FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6346
Cornerstone Action, et al.	)	
	)	

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

In this matter, the General Counsel recommended that the Commission find reason to believe that Cornerstone Action, a New Hampshire-based 501(c)(4) organization, failed to file a 48-hour independent expenditure report for an advertisement attacking Bill Binnie, a candidate in the New Hampshire Republican Senate primary, in violation of Section 434(g)(2) of the Federal Election Campaign Act of 1971, as amended ("the Act"). We supported the recommendation to find reason to believe and supported the authorization of a very brief investigation to determine the cost of the advertisement, which attacked a candidate, contained an unmistakable and unambiguous reference to an election, and encouraged voters to vote against the candidate.[1]

Background

On August 4, 2010, Cornerstone Action began airing a television advertisement entitled "The Feeling is Mutual," which criticized Bill Binnie, a candidate for the Republican primary

[1] Chair Bauerly and Commissioners Walther and Weintraub voted in favor of a motion to approve the General Counsel's independent expenditure reporting recommendation. Vice Chair Hunter and Commissioners McGahn and Petersen dissented. Certification in MUR 6346, dated September 19, 2011.

The General Counsel also recommended that the Commission find no reason to believe that Cornerstone Action coordinated its expenditures with Friend of Kelly Ayotte, Kelly Ayotte's principal campaign committee for U.S. Senate in New Hampshire, for the same ad attacking Bill Binnie, one of Ms. Ayotte's Republican Senate primary opponents, in violation of 2 U.S.C. 441a and 441b. For the reasons set out in the report, the Commission, by a vote of 6-0, supported the recommendations to find no reason to believe that Cornerstone Action violated 2 U.S.C. § 441a(a) and 441b by making an excessive and prohibited in-kind contribution in the form of a coordinated communication and no reason to believe that the Ayotte Committee violated 2 U.S.C. §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind contribution. *See* First General Counsel's Report at 7-11. Certification in MUR 6346, dated September 19, 2011.

election for Senate in New Hampshire in 2010.[2] The advertisement included video clips of Binnie accompanied by various on-screen captions of his statements about policy issues. The advertisement was narrated by a voiceover with the following script:

> Bill Binnie portrays himself as a conservative. Truth is he's shockingly liberal. Binnie supports abortion to avoid the expense of disabled children. He's excited about imposing gay marriage on New Hampshire. He's praised key elements of Obama's healthcare bill. He's even said that he's open to imposing a European-styled value added tax on working families. With these shockingly liberal positions, it's no wonder Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual.

Cornerstone Action filed independent expenditure reports for other ads totaling $23,298 in August and September 2010, including $18,170.50 for a radio advertisement opposing Binnie and $5,127 for a newspaper advertisement opposing Binnie,[3] but no report was filed for the ad at issue in this matter. Cornerstone Action appears to have paid $125,000 to broadcast "The Feeling is Mutual."[4] The advertisement was first broadcast on August 4, 2010, 41 days prior to the Republican primary and was initially scheduled to run beyond the first airing.[5] The Commission does not have information regarding the actual dates the advertisement was aired.

Legal Analysis

Real-time reporting of independent expenditures in the days before an election has been integral to the Act for more than thirty years.[6] The Act has long required that persons making independent expenditures aggregating $1,000 or more *after* the 20th day, but more than 24 hours, before an election file a report with the Commission within 24 hours. 2 U.S.C. § 434(g)(1)(A). This requirement was upheld in *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976), where the Court noted that the purposes for this disclosure include: (1) furthering Congress's "effort to achieve 'total disclosure' by reaching 'every kind of political activity' to ensure that voters are fully informed;" (2) to "achieve through publicity the maximum deterrence to corruption and undue influence possible;" and (3) aiding the Commission in law enforcement, particularly in ensuring that limits on individual contributions to candidates are not circumvented. *Id.* at 76. In 2002,

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[2] *See* http://www.youtube.com/watch?v=Aq0tSsxtJA4 (last visited Oct. 4, 2011).

[3] *See* http://query.nictusa.com/pdf/469/10030414469/10030414469.pdf#navpanes=0, http://query.nictusa.com/pdf/PAPER/10991130573.pdf#navpanes=0.

[4] Sean Sullivan, "Binnie Under Fire from Conservative Group," *Hotline on Call*, August 5, 2010, *available at* http://hotlineoncall.nationaljournal.com/archives/2010/08/binnie_under_fi.php (last visited Oct. 4, 2011).

[5] *Id.*

[6] This reporting requirement was first enacted in 1976 for independent expenditures made after the fifteenth day prior to the election, 2 U.S.C. § 434(e)(2); Pub. L. No. 94-283, Title I, § 104, 90 Stat. 480 (1976), and was amended four years later to require reporting for expenditures made after the twentieth day prior to the election, 2 U.S.C. § 434(c)(2); Pub. L. No. 96-187, Title I, § 104, 93 Stat. 1348 (1980).

