



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of
Kirby Hollingsworth, *et al.*

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MUR 6113

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

This matter arose from a complaint alleging that the campaign committee of Kirby Hollingsworth, a candidate for Texas State representative, violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by running advertisements that compared Hollingsworth and his opponent to candidates for President. Specifically, the ads at issue—run in a district where John McCain received more than 70 percent of the vote—compared Hollingsworth’s positions to those of John McCain and Sarah Palin, and contrasted that against his opponent’s support of Barack Obama.

According to the complaint in this matter, these ads were illegal under the Act because Hollingsworth’s committee paid for them with non-federal funds. Though state candidates frequently discuss the character and positions of federal candidates to help their own electoral prospects, the complaint nevertheless claimed that, because the ads allegedly “promoted, attacked, supported or opposed” (“PASO”) federal candidates, the Hollingsworth committee was required to pay for them with funds subject to the Act’s limitations, prohibitions, and reporting requirements. Moreover, the complaint alleged that these ads constituted expenditures under the Act because they expressly advocated the election of John McCain and Sarah Palin. Therefore, concluded the complaint, the ads were independent expenditures that activated disclosure and disclaimer obligations and caused the Hollingsworth committee to become a federal political committee subject to the Act’s registration and reporting requirements.

While the Office of General Counsel (“OGC”) did not recommend that the Commission find reason to believe that the Hollingsworth committee triggered federal political committee status,¹ it did recommend that the Commission find reason to believe that the state campaign committee should have (1) paid for the communications with federal funds; (2) disclosed the

¹ OGC recommended that the Commission find no reason to believe that Kirby Hollingsworth for State Representative failed to register and report as a political committee. MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel’s Report. We agreed with this recommendation, and for purposes of 2 U.S.C. § 437g(a)(8), for the reasons set forth in the First General Counsel’s Report.

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communications to the Commission as independent expenditures; and (3) included appropriate disclaimers on the communications. OGC further sought authorization from the Commission to “use compulsory process as to all Respondents ... including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.”²

As explained in greater detail below, we voted to reject the recommendations to find reason to believe that the Hollingsworth committee violated the Act.³ To begin, we disagreed that the communications at issue contained express advocacy and, thus, were independent expenditures requiring disclaimers. The regulatory definition of “express advocacy” cannot be stretched to cover communications that reasonably can be read as something other than advocating the election or defeat of a federal candidate. We also voted against finding reason to believe that these advertisements “PASOed” federal candidates and, consequently, could only be paid for with federal funds, because: (1) it does not appear that the law was intended to reach the type of ads at issue in this matter; (2) the question of what constitutes a “PASO” communication is unsettled as a matter of law; and (3) proceeding in this matter would raise constitutional issues that can otherwise be avoided.

I. BACKGROUND

In 2008, Kirby Hollingsworth was a candidate for the Texas House of Representatives in Texas’s Third District. The election proved to be very close, with Hollingsworth losing 51.8 percent to 48.2 percent. By contrast, the Presidential election results in the same district were not remotely close – Senator McCain and Governor Palin received more than 70 percent of the vote. In an effort to boost his chances of winning, Hollingsworth attempted to capitalize on the broad support for McCain/Palin in the district, and on then-Senator Obama’s relative unpopularity in the district, by associating himself with positions taken by McCain/Palin, while linking his opponent to Obama’s policies.⁴ Thus, the Hollingsworth committee sent a mail piece and produced a radio advertisement, both of which promoted Hollingsworth’s candidacy and criticized then-Senator Obama’s policies and his opponent’s support of them.

The mailer included a headline banner that read: “Kirby Hollingsworth and John McCain: Real Experience. Real Solutions. Both Are Ready to Lead.” In the upper left-hand quadrant was a photo of Hollingsworth, with this quote: “Northwest Texas is firmly behind John McCain and Sarah Palin – and so am I” – clearly attributed to Hollingsworth – along with the tagline: “Kirby Hollingsworth: Your conservative choice for State Representative.” Below that, on the bottom half of the front page, was a photo of Hollingsworth’s opponent with an inset of a photo of Barack Obama and the statement: “Barack Obama’s liberal policies are bad for America . . . And Mark Homer’s [Hollingsworth’s opponent] blind support for these policies are bad for Texas.” The back of the mailer read:

² MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel’s Report at 16.

³ MUR 6113 (Kirby Hollingsworth, *et al.*), Certification dated Sept. 1, 2009 and Nov.3, 2009.

