



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Education Finance Reform Group,)	MUR 5996
Tim Bee for Congress, and)	
David Katsel, in his official capacity)	
as Treasurer)	

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

We agreed with the outcome in this matter but write separately to explain our reasons for dismissing the coordination allegation, specifically with respect to whether the use of a “head shot” photo obtained from the candidate’s website constitutes the republication of campaign materials for purposes of satisfying the content prong at 11 C.F.R. § 109.21(c)(2). As explained below, we do not believe the republication of photographs from a candidate’s publicly available website, particularly “head shot” photos, constitutes republication of campaign materials for purposes of satisfying the content prong of the Commission’s coordination regulations.

I. BACKGROUND

In this matter, the Education Finance Reform Group (“EFRG”), an unincorporated association, paid for a television advertisement thanking State Senator Tim Bee for sponsoring Senate Bill 1488, a bill concerning a Teacher Performance Pay Program which EFRG supported. The bill had recently passed the state senate and, at the time the ad aired, was pending in two state house committees. State Senator Bee was, at the time, a candidate for the U.S. House of Representatives from Arizona’s 8th congressional district. The advertisement contained footage of Bee, as well as a “head shot” photo that appears to have been downloaded from Bee’s Federal campaign website and appeared for two seconds at the end of the 30 second advertisement.¹

¹ A full recitation of the facts can be found in the Factual and Legal Analysis adopted by the Commission.

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The Democratic Congressional Campaign Committee (“DCCC”) filed a complaint alleging that the ad was coordinated and, as such, the costs of the advertisement constituted a prohibited and excessive contribution from EFRG to Tim Bee for Congress. The Office of General Counsel (“OGC”) recommended that we exercise our prosecutorial discretion and dismiss the complaint because, *inter alia*, the photo was publicly available for download at no cost and appeared for a small portion of the advertisement; thus, any republication was *de minimis* in value.² We agreed that the complaint should be dismissed; however, we do not agree that the download and use of the photo by EFRG constituted republication of campaign materials for purposes of satisfying the content prong of the Commission’s coordination regulations.

II. LEGAL ANALYSIS

Under the Federal Election Campaign Act, as amended (“the Act”), an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents” constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). Under Commission regulations, a public communication is deemed coordinated and constitutes an in-kind contribution if the following three-prong test is satisfied: (1) the communication is paid for by someone other than a candidate, the candidate’s authorized committee or an agent of either; (2) the communication satisfies one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The content standard is satisfied if a communication “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee” unless it meets one of the exceptions at Section 109.23(b), which include: (1) if the materials are republished by the candidate who originally paid for the materials; (2) if the materials are republished in materials that advocate the defeat of the candidate who originally prepared them; (3) if the materials are republished as part of a news story, editorial or commentary exempted under 11 C.F.R. § 100.73 or 11 C.F.R. § 100.132; (4) if the materials “consist[] of a brief quote of materials that demonstrate a candidate’s position as part of the person’s expression of its own views;” or (5) if a national or state party pays for the republication as a coordinated expenditure under 11 C.F.R. § 109.32.

As cited in the Factual and Legal Analysis in this matter, the Commission has specifically addressed the republication of photos obtained from a candidate’s publicly available website in a previous matter, MUR 5743 (Betty Sutton for Congress/EMILY’s List). The facts of that matter are similar to these in that EMILY’s List downloaded photographs from the Betty Sutton for Congress publicly available website and republished those photos in a positive mail piece. As in this matter, OGC concluded that

² OGC also concluded the advertisement did not contain express advocacy as defined at 11 C.F.R. § 100.22(a) and (b).

the use of the photos constituted the republication of campaign materials for purposes of the content prong but recommended that the Commission exercise its prosecutorial discretion and dismiss the matter with respect to EMILY's List because of the difficulty in determining the *de minimis* value of any resulting in-kind contribution. The Commission voted 4-2 to accept OGC's recommendations—Commissioners Weintraub and von Spakovsky dissented, concluding that “[t]he downloading of a photograph from a candidate’s website that is open to the world, for incidental use in a large mailer that is designed, created and paid for by a political committee as part of an independent expenditure without any coordination with the candidate, does not constitute the ‘dissemination, distribution, or republication of candidate campaign materials.’”³ We agree.

The activity at issue here is not the type of “republication of campaign materials” contemplated by the Act and Commission regulations. The traditional type of republication involves the reprinting and dissemination of a candidate’s mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign’s message. In addition, reprinting and reproducing a brochure, mailer, or billboard typically has an ascertainable value.

Conversely, the download of a candidate’s photograph from his or her publicly available website, absent some additional content or message, is not enough to constitute republication of campaign materials. Almost all candidates have publicly available websites and many of them make photographs available for download at no charge by the public, press, and other entities.⁴ Indeed, the Commission now has concluded on two separate occasions that the value of a downloaded photograph as part of a communication that is not otherwise coordinated with the candidate or his or her authorized committee may be difficult to ascertain and in any event is probably *de minimis*.⁵

Here, it appears EFRG downloaded a “head shot” photo from the Tim Bee for Congress website and used it as an incidental portion of a television advertisement. The photograph did not convey any campaign content or message and there is no indication the advertisement was otherwise coordinated with Tim Bee or his authorized committee.

³ See MUR 5743 (Betty Sutton/EMILY’s List) Statement of Reasons of Commissioners Weintraub and von Spakovsky at 4-5.

⁴ In fact, the dissent in MUR 5743 points out that the extrapolation of the example from the 2003 Coordinated and Independent Expenditure Rulemaking for the proposition that the use of a candidate’s photograph would constitute republication was over-read. *Id.* at 4 (citing *Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 443 (Jan. 3, 2003)). Moreover, the Commission’s subsequent rulemaking on Internet Communications, in recognizing the evolving and unique nature of the Internet, took a deregulatory approach. For example, the use by an individual of a photograph from a candidate’s website that is made available for public download does not constitute republication. See *Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (April 12, 2006).

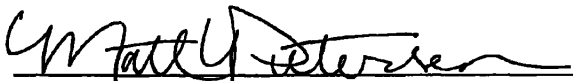
⁵ See MUR 5996 (EFRG/Tim Bee for Congress); see also MUR 5743 (Betty Sutton for Congress/EMILY’s List).

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Thus, we agree with Commissioners Weintraub and von Spakovsky that it makes no sense to conclude that the use of such a photograph, without any additional campaign message or content, and as part of "an otherwise permissible independent expenditure," constitutes republication and should be treated as an in-kind contribution.⁶

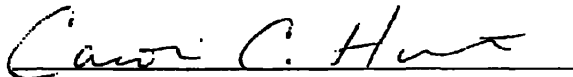
III. Conclusion

We would have found no reason to believe the respondents violated the Act in this matter, but since the result is essentially the same, we joined in the *Heckler v. Chaney* dismissal.⁷



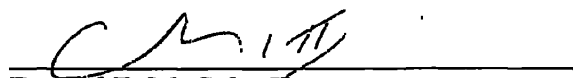
Matthew S. Petersen
Vice Chairman

12/3/09
Date



Caroline C. Hunter
Commissioner

12/3/09
Date



Donald F. McGahn II
Commissioner

12/3/09
Date

⁶ See MUR 5743 (Betty Sutton/EMILY's List) Statement of Reasons of Commissioners Weintraub and von Spakovsky at 4.

⁷ Certification dated October 20, 2009. Chairman Steven Walther, Vice-Chairman Matthew Petersen, Commissioners Cynthia Bauerly, Caroline Hunter and Donald McGahn voted affirmatively. Commissioner Ellen Weintraub was recused.

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