exception from the definition of “coordinated communication” for public communications in which a Federal candidate endorses another candidate for Federal or non-Federal office. 11 C.F.R. § 109.21(g)(1). The safe harbor does not apply if the communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate. *Id.* The legislative history of the statutory provision underlying the Commission’s regulatory endorsement safe harbor indicates that the Bipartisan Campaign Reform Act of 2002 was not intended to prohibit “spending non-Federal money to run advertisements that mention that [State candidates] have been endorsed by a Federal candidate * * * so long as those advertisements do not support, attack, promote, or oppose the Federal candidate.”⁵ This safe harbor rests on the premise that the endorsing candidate or the candidate’s agents may be involved in the development, content and distribution of the communication precisely because endorsements are not made for the purpose of influencing the endorsing candidate’s own election.⁶

The advertisements in this case promote or support Ayotte – the same candidate making the endorsement. RSMC’s advertisements also promote a slate of candidates, but with Ayotte in the lead role. Ayotte’s name appears first, Ayotte’s picture is by far the largest element in the ads and a reasonable observer would certainly understand the phrase “Please Vote This Tuesday!” as an exhortation to vote for Ayotte among the set of candidates in the communication irrespective of whether the advertisements explicitly mention that Ayotte is a candidate. Although the ads contain an endorsement, they also clearly support and promote the candidacy of Kelly Ayotte and are therefore ineligible for the endorsement safe harbor under 11 C.F.R. § 109.21(g)(1).

The facts in this matter differ from those in Advisory Opinion 2007-34 (Jackson) where the Commission concluded that the image of a Federal candidate, Representative Jesse Jackson Jr., on a billboard with a local candidate for state’s attorney qualified for the endorsement safe harbor because it did not promote or support Representative Jackson. The billboard considered in that Advisory Opinion emphasized the local candidate receiving the endorsement, Larry Suffredin. Suffredin’s picture was the same size as Jackson’s picture and appeared with the text: “Larry Suffredin – For State’s Attorney – Vote February 5th.” *See* Advisory Opinion 2007-34 (Jackson) at 2. Here, Ayotte’s image is featured much more prominently than the other state candidates unlike that of Representative Jackson in the billboard at issue in AO 2007-34. In contrast to the advertisements in this matter, the billboard in AO 2007-34 did not mention Jackson’s name and did not make any statement that could be construed as support or promotion of Jackson. Here, Ayotte’s name is the same size as the names of the other candidates and the manner in which her name is listed at the top easily leaves the impression that the reader should “Please Vote This Tuesday!” for Ayotte along with the other candidates in the ads.

Subsequently, the Commission unanimously concluded that even if RSMC, a state political committee, exceeded the monetary threshold for contributions or expenditures related to these ads, *see* 2 U.S.C. § 431(4), RSMC did not have to register as a Federal political committee with the Commission because there was no reason to believe its major purpose was to support or oppose Federal candidates. *Id.* at 2; Factual and Legal Analysis at 4-5.

⁵ 148 Cong. Rec. S2143 (March 20, 2002) (Feingold).

⁶ Coordinated Communications: Explanation and Justification, 71 Fed. Reg. 33190, 33202 (June 8, 2006).

MUR 6431 (New Hampshire Republican Senate Majority Committee)
Statement of Reasons of Vice Chair Weintraub and Commissioners Bauerly and Walther

Accordingly, we would have voted to find reason to believe that RSMC made an excessive or prohibited in-kind contribution and authorized conciliation.⁷ We write separately to emphasize that advertisements that promote or support the Federal candidates making the endorsement are subject to the limitations of the Act, even if the advertisement also includes an endorsement. *Bona fide* endorsements emphasize the candidates being endorsed – not the candidate offering the endorsement. 11 C.F.R. § 109.21(g)(1).

1/13/12
Date

Ellen L. Weintraub
Ellen L. Weintraub
Vice Chair *by enr*

1/13/12
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Commissioner

1/13/12
Date

Steven T. Walther
Steven T. Walther
Commissioner

⁷ Ultimately, even if all six Commissioners agreed that these advertisements did not meet the endorsement safe harbor and therefore caused RSMC to exceed the monetary threshold to trigger political committee status, RSMC would not have to register as a Federal political committee because RSMC's major purpose was not to support or oppose Federal candidates.

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(Political Advertisement)

(Political Advertisement)

(Political Advertisement)

(Political Advertisement)

(Political Advertisement)

Kelly Ayotte Joe Kelly Levasseur Tom DeBlois



“ New Hampshire is at a crossroads.
The only way we will fix our problems is
with common sense solutions, not more
government spending and higher taxes.

I hope you'll join me in supporting
Joe Kelly Levasseur and Tom DeBlois
for State Senate.”

Please Vote This Tuesday!



**Joe Kelly
Levasseur**
For State Senate
District 20



Tom DeBlois
For State Senate
District 18

Paid for by the Republican State
Majority Committee, Peter Duggan, Chairman

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