⁴ MUR 6113 (Kirby Hollingsworth, *et al.*), Response at 1.

Mark Homer ‘urged Democrats to unite behind whoever is chosen as the party’s presidential candidate.’ This is not leadership. Northeast Texas deserves a leader... not a follower. Mark Homer’s blind support for Barack Obama shows that he puts his party first, over Northeast Texas... no matter what!! Barack Obama’s liberal policies are bad for America... And Mark Homer’s blind support for these policies are bad for Texas. Mark Homer... He’s Wrong for Texas.

Hollingsworth also ran a radio ad that compared his opponent’s support of then-Senator Obama with his own endorsement of McCain/Palin:

Do you support Barack Obama for President? Mark Homer does. As reported in the press, Homer told us to be behind Barack Obama. We know Mark Homer is behind Obama, but who’s behind Mark Homer? Official records show Homer is funded by lobbyists and Austin special interests. In Austin, Homer voted to give illegal aliens in-state tuition, and voted to allow illegal immigrants to get special health insurance coverage, leaving less for our kids. Had enough? Meet Kirby Hollingsworth, family man, business man, church leader. Kirby Hollingsworth opposes taxpayer handouts to illegal immigrants, wants less government, lower taxes, and more freedom. Kirby Hollingsworth stands up for the forgotten middle class, and speaks up for our conservative, east-Texas values. And Kirby Hollingsworth thinks Sarah Palin is the breath of fresh air we need. That’s why he proudly endorses the McCain-Palin team. Kirby Hollingsworth for State Representative. The conservative change we need. Political ad paid for by Kirby Hollingsworth for State Representative.

According to respondents, the Hollingsworth committee pulled the radio advertisement and ceased sending out the mailer when the allegations in the complaint arose.

II. DISCUSSION

A. Express Advocacy and Disclaimer

The claim that the advertisements in question constituted express advocacy is easy to dismiss. As we have stated previously, the Commission’s regulatory language at 11 C.F.R. § 100.22⁵ does not encompass all communications that make favorable or unfavorable references to federal candidates. Rather, under both subsections of section 100.22, a communication will be

⁵ This is assuming *arguendo* that the regulation is constitutional in its entirety. Portions of section 100.22—namely, subsection (b)—have been held unconstitutional by Federal courts that have considered the regulation on its merits. See, e.g., *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Maine), *aff’d per curiam*, 98 F.3d 1 (1st Cir.1996), *cert. denied*, 522 U.S. 810 (1997); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998) (finding “that 11 C.F.R. § 100.22(b)’s definition of ‘express advocacy’ is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United State Supreme Court”). States with statutes modeled after section 100.22(b) have not fared much better. See, e.g., *Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D.W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D.W.Va); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999).

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deemed express advocacy only if it contains a clear call to a specific electoral action—the election or defeat of a federal candidate—and cannot be reasonably interpreted to have any other meaning.

Such a call simply does not exist in these ads. OGC highlights numerous phrases from Hollingsworth’s mailer, but none urge the reader or listener to elect John McCain or defeat Barack Obama. Rather, they attempt to link Mr. Hollingsworth to John McCain in order to urge Mr. Hollingsworth’s election, not vice versa.⁶

Similarly, Hollingsworth’s radio ad, in which he links his opponent to Barack Obama and endorses John McCain, contains no call to vote for McCain or against Obama. While OGC argues that the phrase “conservative change we need” constitutes express advocacy,⁷ we disagree that it meets the definition. Because the phrase follows the slogan “Kirby Hollingsworth for State Representative,” the most (and perhaps only) reasonable reading of that phrase is that it refers to electing Hollingsworth, not McCain/Palin. And calling Sarah Palin “the breath of fresh air we need” is the reason Hollingsworth provides for endorsing the Republican presidential ticket; it does not, however, contain a call to vote for Palin and her running mate. Finally, nothing in 11 C.F.R. § 100.22 provides support for the proposition that a mere endorsement of a federal candidate constitutes express advocacy, without additional language urging the election of that candidate or the defeat of that candidate’s opponent.

