



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	
Kinzler for Congress and Raj P. Thakral in	)	MUR 7023
his official capacity as treasurer	)	
Illinois Families First and Kristin Kolehouse in	)	
her official capacity as treasurer	)	
Illinois Family Action	)	

**STATEMENT OF REASONS OF CHAIR CAROLINE C. HUNTER AND  
COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN**

In this matter, we voted to find no reason to believe that Illinois Family Action (“IFA”), a section 501(c)(4) organization, made a prohibited corporate contribution to a candidate in violation of 52 U.S.C. § 30118(a).<sup>1</sup>

The factual basis of the alleged violation was limited to IFA’s use of its own free Twitter account to tweet a link to a YouTube video produced by Kinzler for Congress, the principal campaign committee of congressional primary candidate Gordon (Jay) Kinzler.<sup>2</sup> The Complaint alleges that the source of the video could have been the Kinzler Committee’s non-public YouTube channel.

The Complaint posits that the Kinzler Committee and IFA coordinated IFA’s tweet republishing campaign material, resulting in a prohibited corporate contribution from IFA to the Kinzler Committee.<sup>3</sup> The Kinzler Committee, Kinzler, and IFA deny coordinating IFA’s tweet. The Kinzler Committee asserts it used social media to notify its supporters about the video after it was made public and encouraged them to share it.<sup>4</sup> Without determining whether or not IFA violated the Federal Election Campaign Act of 1971, as amended (“the Act”), the Office of General Counsel (“OGC”) recommended that the Commission dismiss the matter in an exercise of its prosecutorial discretion due to the likely *de minimis* amount IFA spent on its tweet “[e]ven

<sup>1</sup> Certification at ¶ 3, MUR 7023 (Kinzler for Congress, *et al.*) (Apr. 27, 2017).

<sup>2</sup> Compl. at 5-6, Attach. at 32.

<sup>3</sup> *Id.* at 5-6, Attach. at 35.

<sup>4</sup> Kinzler Committee Resp. at 2; Kinzler Aff. ¶ 8; IFA Resp. at 1.

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if IFA's tweeting of the link" to the Kinzler Committee's YouTube video could, as a matter of law, constitute republication of campaign materials.<sup>5</sup>

We disagreed with even the suggestion that IFA's tweet could constitute an in-kind contribution and therefore voted to find no reason to believe that IFA's tweet of a link to a campaign video violated the Act.

**I. IFA's Tweets Are Exempt From Regulation Under the Internet Freedom Rules Adopted in 2006 And Are Not Coordinated Communications**

Tweets of campaign videos are exempt from the definition of "public communication" under the Commission's 2006 rulemaking specifically addressing Internet political activity. Therefore, for the reasons set forth below, such tweets cannot qualify as coordinated communications.

The coordinated communications regulation, found at 11 C.F.R. § 109.21, governs the circumstances under which a person's expenditure for a communication republishing campaign material may be treated as an in-kind contribution to a candidate.<sup>6</sup> The content prongs relevant here expressly apply to "public communication[s]."<sup>7</sup> Internet communications, however, are not "public communications" unless they are published for a fee on another person's website.<sup>8</sup>

In drawing this rule, the Commission observed in its Explanation and Justification ("E&J") that "republication on the Internet is fundamentally different from republication in other contexts, such as if an individual were to pay to reprint a candidate's campaign literature."<sup>9</sup> The Commission further declared that the definition of "public communication" does not include "any content, including republished campaign material," that is not posted for a fee on another's

<sup>5</sup> First General Counsel's Report at 16, MUR 7023 (Kinzler for Congress, *et al.*) ("FGCR").

<sup>6</sup> Under the Commission's coordinated communications regulation, a communication is coordinated and thus an in-kind contribution when it satisfies a three-part test that consists of a payment prong, a content prong, and a conduct prong. 11 C.F.R. § 109.21(a), (b).

<sup>7</sup> 11 C.F.R. § 109.21(c)(2). In addition to public communications, "electioneering communications" may also satisfy the content prong of the coordinated communications rule at section 109.21(c)(1). The definition of electioneering communications, however, includes only "communication[s] that [are] publicly distributed by a television station, radio station, cable television system, or a satellite system," 11 C.F.R. § 100.29(b)(1), and thus a tweet cannot be an electioneering communication.

