



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
New Summit Republicans) MUR 5974

STATEMENT OF REASONS
Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN

I. INTRODUCTION

This matter arose from a complaint alleging that the New Summit Republicans (“NSR”) distributed a brochure expressly advocating the defeat of a Federal candidate, and that, in doing so, violated the Federal Election Campaign Act of 1971, as amended (“the Act”) by failing to (i) report the brochure as an independent expenditure and (ii) include an adequate disclaimer.

On March 4, 2009, the Commission voted unanimously to reject the recommendation of the Office of General Counsel (“OGC”) to find reason to believe that NSR violated the Act. For the reasons set forth in our joint Statement of Reasons, we joined with our colleagues in voting to dismiss this matter. However, we write separately to explain why this brochure did not contain express advocacy and, therefore, was not an independent expenditure.

II. DISCUSSION

A. Factual Background

The Summit County Republican Central Committee (or “Summit County Republican Party”), a local political party committee, is comprised of Republicans elected in each of the precincts in Summit County, Ohio. The complaint in this matter was brought by the Executive Director of the Summit County Republican Party.¹ NSR consists of candidates for and members of the Summit County Republican Party.² One of NSR’s stated goals is to influence the election of the leadership of the Summit County Republican Party.³ Members of the Summit County Republican Party are elected on the

¹ See Response at 2.

² See NSR Website at <http://www.newsummitrepublicans.com/about>.

³ *Id.*

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same date as the Republican primary election held during even numbered years. On March 4, 2008, the Summit County Republican Party held its regularly scheduled leadership election.

One side of the brochure at issue contains two photographs of then-Senator and presidential candidate Hillary Clinton (one of which shows her laughing) and the statements "Stop her laughing!" and "We can beat her if we are united. But..." The other side of the brochure features the headline, "Summit County Needs A New GOP Chairman!" and includes a picture of the incumbent Chairman of the Summit County Republican Party, Alex Arshinkoff, next to a photo of Ronald Reagan. The text reads as follows:

Current Republican Chairman Alex Arshinkoff has been spending too much of the party's money on himself and not enough on winning elections.

The Result? The party is divided, badly in debt, and has a record of 8 wins and 44 losses since 2002.

Examples of the chairman's extravagant spending:

- Paying over \$900/month to lease Arshinkoff's Cadillac Escalade.
- Buying Arshinkoff \$6,683.97 worth of meals at a posh downtown restaurant in 2006.
- Paying for Arshinkoff's \$5,007.89 tab at Portage Country Club.
- Lavishing well over \$600,000 for the county headquarters, payroll, and administrative operations, such as car washes, detailing and custom drapery.

That's money that should be spent beating Democrats and electing Republicans.

HOW YOU CAN HELP

Stand with us and **join the Republican Central Committee** where you can vote to remove Alex Arshinkoff and elect a **NEW** party chairman!

This committee sets the party's rules and elects the party leaders. We are working to win a majority of that committee so we can:

- Elect a **NEW** party chairman
- Clean up the party's finances
- Recruit qualified candidates to run for office
- Offer more and better services to candidates and officeholders
- Implement tight fiscal controls so donor money isn't squandered
- Involve more people in the party
- **WIN ELECTIONS!**

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We need candidates for Central Committee! There is no time commitment to run or serve! Send in this postcard and help make the Summit County Republican Party a winner again!⁴

In its response to the complaint, NSR acknowledges having produced the brochure, but contends that the brochure did not contain express advocacy. According to information provided to us by OGC, the brochure was produced and distributed in late 2007 and was mailed only to registered Republicans.

B. Analysis

This matter, like others that have come before and been rejected by the Commission,⁵ appears to be an attempt by a complainant to bring a federal agency's resources to bear on a local party committee's intra-party leadership contest. The complainant attempts to achieve this by asserting that the NSR brochure constituted an independent expenditure and lacked certain required disclaimers. We disagree.

"Independent expenditure" is defined by the Act as:

an expenditure by a person (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.⁶

Thus, to be an independent expenditure, a communication must "expressly advocat[e] the election or defeat of a federal candidate." Commission regulations define "expressly advocating" as:

[A]ny communication that

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper

⁴ Complaint, attachment.

⁵ See, e.g., MUR 6029 (Adkin) (complaint alleged letter sent by local party official challenging credentials for a district convention lacked requisite federal disclaimers). See generally MURs 5977 and 6005 (American Leadership Project) for a general example of an intraparty rivalry spilling over into a complaint filed with the Commission.