As OGC noted in its report, “Hollingsworth’s ad and mailer are advocating that voters who are voting for McCain/Palin due to their conservatism and qualifications can find those same qualities in Hollingsworth and therefore should vote for him.”⁸ Thus, these ads can be interpreted in a manner other than advocating the election or defeat of a federal candidate—to wit, they are really only advocating Hollingsworth’s election to the Texas House of

⁶ OGC also argues that use of the phrase “Ready to Lead” “is a repetition of McCain’s presidential campaign slogan ‘Ready to Lead,’ and so expressly advocates for McCain’s election.” MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel’s Report at 10. However, the regulation itself defines express advocacy as, among other things, “campaign slogan(s) . . . , which in context can have no other reasonable meaning that to urge the election or defeat of one or more clearly identified candidate(s).” 11 CFR § 100.22(a). Therefore, it is not enough merely that a campaign slogan of a federal candidate is used; instead it must also have no other reasonable meaning than urging the election or defeat of a federal candidate. The tagline of the mailer is actually “Both are Ready to Lead,” which, even if one determines that this was McCain’s campaign slogan, clearly indicates that the slogan can also be read as urging the election of a non-federal candidate – *i.e.*, Hollingsworth. As such, use of this slogan cannot be express advocacy under Commission regulations. Similarly, touting both Hollingsworth’s and McCain’s “real experience and real solutions” can be read reasonably as providing reasons to support Hollingsworth.

⁷ MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel’s Report at 11.

⁸ MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel’s Report at 11. OGC also says that “the ad and mailer do not direct the listener/reader to take any action other than voting.” *Id.* at 11-12. This inverts the proper standard; a call to vote generally is not enough to meet the regulatory definition of express advocacy, and lack of a legislative call to action does not, by default, convert a communication to express advocacy. Nor does a call to vote for a state candidate fall within the Commission’s regulations. Rather, only a call to vote for or against a federal candidate or otherwise urge the election or defeat of a federal candidate constitutes express advocacy under the regulations.

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Representatives. Therefore, under the Commission's regulations, they are not express advocacy.⁹

Therefore, because the mailer and radio ads did not contain express advocacy, they were not required by the Act either to contain a disclaimer under 2 U.S.C. § 441d¹⁰ or to be reported as independent expenditures under 2 U.S.C. § 434(c) and (g).

B. Use of Non-Federal Funds for PASO Communications

In the Bipartisan Campaign Reform Act ("BCRA"), Congress included a provision prohibiting state and local candidates or officeholders (or their agents) from using non-federal funds for communications that refer to a clearly identified candidate for federal office and *promote, attack, support or oppose* that candidate.¹¹ While the provision was upheld facially, what specifically constitutes a PASO communication remains undeveloped.¹² The Commission has never defined the contours of what it means to "promote, attack, support or oppose" a clearly identified Federal candidate—though it may do so soon by way of regulation.¹³

⁹ See MUR 5974 (New Summit Republicans), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn (analyzing a non-federal candidate's campaign brochure which referenced a clearly identified federal candidate, and concluding that it did not contain express advocacy). OGC, by contrast, appears to misunderstand *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249-50 (1986) ("*MCFL*"), by reading it to hold "that a corporation's communication constituted express advocacy, despite the inclusion of issue speech"; therefore a communication can be both issue advocacy and express advocacy. MUR 6113 (Kirby Hollingsworth, *et al.*), First General Counsel's Report at 12. *MCFL* involved a mailer that linked candidates to the "pro-life" position and then urged voters to "Vote Pro-Life." Contrary to OGC's reading of the case, the Court specifically said that the mailer "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates." 479 U.S. at 250. In this case, there was no such call to vote for John McCain and Sarah Palin nor a call to vote against Barack Obama – only a call to vote for Kirby Hollingsworth and a call to vote against his opponent.

¹⁰ Individuals or entities that are not political committees under the Act are not subject to the disclaimer requirements unless the communications expressly advocate the election or defeat of a clearly identified candidate or solicit a contribution within the meaning of the Act. 2 U.S.C. § 441d(a).

¹¹ 2 U.S.C. § 441i(f).

¹² See MUR 6019 (Caserta) (the Commission dismissed a complaint alleging a State candidate used non-Federal funds in a communication that PASOed a Federal candidate). *Cf.* MUR 5714 (Montana State Democratic Central Committee) (in which the Commission found reason to believe that a State party committee used non-Federal funds in a communication that PASOed a Federal candidate). To our knowledge, MUR 5714 is the only enforcement matter involving PASO in which the Commission has found reason to believe. However, the Commission did not specifically explain its interpretation or definition of PASO in that matter. See also Coordinated Communications (Notice of Proposed Rulemaking), 74 Fed. Reg. 53893 (Oct. 21, 2009) (currently pending rulemaking, the NPRM for which sets forth two alternative definitions of PASO) [hereinafter "Coordinated Communications NPRM"].