<sup>8</sup> 11 C.F.R. § 100.26. It is irrelevant whether a person pays staff or a vendor to help produce an Internet communication. Instead, the operative issue is whether one person pays another person to disseminate a communication on the second person's website. *See infra* at 5 n.21.

<sup>9</sup> Internet Communications, 71 Fed. Reg. 18,589, 18,600 (Apr. 12, 2006) ("Explanation and Justification" or "E&J").

website.<sup>10</sup> Accordingly, “a person’s republication of a candidate’s campaign materials on his or her own website, blog, or e-mail cannot constitute a ‘coordinated communication.’”<sup>11</sup>

Because IFA did not pay Twitter to tweet the link to the Kinzler Committee’s video, IFA’s tweet is not a communication placed for a fee on another person’s website. It therefore is not a “public communication” and does not satisfy the content prong of the coordinated communications test. Accordingly, IFA’s tweet cannot be a coordinated communication.

## II. The 2003 Republication Rule at 11 C.F.R. § 109.23 Does Not Countermand The Internet Freedom Rules Adopted in 2006

Some would advance an alternative approach in an effort to maintain regulatory authority over free tweets. The alternative approach would read the Commission’s republication provision at 11 C.F.R. § 109.23 in isolation from the Commission’s subsequent and more specific regulations that exempt free Internet communications from the definitions of “public communication,” “contribution,” and “expenditure.”<sup>12</sup> However, any such effort to assert Commission authority to punish tweets and other free Internet communications would suffer obvious substantive defects and raise fair notice concerns.

Generally, under section 109.23, the republication of campaign materials prepared by a federal candidate constitutes “a contribution . . . of the person making the expenditure.”<sup>13</sup> But, as explained above, the Commission expressly exempted the republication of campaign materials through free online dissemination from treatment as a coordinated expenditure, or contribution, in section 109.21. The Commission’s 2006 rationale when it revised the definition of “public communication” is probative here. By limiting the definition of “public communication” to materials posted for a fee on a third party’s website, the Commission precluded free Internet communications that republish campaign materials from being deemed in-kind contributions to candidates even when the republication is coordinated with the candidates.<sup>14</sup> The statement in the E&J, noted above, that “republication on the Internet is fundamentally different from republication in other contexts,”<sup>15</sup> thus memorialized the Commission’s definitive interpretation

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 11 C.F.R. §§ 100.94(b), 100.155(b); *see also* FGCR at 15-16.

<sup>13</sup> 11 C.F.R. § 109.23(a). We have previously noted the apparent discrepancy between the Act’s treatment of republication as an “expenditure” (52 U.S.C. § 30116(a)(7)(B)(iii)) and the Commission regulation’s treatment of republication as a “contribution.” *Compare* 52 U.S.C. § 30116(a)(7)(B)(iii), *with* 11 C.F.R. § 109.23. *See, e.g.*, Statement of Reasons of Vice Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 n.4, MURs 6603 (Ben Chandler for Congress, *et al.*), 6777 (Kirkpatrick for Arizona, *et al.*), 6801 (Senate Majority PAC, *et al.*), 6870 (American Crossroads, *et al.*) & 6902 (Al Franken for Senate 2014, *et al.*). We need not resolve that conflict here in order to conclude IFA’s tweet is exempt from regulation.

<sup>14</sup> Explanation and Justification at 18,600.

<sup>15</sup> *Id.* at 18,600.

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of how republication by means of the Internet (which is exempted from regulation) differs from traditional forms of republication.<sup>16</sup> To the extent there is any conflict, section 109.21 controls.

The exemption is further confirmed by reference to sections 100.94 and 100.155 of the Commission's 2006 regulations (known as "the Internet Exemption"). Those regulations expressly exempt from the definitions of "contribution" and "expenditure" the uncompensated Internet political activities of individuals and groups, such as IFA's tweet.<sup>17</sup> Thus, even if a tweet of a hyperlink exempted under section 109.21 could nevertheless fall within the scope of section 109.23, it would remain exempt from the definitions of contribution and expenditure under 100.94 and 100.155. In other words, because sections 100.94 and 100.155 exempt IFA's tweet from the definitions of "contribution" and "expenditure," the tweet cannot be a contribution under section 109.23.

