



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Unknown Respondents) MUR 6441
)

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

The complaint in this matter alleged that three political mailers distributed in the Fifth District of Virginia failed to include disclaimers required by the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations. The mailers praised independent candidate Jeffrey Clark for his position on taxes while describing his opponents' views unfavorably. If a political committee paid for these mailers, the Act requires that the mailers must include a disclaimer disclosing the identity of the funding committee.¹ Although the information available at this stage is not conclusive as to whether or not a political committee paid for the mailers, the facts before us present a sufficient basis to open a limited investigation to determine whether disclaimers were required.² Therefore, in accordance with the recommendation from the Office of General Counsel ("OGC"), we voted to authorize a limited investigation to determine their source.³

¹ The Act requires that whenever a political committee finances any communication through any mailing, the communication must clearly state that the communication has been paid for by such political committee. 2 U.S.C. § 441d(a). Such a communication would include a "mass mailing...or any other form of general public political advertising." 11 C.F.R. § 100.26.

² "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated. See *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, May 2012, available at http://www.fec.gov/em/respondent_guide.pdf. In fact, "reason to believe" determinations indicate only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred. See 72 F.R. 12545, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process* (March 16, 2007).

³ We voted to find reason to believe that one or more "unknown respondents" violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by failing to include the appropriate disclaimer information on its disseminated mailers and authorized a limited investigation. Chair Hunter and Commissioners McGahn and Petersen dissented. Thereafter, the Commission voted to close the file in this matter. Certification in MUR 6441, dated July 10, 2012.

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This is not the first time that this issue has divided the Commission. In another recent matter,⁴ the Commission did not have the four votes necessary to authorize a limited investigation to determine whether a set of anonymous mailers should have included a disclaimer.⁵ Commissioners Bauerly and Weintraub wrote a statement in that matter explaining the basis for their vote to authorize that limited investigation.⁶ Consistent with that statement, we write here to emphasize: 1) that an investigation would not infringe upon the rights of any speaker; and 2) that the constitutional argument advanced in support of avoiding this matter is not supported by the decisions of the Supreme Court.

In this case, a limited investigation would have consisted of OGC contacting the post office to determine who purchased the mailers' bulk mail permit and then the owner of the bulk mail permit to ask if political committee funds were used to pay for the mailers. If the answers to these limited inquiries revealed that no committee funds were used, the case would end there – leaving this person or entity who paid for the mailers completely anonymous to the public.⁷ That would be the extent of the investigation in a matter such as this one.

This investigation would not infringe upon the rights of the person or entity responsible for the mailers. We reject the notion that all speakers have an absolute entitlement to anonymity. A speaker's identity may be revealed to law enforcement officials for legitimate law enforcement purposes. Even speakers who wish to maintain their anonymity to protect themselves from "threats, harassment, or reprisals" must sometimes reveal their identity to a court in order to obtain an exemption from otherwise constitutionally valid laws.⁸

The constitutional argument advanced in support of avoiding this matter is not supported by the decisions of the Supreme Court. Although we do not dispute the holding of *McIntyre v. Ohio Elections Commission*,⁹ in which the Supreme Court held

⁴ MUR 6429 (Unknown Respondents).

⁵ Then-Chair Bauerly and Commissioner Weintraub voted to authorize a limited investigation. Then-Vice Chair Hunter and Commissioners McGahn and Petersen dissented. Certification in MUR 6429, dated April 26, 2011.

⁶ Statement of Reasons of Chair Bauerly and Commissioner Weintraub in MUR 6429, dated June 27, 2011, at 8-9, available at <http://eqs.nictusa.com/eqsdocsMUR/11044294151.pdf>.

⁷ Though the Act is ambiguous with regard to the confidentiality of investigatory files, see *AFL-CIO v. FEC*, 333 F.3d 168 at 174 (D.C. Cir. 2003), the Commission often redacts sensitive information from its reports. If the speaker(s) are permitted to make anonymous communications, the name(s) could be redacted in reports released to the public.