¹³ See Coordinated Communications NPRM. Where, as here, the regulations impacting the underlying conduct are in flux, dismissal is especially warranted. See MUR 5491 (Jerry Falwell Ministries, Inc., *et al.*), Statement of Reasons of Chairman Scott Thomas, Vice Chairman Michael Toner, and Commissioners David Mason, Danny McDonald, Bradley Smith, and Ellen Weintraub at 2 (regarding an allegation about an electronic newsletter, raised at a time when the Commission was "considering in the rulemaking context" the extent to which Internet communications "ought to be regulated," the Commissioners explained that "it is not a good use of Commission resources to pursue through enforcement a point that may soon be overtaken by regulatory developments, particularly where the expenditure, if there was one, was likely to have been very small. The regulatory process will

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Indeed, the Commission has exercised its discretion to dismiss at least one matter that turned on the meaning of “promote, attack, support or oppose.” In MUR 6019 (Caserta), the Commission voted to dismiss a complaint alleging that the respondent, a state candidate, who produced a mailer that promoted the presidential candidacy of Barack Obama, impermissibly paid for it with non-federal funds.¹⁴ In that matter, the mailer was a two-sided campaign brochure, which contained an endorsement of the State candidate by the “precinct captain” of Barack Obama for President, and included the following language: “Dear Democratic Friend, *whether you support Barack Obama (as I do) or Hillary Clinton, there is one Democratic candidate we can all agree on: Dominic Caserta for State Assembly.*” The back of the brochure contained a signed letter from Caserta, stating that he had been endorsed by local leaders of the Barack Obama for President campaign and had spoken at a recent Hillary Clinton for President rally (a picture of Caserta with then-candidate Hillary Clinton appeared alongside the statement). Noting that “the available information indicates that the Caserta Committee may have intended to promote Caserta’s candidacy,” although the brochure may have also promoted the candidacies of Obama and Clinton, the Commission unanimously dismissed the matter.¹⁵

Though the PASO provision at issue could be read to cover the ads produced by the Hollingsworth committee, it does not appear that this provision was intended to capture these types of communications. One of BCRA’s principal authors, Senator Feingold, made clear that Congress did not intend for BCRA to restrict state candidates from advertising either endorsements or comparing their views with those of federal candidates but rather sought to prevent non-federal funds from being funneled through state and local candidate committees to finance federal campaign ads:

[I]t is not our intent to prohibit State candidates from spending non-Federal money to run advertisements that mention that they have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate,

provide an opportunity to set out a rule of general applicability based on a fuller record than any one enforcement matter can provide.”). *See also* MUR 5718 (Citizens for Giannoulis) (the Commission voted unanimously to approve an OGC recommendation to dismiss, as a matter of prosecutorial discretion, allegations that a respondent violated the coordinated communications regulations for activity that, although not protected under the regulations at the time, subsequently was protected by revised regulations).

¹⁴ MUR 6019 (Caserta), Factual and Legal Analysis (emphasis added); *Id.*, Certification dated Mar. 5, 2009.

¹⁵ *Id.* Similarly, the Commission has dismissed other technical violations that did not pose threats of actual or apparent corruption. Recently, for example, the Commission dismissed a complaint alleging that television and newspaper advertisements featuring U.S. House of Representatives Speaker Nancy Pelosi, which were created, produced and financed by a corporation, were impermissible coordinated communications. Even though all three of the coordinated communications prongs were arguably satisfied, the Commission exercised its prosecutorial discretion to dismiss the matter because, *inter alia*, any violation was, at most, technical in nature, and not the type of activity the law was intended to prohibit. MUR 6020 (Alliance for Climate Protection), Statement of Reasons of Chairman Steven Walther, Vice Chairman Matthew Petersen, and Commissioners Cynthia Bauerly, Caroline Hunter, and Donald McGahn; *Id.*, Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn. As in that matter, any violations here would be technical in nature with arguably even less actual or intended effect on a Federal election. Therefore, dismissal is appropriate.

regardless of whether the communication expressly advocates a vote for or against a candidate.¹⁶

* * *

The test for whether a communication is covered [by 2 U.S.C. §441i(f)] will be whether the advertisement supports or opposes the Federal candidate *rather than simply promoting the candidacy of the State candidate who is paying for the communication*. That will be up to the FEC to determine in the first instance, but I believe that State candidates will be able to fairly comply with this provision. All we are trying to prevent with this provision is the *laundering* of soft money through State campaigns for advertisements promoting, attacking, supporting or opposing Federal candidates.¹⁷

The materials in question are nothing more than typical state candidate campaign materials of the sort described by Senator Feingold, and thus were not intended to be covered. Specifically, the Hollingsworth ads can be interpreted as “simply promoting the candidacy of the State candidate.” This treatment of the Hollingsworth ads is consistent with Senator Feingold’s comment that the prohibition does not apply to a state candidate’s advertisement that publicizes a federal candidate’s endorsement. There is little meaningful distinction between that type of communication and an advertisement in which a state candidate associates him or herself with a federal candidate “simply [to] promot[e] the candidacy of the State candidate.” Merely mentioning or referencing a federal candidate in a state candidate advertisement is not sufficient to transform the promotion of the state candidacy into a PASO communication.