The scope of Internet communications covered by sections 100.94 and 100.155 is comprehensive and readily includes the tweet here. The regulatory text itself exempts "[s]ending or forwarding electronic messages; providing a hyperlink or other direct access to another person's Web site; paying a nominal fee for the use of another person's Web site; and *any other form of communication distributed over the Internet.*"<sup>18</sup> The accompanying E&J explained that the final rule deregulated "e-mailing, including forwarding; linking, *including providing a link or hyperlink to a candidate's, authorized committee's or party committee's website.*"<sup>19</sup> Further, in anticipation of "future advances in technology," the Commission explained that sections 100.94 and 100.155 protect "any other form of Internet communication that is, or might be, used for

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<sup>16</sup> In addition to the textual and logical arguments, two canons of statutory construction inform our interpretation of section 109.23 in this context. First, when there is a conflict between a general provision (such as the regulation addressing republication of campaign materials generally, regardless of medium) and a specific provision (such as the regulations addressing Internet activities, including republication on the Internet), the specific provision is treated as an exception to the general one. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183-88 (2012). Second, rules promulgated later in time, such as the Internet Exemption and amendment of the "public communication" definition, supersede conflicting earlier rules, such as the general republication rule. *Id.* at 327-33.

<sup>17</sup> The exemption applies regardless of whether the person disseminating campaign information for free on the Internet is "acting independently or in coordination with any candidate, authorized committee, or political party committee." 11 C.F.R. §§ 100.94(a), 100.155(a); *see, e.g.*, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 4, MUR 6974 (Foundation for a Secure and Prosperous America) (agreeing with OGC's no-reason-to-believe recommendation on grounds that online videos, even if containing express advocacy, are exempt from Commission regulation); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 3-4, MUR 6729 (Checks and Balances for Economic Growth) (agreeing with OGC's no-reason-to-believe recommendation on grounds that the Internet Exemption applies to an organization's politically themed videos posted for free on the Internet).

<sup>18</sup> 11 C.F.R. §§ 100.94(b), 100.155(b).

<sup>19</sup> Explanation and Justification at 18,605.

political activity,” noting the list of activities exempted was merely an “illustrative, rather than an exhaustive, list[.]”<sup>20</sup>

The key issue is whether the group or individual compensates another person to disseminate the group’s or individual’s express advocacy online, like paid advertising, not whether the group or individual incurs costs to conduct the Internet activity.<sup>21</sup> But IFA neither received compensation for tweeting “a hyperlink . . . to another person’s Web site” nor paid Twitter to disseminate its online posts. Thus its tweet is exempted from the definitions of both “contribution” and “expenditure.”<sup>22</sup>

Moreover, if the Commission had intended to regulate under section 109.23 particular activity that it was specifically exempting in sections 109.21, 100.94 and 100.155, surely it would have said so explicitly. However, no such intent was ever expressed, either in the rule itself or the supporting explanations and justifications.<sup>23</sup> Consequently, such an approach would

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<sup>20</sup> *Id.*

<sup>21</sup> The Complaint also contends “[w]hether or not the Commission views the electronic distribution of campaign materials itself as an expenditure, we believe it must take into account the cost of staff time, office space, equipment usage, etc. required for IFA to undertake such activities.” Compl. at 6. The Commission considered whether to regulate production costs in the Internet Communication rulemaking. In response to a proposal to establish a threshold (*e.g.*, \$25,000) over which an individual’s costs to prepare materials for distribution on the Internet would be subject to the campaign finance laws, the Commission clarified that production costs are not regulated unless a communication is disseminated for a fee on another person’s website. *See Democracy 21*, Campaign Legal Center and Center for Responsive Politics, Comment on Notice of 2005-10: Internet Communications at n.10, 16 (June 3, 2005); Explanation and Justification at 18,597 (addressing costs of producing videos and other content for Internet communications). Indeed, the exemption would be meaningless if we were to scrutinize and regulate the component costs of an exempt communication or otherwise limit the exemption to only the negligible costs of a communication’s Internet distribution. For covered activities, the Internet Exemption applies to “uncompensated personal services related to such Internet activities” and “equipment or services . . . regardless of who owns the equipment and services,” including but “not limited to: Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet.” 11 C.F.R. § 100.94 (a)(1)-(2), (c).