⁶ 2 U.S.C. § 431(17). The term "candidate" means an individual who seeks Federal office. 2 U.S.C. § 431(2).

stickers, advertisements, etc. which say “Nixon's the One,” “Carter '76,” “Reagan/Bush” or “Mondale!”; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.⁷

Contrary to the ultimate conclusion recommended by OGC, the brochure does not contain express advocacy regarding a Federal candidate under either section 100.22(a) or (b). With respect to subsection (a), the brochure does not contain any of the regulation’s enumerated so-called “magic word” phrases. Nor does the brochure constitute express advocacy under the standard set forth in *FEC v. Massachusetts Citizens for Life (“MCFL”)*.⁸ Finally, there are no campaign slogans or similar individual words that only can be reasonably understood as admonitions to vote for or against a particular federal candidate. Therefore, the brochure does not contain express advocacy under section 100.22(a).⁹

It has been suggested that the brochure comes within the reach of both subparts (a) and (b), however, because it contains a picture of then-Senator Hillary Clinton of New York, accompanied by the phrase “we can beat her.” We find such arguments unpersuasive, because to make this claim requires reading a small portion of the brochure (and worse, only a portion of one sentence) in isolation, and devoid of any context. But subpart (a), by its own language, expressly contemplates an analysis done “in context.” And subpart (b), which contains the reasonable person test,¹⁰ also requires that a

⁷ 11 C.F.R. 100.22. Because our conclusion is based upon the regulation on its face, we need not address either the enforceability or constitutionality of subsection (b). See generally *infra* note 10.

⁸ 479 U.S. 238, 243 (1986). In *MCFL*, the Supreme Court held that a mail piece which purported to provide “everything you need to know to vote pro-life,” and expressly stated “vote pro-life” accompanied by photos of candidates identified as supporting a pro-life position, constituted express advocacy.

⁹ We agree with OGC that the brochure did not reference Senator Clinton by name and did not contain any of the so-called “magic words” listed in section 100.22(a). However, we disagree with OGC’s claim that because it could not see a way to read the brochure other than as express advocacy regarding Senator Clinton, it was express advocacy under subpart (a).

¹⁰ The reasonable person test in section 100.22(b) has been held to be unconstitutional by a number of courts. See, e.g., *Virginia Society for Human Life, Inc. v. FEC (“VSHL”)*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Committee, Inc. v. FEC (“MRLC”)*, 914 F. Supp. 8 (D. Me.), *aff’d per curiam*, 98 F.3d 1 (1st Cir. 1996). It has also been the subject of extensive criticism by a number of prior FEC Commissioners. See, e.g., MUR 5874 (Gun Owners of America, Inc.), Statement of Reasons of Vice Chairman David Mason; MUR 5154 (Sierra Club, Inc.), Statement of Reasons of Vice Chairman Bradley Smith and Commissioners David Mason and Michael Toner; MUR 5024R (Council for Good Government), Statement of Reasons of Commissioner Bradley Smith; and MUR 4922 (Illinois Suburban O’Hare Commission), Statement of Reasons of Commissioners David Mason and Bradley Smith. See also

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communication be read in context, *i.e.*, read “as a whole and with limited reference to external events.” Under these standards, the NSR brochure reasonably can be read to advocate the defeat of a non-federal candidate for a county party chairman’s race, and that the only electoral appeal relates to that local chairmanship race, not to the presidential election, as alleged in the complaint.

Specifically, NSR sought to oust the incumbent Chairman of the Summit County Republican Party, Alex Arshinkoff. Its brochure alleges that Arshinkoff was “spending too much of the party’s money on himself, and not enough on winning elections,” and specifically urges readers to elect a new party chairman. Thus, even though we think that the local party chairman’s race is the most, and perhaps only, reasonable reading of the brochure, certainly for the purpose of section 100.22(b) reasonable minds can differ as to whether it encourages action to elect or defeat a federal candidate.

The mere fact that Hillary Clinton was referenced in the brochure is not enough to transform an ad for which an alternative meaning exists into express advocacy – to hold otherwise would impermissibly reduce the concept of express advocacy to a mere reference standard.¹¹ Political party committees frequently invoke the names of prominent political figures, including Federal candidates and officeholders. The parties may pull such names, whether historical or present-day, from within their own party or from opposing parties to make a point about where the parties stand on issues or their governing philosophies, or to lend support to another candidate, such as a contender for state or local office. Communications that merely reference high-profile politicians in such manner (often in jurisdictions or at times where such politicians are not even up for election) do not, by themselves, amount to express advocacy.

MUR 4922, First General Counsel Report at 5, n. 5 (Recognizing that “[t]wo appellate courts have determined that part (b) of [11 C.F.R. 100.22] is invalid” (citing the decision of the First Circuit in *MRLC*, 98 F.3d 1, and *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997)), that “[o]n September 22, 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits,” and that “[i]n January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. 100.22(b) anywhere in the country” (citing *VSHL*, 83 F. Supp.2d 668 (E.D. Va. 2000))); *Id.*, Statement of Reasons of Chairman Darryl Wold (“The conclusion I reached that the existence of express advocacy rests on paragraph (b) of our regulation at § 100.22 is also a significant factor that weighs heavily against proceeding.”).

