



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6684
Gregg for Indiana)
John Gregg)

**STATEMENT OF REASONS OF
CHAIRMAN LEE E. GOODMAN**

In this matter, the Commission was asked to consider whether an independent advertisement run by a state candidate in a gubernatorial race criticizing his opponent violated federal law.

The Complaint alleged that John Gregg, the Democratic candidate for governor in the State of Indiana, and his campaign committee, Gregg for Indiana (“the Respondents”), violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by using state campaign funds to pay for a television advertisement referenc[ing] a federal candidate.¹ The Response denied these allegations, asserting that the advertisement and its funding were permissible because the advertisement did not promote, attack, support, or oppose (“PASO”) a federal candidate.²

The advertisement in question was titled “Back and Forth.” The advertisement featured a series of alternating video clips of Gregg’s Republican challenger for governor, Mike Pence, and the Republican candidate for the U.S. Senate, Richard Murdoch.³ The clips replayed original statements made by Pence and Murdoch on specific issues, in their own words and without edits, and the clip of Murdoch did not exhort viewers to vote for him or against his federal opponent.⁴

The video clip of Murdoch was replayed without editorial commentary about Murdoch.⁵ Other than replaying video footage of Murdoch speaking, at no point did Gregg’s advertisement

¹ MUR 6684 (Gregg for Indiana), Complaint.

² MUR 6684 (Gregg for Indiana), Response.

³ See MUR 6684 (Gregg for Indiana), Complaint at 2 (*citing* <http://www.greggforgovernor.com/media/video>); see also MUR 6684 (Gregg for Indiana), First General Counsel’s Report at 3 (transcript of the advertisement in question).

⁴ *Id.*

⁵ *Id.*

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comment on Murdoch, express an editorial viewpoint on Murdoch, or exhort viewers to vote for or against Murdoch.⁶ After comparing video clips of Pence with Murdoch, the advertisement concluded with the tagline “You can stop the Tea Party with Governor John Gregg.”⁷

The Commission dismissed the matter on the grounds that even “[a]ssuming, *arguendo*, that the advertisement could be interpreted as opposing [the federal candidate] under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not exhort viewers to vote against [the federal candidate].”⁸ I voted for this rationale because I agree that the advertisement focused on the gubernatorial election and believe that this matter should be dismissed. I write separately, however, to express my view that the advertisement in question did not PASO a federal candidate and to raise concerns about the continuing constitutionality of restrictions on independent speech by state and local candidates.

A. “Back and Forth” Does Not Promote, Attack, Support, or Oppose a Federal Candidate

Under the Act, a “candidate for State or local office . . . may not spend any funds for a communication described in [2 U.S.C. § 431(20)(A)(iii)] unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”⁹ Section 431(20)(A)(iii) describes “a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office”¹⁰ Thus, the Act requires that any public communication sponsored by a state or local candidate that promotes, attacks, supports, or opposes a candidate for federal office be paid for with funds subject to the Act’s source and amount limitations.

It is not enough under the PASO standard merely to identify a federal candidate in a communication that focuses on a state election.¹¹ The PASO standard requires the presentation of the sponsor’s editorial viewpoint about the federal candidate. A state candidate’s presentation of historical video clips of a federal candidate in his own words without expressing any independent commentary by the state candidate about that federal candidate -- and moreover to

⁶ *Id.*

⁷ *Id.*

⁸ MUR 6684 (Gregg for Indiana), Factual & Legal Analysis at 6.

⁹ 2 U.S.C. § 441i(f)(1); *see also* 11 C.F.R. § 300.71.

¹⁰ 2 U.S.C. § 431(20)(A)(iii); *see also* 11 C.F.R. § 300.71.

¹¹ *See* MUR 6113 (Kirby Hollingsworth), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 7 (“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.”); *see also* MUR 6207 (Mark DeSaulnier), Statement of Reasons of Chairman Matthew S. Petersen, Vice-Chair Cynthia L. Bauerly, and Commissioners Caroline C. Hunter, Donald F. McGahn II, and Ellen L. Weintraub at 4-5; Advisory Opinion 2009-26 (Coulson) at 7; Advisory Opinion 2007-34 (Jackson) at 3; Advisory Opinion 2007-21 (Holt) at 4; Advisory Opinion 2003-25 (Weinzapfel) at 4.

express an explicit point about the state candidate's own election -- does not PASO the federal candidate. The fact that certain historical video clips of a federal candidate's remarks may have relevance to the state election and may be perceived by some viewers as flattering or unflattering of the federal candidate is not sufficient to constitute an editorial message about the federal candidate by the state candidate sponsoring the communication. "Back and Forth" presented raw original video of a federal candidate, without further commentary about the federal candidate, and expressed an explicit message about the two state candidates in a state election. Thus, "Back and Forth" did not promote, attack, support, or oppose any candidate for federal office.