Congress expanded independent expenditure reporting to require that persons who make independent expenditures aggregating $10,000 or more up to and including the 20th day *before* an election file a report within 48 hours.[7]

The Act defines an independent expenditure as any expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert with a candidate, political party, or their respective agents. 2 U.S.C. § 431(17). The Commission has defined express advocacy in the regulations set forth at 11 C.F.R. § 100.22. Under Section 100.22(a):

> Expressly advocating means any 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 of 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 stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"

11 C.F.R. § 100.22(a) (emphasis added). Under Section 100.22(b), a communication contains express advocacy if:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, [it] 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.

11 C.F.R. § 100.22(b).

"The Feeling is Mutual" advertisement is an independent expenditure that should have been reported by Cornerstone Action because it expressly advocated the defeat of Bill Binnie and was made independently of a candidate or party.

This ad used individual words that in context can have no reasonable meaning other than to urge the defeat of Mr. Binnie in the upcoming Republican Senate primary. 11 C.F.R. § 100.22(a). The ad was exclusively about Binnie's views. It exaggerated and mocked the policy statements Binnie made in the context of his race in the Republican Senate primary. It

[7] 2 U.S.C. § 434(g)(2)(A), Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002).

labeled his positions as "shockingly liberal" and stated, "It's no wonder Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual." The ad was directed at New Hampshire Republicans, the only viewers who were eligible to vote in the election in which Binnie was on the ballot, and called for them to take an action, now. The only way that these Republican viewers could *tell* Binnie, a non-incumbent primary candidate, that "the feeling is mutual" – that the party does not like him – was to vote against him in the upcoming primary.

Section 100.22(a) express advocacy includes communications that contain "in effect an explicit directive" to vote for or against a candidate. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S 238, 249 (1986). For example, in MUR 5831 (Softer Voices), all six Commissioners found reason to believe that the advertisement at issue was express advocacy under both 11 C.F.R. §§ 100.22(a) and (b) where the advertisement depicted Senator Rick Santorum and his opponent Bob Casey, attacked Casey's qualifications while praising Santorum's, and concluded "[c]an we really risk Bob Casey learning on the job?" MUR 5831 Factual and Legal Analysis at 6-8. The Commission concluded that the ad exhorted viewers to defeat Casey because the only way the viewer could "risk Bob Casey learning on the job" would be by voting for him for the job of Senator. *Id.* at 8. Similarly, singling out New Hampshire Republicans before a Republican primary election and exhorting them to "tell Binnie the feeling is mutual," in context, can have no other reasonable meaning than to urge Binnie's defeat. Therefore, Cornerstone Action's "The Feeling is Mutual" advertisement contains express advocacy under 11 C.F.R. 100.22(a).

Cornerstone Action's "The Feeling is Mutual" advertisement is also express advocacy under 11 C.F.R. § 100.22(b). Our colleagues contend that the ad is not express advocacy because "reasonable minds" could determine that the advertisement did not encourage action to elect or defeat Binnie, but rather encouraged some other kind of action. But there is no credible alternative for what that call to action might be. The advertisement is all about Binnie, a non-incumbent primary candidate with no power to affect any legislative issue.

Forty-one days before the New Hampshire primary, Cornerstone Action began a six-figure media buy, urging New Hampshire Republicans to express their party's rejection of Bill Binnie: "Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual." The script of the advertisement and the context (the proximity to a Republican primary election) make it clear that the ad calls on New Hampshire Republicans to cast a vote against Binnie in the primary election.

Finally, even if the advertisement did not contain express advocacy, there would still be sufficient basis to authorize a limited investigation as the broadcast of the advertisement may have been an unreported electioneering communication. Broadcast advertisements that air thirty days before a primary election, refer to a clearly identified federal candidate, and are targeted to the relevant electorate are electioneering communications. 2 U.S.C. § 434(f)(3).[8] We know that the advertisement was first aired 41 days before the New Hampshire Republican primary and

[8] Any broadcast advertisement that contains express advocacy qualifies as an independent expenditure, and therefore is not an electioneering communication. *See* 2 U.S.C. § 434(f)(3)(B)(ii).

was scheduled to run beyond the first airing, but we do not know how long the advertisement actually aired. If the advertisement ran within 30 days of the primary election, it likely should have been reported as an electioneering communication.[9]

For these reasons, we voted to authorize a limited investigation to determine the cost and timing of the advertisement. Consistent with Congress and the Supreme Court, we ardently support full and complete reporting in a timely manner. In its decision in *Citizens United*, the Court stated that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[10] It is our belief that an investigation into this matter was necessary to ensure these goals are upheld.

10/21/11
Date

Cynthia L. Bauerly
Chair

10/20/11
Date

Steven T. Walther
Commissioner

10/20/11
Date

Ellen L. Weintraub
Commissioner

[9] Electioneering communications aggregating more than $10,000 in a calendar year are subject to disclosure requirements under the Act. 2 U.S.C. § 434(f).

[10] *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).