¹¹ See *Buckley v. Valeo*, 424 U.S. 1, 44, n. 52 (1976) (narrowing the definition of “expenditure” to “communications containing express words of advocacy such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject’”); see also *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that electioneering communications, which were defined by statute to mean, *inter alia*, certain communications that merely referenced a federal candidate, can be regulated only to the extent that they are the functional equivalent of express advocacy); *FEC v. Wisconsin Right to Life (“WRTL”)*, 127 S. Ct. 2652 (2007) (applying *McConnell*, and holding that the ads at issue, which referenced a federal candidate, were not the functional equivalent of express advocacy). Cf. MUR 5024R (Council for Good Government), General Counsel’s Report #2, at 9 (misreading *McConnell* to mean that communications falling within the statutory definition of electioneering communications are the functional equivalent of express advocacy).

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In this matter, the NSR brochure as a whole no more constituted a call to vote against Hillary Clinton for president than it was a call to vote for Ronald Reagan. Rather, Clinton's image appears to be used to symbolize generally politicians or policies that NSR is against, just as Reagan's image appears to symbolize either fiscal responsibility (a stated theme of the anti-Arshinkoff campaign), or the type of Republican NSR would like as its leader. Both Clinton and Reagan, therefore, appear in the ad as symbols that are meant to evoke specific emotions and memories in the minds of the recipients, not in any personal capacity as a candidate.

Moreover, at the time the mailer was sent, Hillary Clinton was a candidate for the Democratic presidential nomination, not for the Summit County Republican Party chairmanship. The brochure appears to have been sent only to registered Republicans in Summit County. Although the Summit County Republican Party leadership election was held on the same day as the Democratic (and Republican) presidential primary election, Ohio has a "closed primary" system (only registered party members who have declared their party affiliation may participate). Hence, the brochure was not sent to voters who were eligible to vote in the election in which Hillary Clinton was a candidate. In fact, as registered members of the Republican party, the recipients of the brochure were ineligible to vote in the only Ohio election in which Senator Clinton was actually a candidate at the time the brochure was sent (*i.e.*, the Democratic primary).

That recipients of the brochure could have perhaps voted against Senator Clinton eventually is too attenuated, and relies on several contingencies that did not come to pass. Obviously, Senator Clinton might have won the Democratic primary, thereby perhaps creating an opportunity for Summit County Republican voters to vote against her in the general election eight months later. It strains credulity, though, to believe that, notwithstanding the brochure's clear electoral message against the incumbent Summit County Republican Party chairman in a local party leadership election, the brochure was actually advocating the defeat of Senator Clinton in an election eight months later.¹² After all, when the brochure was mailed, Senator Clinton was not even certain to be a candidate in the November general election.

Clearly, the brochure could be reasonably interpreted as something other than an appeal to vote against Hillary Clinton in November: the brochure specifically urged the election of a new chairman of the Summit County Republicans in March, and did not on its face concern an election in which Senator Clinton was participating. The mere presence of the photo of a Federal candidate and a stray phrase plucked out of context cannot, by themselves, transform the brochure into express advocacy against Senator Clinton. After all, words that may constitute express advocacy subject to regulation in one context may not constitute express advocacy subject to regulation in another. Similarly, because the NSR brochure does not contain express advocacy under section

¹² Although we need not reach the issue of how close is too close, eight months is certainly too long a time period to be considered in "proximity to the election" as contemplated by section 100.22(b).

100.22(b), it would make no sense to then claim it constitutes express advocacy under the more narrowly tailored section 100.22(a).¹³

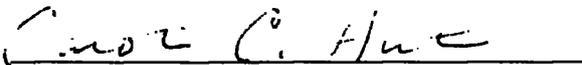
III. CONCLUSION

The plain content of the NSR brochure, and the fact that it was sent only to registered Republicans (who were ineligible to vote in the Democratic presidential primary), demonstrate convincingly that NSR's communication was limited only to advocacy in a race for a local party committee chairmanship. Thus, the brochure did not contain "express advocacy" within the meaning of the Act and, furthermore, did not constitute an independent expenditure requiring a disclaimer. Accordingly, the brochure is beyond the reach of the Commission's jurisdiction. For these reasons, in addition to the reasons set forth in the joint Statement, we voted to dismiss this matter.

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MATTHEW S. PETERSEN
Vice Chairman

5/29/09
Date


CAROLINE C. HUNTER
Commissioner

5/29/09
Date


DONALD F. McGAHN II
Commissioner

5/29/09
Date

¹³ Few would argue that "magic words" contained in a news article, commentary, educational setting, or in connection with parody would be within the regulatory reach of the regulations. *But see* Transcript of Oral Argument at 29-31, *Citizens United v. FEC*, No. 08-205 (S. Ct. argued Mar. 24, 2009) (when asked by Chief Justice Roberts "If it's a 500-page book, and at the end it says, and so vote for X, the government could ban that?" the Deputy Solicitor General replied, "we [the government] could prohibit the publication of the book.").