⁸ See *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

⁹ 514 U.S. 334 (1995).

that the state of Ohio could not impose an outright ban on anonymous leaflets,¹⁰ the underlying facts at issue here are very different. *McIntyre* involved a fine against an individual who personally prepared and hand-distributed leaflets at a public meeting urging attendees to vote against a local school tax levy.¹¹ Here, by contrast, the communications under consideration consist of at least 600 professionally produced mass mailers discussing the merits of Federal candidates. The disclaimer requirement applies only to mailings of 500 or more "substantially similar" communications.¹² Furthermore, because the communications do not contain express advocacy, a disclaimer would only be required if the mailers are financed by a political committee. The constitutionality of this limited disclaimer provision is not in doubt; the issue in this case is whether the Commission has the authority to conduct a limited investigation to determine whether the law's requirements have been satisfied.

This requirement dates back to the 1976 amendments to the Act.¹³ In 2002, nearly seven years after *McIntyre* was decided, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which expanded the list of communications required to include disclaimers.¹⁴ The broader disclaimer requirement included mailers and other communications by political committees.¹⁵ Subsequently, the plaintiffs in *McConnell v. FEC* challenged the constitutionality of this broader disclaimer requirement, focusing particularly on the addition of electioneering communications to the list of communications requiring a disclaimer.¹⁶ The Court rejected the plaintiffs' challenge,

¹⁰ We do note, however, that *McIntyre* was explicitly limited to the complete ban on anonymous speech at issue in that case. Justice Stevens noted that "a State's enforcement interest might justify a more limited identification requirement." *Id.* at 353. Justice Ginsburg, in her concurrence, went even further:

"In for a calf is not in for a cow... We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity. Appropriately leaving open matters not presented by *McIntyre*'s handbills, the Court recognizes that a State's interest in protecting an election process 'might justify a more limited identification requirement.'" *Id.* at 358.

¹¹ *McIntyre* acted on her own, "[e]xcept for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot." *McIntyre*, 514 U.S. at 337.

¹² A "mass mailing" means a mailing of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. 2 U.S.C. § 431(23). "Substantially similar" means communications that include substantially the same template or language, but vary in non-material respects. 11 C.F.R. § 100.27 and § 100.28. Each of the three mailers at issue in this case contained a separate bulk mail permit number, and the U.S. Postal Service requires at least 200 pieces of mail in order to use standard bulk mail. See <http://pe.usps.com/businessmail101/getstarted/bulkmail.htm>. Therefore, at least 600 mailers were sent out, more than necessary to meet the regulatory definition of "mass mailing."

¹³ See Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title 1, §112(2), 90 Stat. 49 (1976).

¹⁴ See BCRA, Pub. L. No. 107-155, Title III, § 311, 116 Stat. 105 (2002).

¹⁵ *Id.*

¹⁶ 540 U.S. 93, 230-31 (2003).

stating that the "inclusion of electioneering communications in [the Act's] disclosure regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing."¹⁷ Since *McConnell*, the Supreme Court has repeatedly upheld campaign finance laws that serve the interest of disclosure, including in *Citizens United*, where the Court stated that "effective disclosure" is what "enables the electorate to make informed decisions and give proper weight to different speakers and messages."¹⁸ Plainly, the Supreme Court does not view *McIntyre* as precluding the disclaimer requirements at issue here.

Congress has expressly given the Commission the task of enforcing Federal campaign finance laws including those requiring disclaimers; and both Congress and the courts have particularly emphasized the importance of laws that provide for disclosure of the identity of a speaker. Policing the line between those who are acting in accordance with the law and those who are not necessarily requires investigations to determine which side of the line a speaker is on. For these reasons, we voted in this matter to authorize an investigation to determine whether disclaimers were required.

8/15/12
Date

Ellen L. Weintraub *ELW*
Ellen L. Weintraub
Vice Chair

8/15/12
Date

Cynthia Bauerly *CB*
Cynthia L. Bauerly
Commissioner

8/15/12
Date

Steven T. Walther
Steven T. Walther
Commissioner

¹⁷ *Id* at 231 (quoting *Buckley v. Valeo*, 424 U.S. 1, 81 (1976)).

¹⁸ *Citizen's United v. FEC*, 558 U.S. ___, 138 S. Ct. 876, 916 (2010); see also *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811 (2010).

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