Furthermore, Senator Feingold’s statement suggests, the target of Section 441i(f) was the laundering of non-federal funds through state and local campaign committees. However, in this matter, there is no evidence that non-federal funds were being “laundered” through the Hollingsworth committee for the purpose of financing ads favorable to McCain and unfavorable to Obama. Moreover, there is no evidence to suggest that any of the referenced federal candidates (McCain, Palin, or Obama) knew anything about the advertisements.¹⁸ Nor is there

¹⁶ 148 Cong. Rec. S2143 (Mar. 20, 2002) (statement of Senator Feingold). OGC, in its recommendation to the Commission, argued that exceptions drawn to permit endorsing communications in previous advisory opinions (covering federal candidates’ endorsements of state candidates) and 11 C.F.R. § 109.21(g) (covering federal candidates’ endorsements of other federal candidates) do not apply to the situation in this case. OGC then appeared to assert broadly, however, that, based on Senator Feingold’s floor statement, the non-federal funds prohibition in section 441i(f) of the Act “was not intended to prohibit endorsing communications” generally (regardless of who the endorser and endorsee are), “so long as those advertisements do not support, attack, promote or oppose the Federal candidate.” See MUR 6113, First General Counsel’s Report at 6 n. 2 (internal citations omitted). It is unclear how OGC’s apparent interpretation of that floor statement squares with its ultimate view that Hollingsworth’s endorsement of McCain and Palin constituted PASO. Under OGC’s apparent view that “endorsing communications” are permitted unless they PASO a federal candidate, it is incongruous that a state candidate may endorse a federal candidate without PASOing him, but is automatically deemed to have PASO’d that federal candidate if the endorsement explains why, as was the case here. Regardless, if OGC is correct that there should be a line between “endorsing communications” that do not PASO and “endorsing communications” that do, such fine nuances should be clarified by rule rather than the enforcement process.

¹⁷ 148 Cong. Rec. S2143 (Mar. 20, 2002) (statement of Senator Feingold) (emphasis added).

¹⁸ *Davis v. FEC*, 128 S. Ct. 2759 (2008). Thus, this removes any threat of corruption or the appearance thereof, which is the only constitutionally permitted basis for the regulation of protected political speech.

evidence that the public suffered any harm or that the Hollingsworth committee acted in bad faith when it ran these ads. Again, in a district where it was a foregone conclusion that John McCain and Sarah Palin would prevail by lopsided margins,¹⁹ it is virtually inconceivable that Hollingsworth spent his funds to sway his potential constituents to vote for the presidential ticket rather than for the purpose of promoting his own state candidacy. Thus, the circumstances surrounding this matter support the Hollingsworth committee's assertion that the communications were designed to associate a state candidate with a federal candidate for the purpose of influencing a state election instead of the other way around. Given these facts, the communications at issue do not appear to involve the sort of "laundering soft money through State campaigns" that the PASO provision was designed to prohibit.²⁰ Consequently, we exercised our prosecutorial discretion in dismissing this matter.²¹

Even if this matter presents a "close call," as the Supreme Court has made clear, "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."²² This matter provides a fitting application of this rule (which, of course, is not just limited to matters involving the corporate electioneering communications at issue in that case). In *Wisconsin Right to Life*, the Court narrowed the scope of BCRA's "electioneering communications" provision—which previously had survived a facial challenge—by limiting its reach to ads "susceptible of no reasonable interpretation other than ... an appeal to vote for or against a specific candidate."²³ Thus, while the PASO provision at issue was facially upheld by

¹⁹ See Texas Legislature Online election results at: <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/house/dist3/r8.pdf>.