<sup>22</sup> *See Concurring Statement of Commissioner Lee E. Goodman at 2-3, MUR 6849 (Kansans for Tjahrt, et al.)* (“[F]ree use of the Twitter communication platform to re-tweet campaign materials clearly falls within the regulatory exemptions. . . . both as a matter of black letter law and established regulatory practice, an individual’s or group’s re-dissemination of campaign materials using Internet-based communication tools such as Twitter, links, emails, and website postings are not contributions or expenditures regulated by the Commission.”).

<sup>23</sup> Former Chairman Thomas, former Commissioner Toner, and Commissioner Weintraub revealed no such intent in Congressional testimony given during the midst of the Commission’s rulemaking process. Indeed, statements made by certain Commissioners contemplated the very fact pattern at issue and deemed section 109.23 inapplicable. *See Political Speech on the Internet: Should it be Regulated?: Hearing Before the H. Comm. on House Administration, 109th Cong. 34 (2005)* (statement of Ellen L. Weintraub, Comm’r, FEC) (“[O]n the republication of campaign materials, which is generally covered under the law and is regulated. On the internet it takes on a whole different character . . . [W]hatever our rules are in other contexts for republishing campaign materials, [] they would not apply in the same way to linking and forwarding and cutting and pasting online.”). This position on internet republication is consistent with BCRA co-sponsor Senator Russ Feingold’s view that “linking campaign Web sites, quoting from, or republishing campaign materials and even providing a link for donations to a candidate, if done without compensation, should not cause a blogger to be deemed to have made a contribution to a campaign

create an internal conflict in the Commission's rules, subjecting to regulation any unsuspecting person who uses a free Twitter account to send a link to a campaign video.

It is impossible to reconcile the broad protection afforded by the Internet Exemption and the Commission's explicit recognition of its application to the online republication of campaign materials<sup>24</sup> with a theory that the republication rule at section 109.23 countermands the Internet Exemption with respect to online republications.<sup>25</sup> Accordingly, by the basic rules of logic, because IFA's tweet is exempt from the definition of public communication under section 109.21 and exempt from the definition of contribution and expenditure under sections 100.94 and 100.155, the tweet cannot be considered a contribution under section 109.23.

\* \* \*

In sum, considering the statutory, regulatory, and policy backdrop set forth above, we could not interpret our regulations to conclude that IFA made a contribution to the Kinzler Committee merely by tweeting a link to a Kinzler Committee YouTube video. Our colleagues disagreed with our conclusion that IFA's tweet is exempt from regulation and instead voted for a draft Factual and Legal Analysis that implied IFA's tweet might constitute an in-kind contribution, but dismissed the violation merely because the tweet's value was likely *de minimis*.<sup>26</sup> We fundamentally disagree with our colleagues' legal interpretation because, in contravention of the Commission's 2006 Internet Exemption, it would erroneously leave free postings on the Internet subject to Commission regulation based on case-by-case judgments of what does or does not constitute *de minimis* value.<sup>27</sup>

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or trigger reporting requirements." Explanation and Justification at 18,600 (quoting Senator Russ Feingold, *Blogs Don't Need Big Government* (Mar. 10, 2005), <http://www.mydd.com/story/2005/3/10/112323/534> (last visited Mar. 24, 2006)).

<sup>24</sup> See *supra* Section I.

<sup>25</sup> *Id.*; see also Explanation and Justification at 18,604 (confirming that, "[u]nder the final rules at 11 CFR 100.94 and 100.155, individuals are free to republish materials using the Internet without making a contribution or expenditure").