An alternative approach would require the Commission to evaluate the subjective message and intent of such advertisements based upon viewer perceptions. In *Buckley v. Valeo*, the Supreme Court observed that restrictions that put speakers "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning . . . 'offer[] no security for free discussion.'"¹² The Court in *FEC v. Wisconsin Right to Life, Inc.* supported this view, holding that "the proper standard for [evaluating political speech] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."¹³ Accordingly, "[t]he Commission is reluctant to make these difficult subjective determinations if they can be avoided."¹⁴ I see no reason to abandon that reluctance here.

B. Section 441i(f) As Applied to State and Local Campaigns Is Constitutionally Dubious

I write also to observe that section 441i(f) is constitutionally dubious in light of *Citizens United v. FEC* and its progeny.¹⁵ *Citizens United* held that Congress cannot limit independent political speech without a compelling state interest, and that "[l]imits on independent expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption."¹⁶ By doing so, *Citizens United* and its progeny permitted individuals, organizations and corporations to make unlimited expenditures expressly advocating the election or defeat of federal candidates, and to make unlimited contributions to groups that make such expenditures.¹⁷ The only restriction on such expenditures is that they must be independent and that the Commission can require independent speakers to file expenditure-specific reports disclosing each expenditure.

¹² 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

¹³ 551 U.S. 449, 469 (2007) ("*WRTL*").

¹⁴ Explanation and Justification: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35300 (July 6, 1995).

¹⁵ 558 U.S. 310 (2010).

¹⁶ *Id.* at 357; see also *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (striking limitation on non-coordinated, independent expenditures by political parties).

¹⁷ See *id.*

Section 441i(f) imposes federal source and amount restrictions on state and local candidate committees -- as a class of speakers -- that PASO a candidate for federal office. It does not distinguish between coordinated communications and communications that are made independent of any federal candidate. Thus as with the challenged statute in *Citizens United*, "Congress has created [a] categorical ban[] on speech that [is] asymmetrical to preventing *quid pro quo* corruption."¹⁸ Accordingly, *Citizens United* raises serious constitutional doubt regarding the continuing validity of section 441i(f).

In *McConnell v. FEC*, the Court upheld section 441i(f)'s categorical restriction on state and local campaign committees, reasoning that Congress had but one sufficiently strong interest: preventing the circumvention of other contribution limits.¹⁹ The circumvention interest the Court identified in *McConnell* was a third-order consequence based on the following logic chain:

- Contributions to candidates pose a risk of *quid pro quo* corruption, therefore they may be limited;
- Once contributions directly to candidates were limited, would-be corruptors might turn to contributions to national parties to curry favor with federal candidates, thus all contributions to national parties could be limited;
- Once contributions to national parties were limited, would-be corruptors might turn to state and local political parties to corrupt federal officeholders, therefore contributions used for a broad category of federal election activity could be limited; and
- Finally, once contributions to state and local parties were limited, would-be corruptors could conceivably turn to state and local candidates to corrupt federal candidates, therefore contributions that might fund communications that PASO federal candidates could be limited.²⁰

Subsequently, *WRTL* held "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."²¹ The apparent prophylaxis-upon-prophylaxis-upon-prophylaxis justification countenanced by the Court in *McConnell* has not been tested following *WRTL* and *Citizens United*, particularly as applied to state and local campaigns that for all practical and technical legal purposes are more like independent expenditure committees than

¹⁸ *Citizens United*, 558 U.S. at 361.

¹⁹ 540 U.S. 93, 185 (2003).

²⁰ See *McConnell*, 540 U.S. at 268 (2003) (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The joint opinion's handling of § 323(f) is perhaps most telling, as it upholds § 323(f) only because of 'Congress' eminently reasonable *prediction* that . . . state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising.' *Ante*, at 684 (emphasis added). That is, this Court upholds a third-order anticircumvention measure based on Congress' anticipation of circumvention of these second-order anticircumvention measures that might possibly, at some point in the future, pose some problem.").

²¹ 551 U.S. at 479.

the kinds of organizations that present direct circumvention risks. Thus, *WRTL* and *Citizens United* cast significant constitutional doubt over section 441i(f)'s restrictions.²²



LEE E. GOODMAN
Chairman

Mar. 26, 2014
Date

²² Furthermore, even if Section 441i(f) remains facially valid, there is no hint in the content of the advertisement that would indicate that the advertisement served any circumvention objective. *See* MUR 6113 (Kirby Hollingsworth), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 7 (dismissing similar allegations in part on the grounds that “there is no evidence that non-federal funds were being ‘laundered’ through the [Respondent’s] committee for the purpose of financing ads favorable to the [federal candidate referenced]” in order to avoid raising potentially serious constitutional questions).

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