²⁰ The Supreme Court likewise suggested that such ads are beyond the scope of BCRA. In facially upholding the PASO standard, the majority in *McConnell* expressly disagreed with Justice Kennedy's concern that BCRA might prohibit a state-candidate ad stating: "Bush appointed [the state candidate] to be Alabama co-chairman of the George W. Bush for President Campaign." *McConnell*, 540 U.S. at 184, 317. This is instructive because Justice Kennedy's example informs potential voters both that (1) Bush appointed the state candidate to be a co-chairman of his local campaign operation and that (2) the state candidate supported Bush by agreeing to co-chair part of the reelection campaign (analogous to a state candidate endorsing a Federal candidate as in this matter). Thus, since both of these ideas together would not PASO a candidate, it is not clear how either of them standing alone would.

²¹ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). See also *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

²² *FEC v. Wis. Right to Life, Inc.*, ("WRTL I") 551 U.S. 449, 474 (2007).

²³ *WRTL II*, 551 U.S. at 470. BCRA's structure is instructive. It creates intermediate PASO restrictions regulating some speech and a more restrictive standard prohibiting corporate references of federal candidates in "electioneering communications." The Supreme Court upheld facially the ban on electioneering communication references, but clarified that those restrictions could only be applied to communications that were the functional equivalent of express advocacy. It would be an odd result if a corporation's electioneering communication was entitled to greater First Amendment protection than a state candidate's discussion of an issue of importance in his race under the facially less restrictive PASO regulations.

the Court,²⁴ we still must take care in how it is applied in order to avoid unnecessarily getting mired in constitutional thickets.²⁵

As the Court recognized:

The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.²⁶

The activities under the Commission's jurisdiction "differ in terms of their constitutional significance from those which are of concern to other Federal administrative agencies."²⁷ Accordingly, the Commission must be especially sensitive to the constitutional boundaries of its jurisdiction before proceeding with an enforcement matter.²⁸ In this matter, given the constitutional protections afforded political speech, coupled with questions about whether the PASO provision covered the communications at issue and the specific circumstances surrounding the state election here, the prudent course for the Commission is to exercise its discretion to dismiss the matter. As we have repeatedly explained, the enforcement process of the Commission is not the place to articulate new legal prohibitive norms.²⁹

²⁴ *McConnell v. FEC*, 540 U.S. 93, 170, n. 64 (2003) (Upholding the 'promote,' 'oppose,' 'attack,' and 'support' standard on its face).

²⁵ See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.")). See also *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). See also *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) for application of the principle in *DeBartolo* to FEC regulations and decision making.

²⁶ *WRTL II*, 551 U.S. at 467-68 (internal citations omitted).

²⁷ *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981).

²⁸ See *North Carolina Right to Life, Inc., v. Leake*, 525 F.3d 274 (4th Cir. 2008) (recognizing that "open-ended terms provide little *ex ante* guidance to political speakers as to whether their speech will be regulated," leaving speakers "to guess and wonder whether a regulator, applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable as electoral advocacy," which "simply guarantees that ordinary political speech will be chilled, the very speech that people use to express themselves on all sides of those issues about which they care most deeply.").

²⁹ 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 5878 (Pederson 2006), 5642 (George Soros), 5937 (Romney for President, Inc.), 5712 and 5799 (Senator John McCain), and Reports of the Audit Division of Missouri Democratic State Committee, *Agenda Document 08-36* (Dec. 4, 2008), and Friends of Weiner, *Agenda Document 09-26* (May 14, 2009).

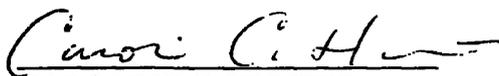
III. CONCLUSION

This matter involves a state candidate whose campaign committee paid for a mail piece and a radio advertisement that compared his positions to those of John McCain and Sarah Palin, and contrasted that with his opponent's support of Barack Obama. In other words, a state candidate spent funds to say that he identified himself with a named federal candidate and linked his opponent to another federal candidate—a campaign practice not intended to be curbed by the Act nor required by the Act to be paid with non-federal funds. Consequently, these communications reasonably could be read as urging the election of the state candidate himself—and thus did not constitute federal electoral advocacy—and do not appear to be the type of ads that the PASO provision was crafted to address. Accordingly, we rejected OGC's recommendations to find reason to believe that Kirby Hollingsworth's state campaign committee violated the Act.

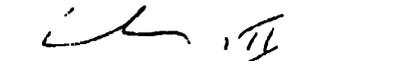
12/18/09
Date


MATTHEW S. PETERSEN
Vice-Chairman

12/18/09
Date


CAROLINE C. HUNTER
Commissioner

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Date


DONALD F. MCGAHN II
Commissioner

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