<sup>26</sup> The video's URL was apparently copied at no charge from the Committee's YouTube channel, and the costs associated with the tweet were likely little or nothing. See, e.g., Factual and Legal Analysis at 5, MUR 6795 (CREW) ("[I]t does not appear that the costs of posting press releases on CREW's website and sending a mass email would have triggered the \$250 independent reporting threshold"); Statement of Reasons of Chairman Scott Thomas, Vice Chairman Michael Toner, Commissioner Danny McDonald, Commissioner Ellen Weintraub at 2, MUR 5523 (Local 12 United Assoc. Plumbers) ("[T]he expenditures associated with these express advocacy and solicitation website communications were negligible."); Explanation and Justification at 18,596 ("[T]here is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients."). We agree that even if IFA's tweeting of the link to the Committee's YouTube video could constitute contributions (as dissemination, distribution, or republication of campaign materials by operation of 11 C.F.R. § 109.23), the costs were likely *de minimis* and the allegation should be dismissed pursuant to our prosecutorial discretion.

<sup>27</sup> Our disagreement with our colleagues' efforts to regulate and restrict free speech by American citizens on the Internet continues. See Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C.

Furthermore, when the Commission adopted the Internet Exemption in 2006, it largely freed independent political discourse on the Internet from the threat of federal investigation and punishment. The Commission notified the public through that rulemaking of the comprehensive scope of the freedom it was protecting. The public has the right to rely on the Commission's clear statements published in the *Federal Register* as to how it will interpret and apply its regulations and the right to clear rules regulating First Amendment activity.<sup>28</sup> The need for clarity and consistency is even more acute in the Commission's enforcement process, when the agency relies on its interpretation of its regulations to punish First Amendment activity.<sup>29</sup>

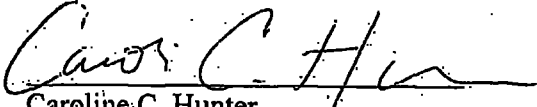
In our view, dismissing this matter as an exercise of our prosecutorial discretion rather than as a matter of law in an effort to preserve the Commission's claim to legal authority to regulate and punish certain online political activity under a strained (and previously unacknowledged) regulatory theory would chill clearly protected political speech, raise serious fair notice concerns, and ultimately prove untenable. For these reasons, we voted to find no reason to believe that IFA made a prohibited corporate contribution when it tweeted a hyperlink to a federal candidate's campaign video.

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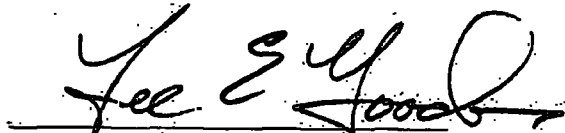
Hunter and Matthew S. Petersen, MUR 6729 (Checks and Balances for Economic Growth); Statement of Reasons of Vice Chair Ann M. Ravel, MUR 6729 (Checks and Balances for Economic Growth).

<sup>28</sup> See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”); *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“Proliferous laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”) (citing *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (“[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”) (internal quotations omitted)).

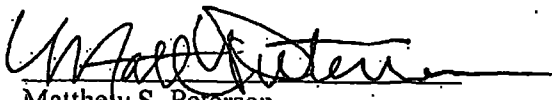
<sup>29</sup> See *FCC v. Fox Television Stations, Inc.*, 567 U.S. at 254-55 (“The [FCC’s] lack of notice to Fox and ABC that its interpretation had changed so . . . their broadcasts were a violation of [the statute] as interpreted and enforced by the agency ‘fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.’ This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to . . . regulations that touch upon sensitive areas of basic First Amendment freedoms.”) (citations omitted); *CBS Corp. v. FCC*, 663 F.3d 122, 152 (3d Cir. 2011) (vacating FCC’s order finding CBS liable for a forfeiture penalty as a result of “arbitrarily and capriciously depart[ing] from its prior policy”); see also *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1144 (10th Cir. 2010) (“[E]ven if Congress repealed the APA tomorrow, the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice. . . . And it pertains when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action.”) (citations omitted).

  
Caroline C. Hunter  
Chair

1/23/18  
Date

  
Lee E. Goodman  
Commissioner

Jan. 23, 2018  
Date

  
Matthew S. Petersen  
Commissioner

Jan. 23, 2018  
Date

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