



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

CONCURRING OPINION

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

ADVISORY OPINION 2005-16

In Advisory Opinion 2005-16, the Federal Election Commission found that a series of blogs created by Fired Up! LLC ("Fired Up"), a partnership established earlier this year, qualifies for the press exception found at 2 U.S.C. § 431(9)(B)(i). Given the facts before the Commission at this time, we voted to approve Advisory Opinion 2005-16. We did so, however, recognizing that only time will truly tell whether Fired Up is actually a media entity, or an entity controlled by a candidate or political party, or even a "political committee" under the Act.

The Act specifically excludes certain press activities from the definition of contribution and expenditure. Qualification for the so-called "press exception" is reserved for:

Any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i). The Supreme Court has stated that the press exception should be narrowly construed. In rejecting a press exception claim by an incorporated entity¹ in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("*FEC v. MCFL*") (emphasis added), the Court stated, "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating § 441b's prohibition.*"

¹ The Act generally prohibits "any corporation whatever" from making any contribution or expenditure from corporate treasury funds in connection with a federal election and further prohibits any candidate or committee from knowingly accepting any such contribution. 2 U.S.C. § 441b(a).

We agree with the conclusion of Advisory Opinion 2005-16 that "Fired Up qualifies as a press entity." Advisory Opinion 2005-16 at 5. Quoting from Fired Up's Missouri website, the Opinion points out that:

Fired Up's mission "is to keep Missourians informed and united in the fight for responsible government, strong communities, and secure families." . . . A founding member of Fired Up, former U.S. Senator Jean Carnahan, urges readers of the Missouri website to "[t]hink of Fired Up! as you would a local coffee shop—a place where we can exchange ideas, freely and respectfully. But," she adds, "it is also a launching pad for community action that grows out of our discussion and concerns."

Advisory Opinion 2005-16 at 2 (citations omitted). Based upon these and other materials we have seen on the website as well as the representation that Fired Up is going to have as its sole business the distribution of news stories, editorials and commentaries, we believe that, on balance, Fired Up qualifies as a press entity.

Even though we voted to approve Advisory Opinion 2005-16, this request does present several concerns. First, under the statute, the press exception is not available if an entity is "owned or controlled" by a political party or a candidate. 2 U.S.C. § 431(9)(B)(i). For example, the Missouri Democratic Party cannot directly or indirectly set up a website, print "news" about Republican Party House and Senate candidates, and then finance the whole effort with unlimited contributions from individuals or prohibited corporate and labor money because it claims the website is entitled to the press exception.

The facts of this matter reveal a number of strong connections—historical and financial—between Fired Up and the Missouri Democratic Party and Democratic federal candidates in the state. According to Fired Up's website, Roy Temple (a co-founder of Fired Up and the primary editor of the website's content) was Executive Director of the Missouri Democratic Party during the 2000 election cycle and worked as an advisor to the state party in the 2004 election cycle. *See also St. Louis Post Dispatch* (October 9, 2005)(Fired Up is "one of a cadre of blog sites set up in March by veteran Democratic consultant Roy Temple, with the support of many of the state party's top figures.") (emphasis added). The second co-founder is Scott Sorrell, owner/manager of CS Data Managers. In 2005, Mr. Sorrell and his company received payments from the Russ Carnahan congressional committee and the Missouri Democratic Party. The third co-founder is Jean Carnahan, former Democratic United States Senator from the State of Missouri.

Obviously, given the restrictions imposed by 2 U.S.C. § 431(9)(B)(i), the Missouri Democratic Party cannot control Fired Up either directly or indirectly through the use of surrogates. Fired Up maintains that this has not occurred and represents in its Advisory Opinion Request that "Fired Up is neither owned nor controlled by any political party, political committee or candidate." Advisory Opinion Request 2005-16 at 2

(August 22, 2005). We relied upon this representation in considering Fired Up's Advisory Opinion Request.

The facts presented in this matter also raise the concern that Fired Up may cross over into political committee status. The Act defines a "political committee" as "any committee, club, association or other group of persons" that receives contributions "or makes expenditures aggregating in excess of \$1,000 a calendar year."² The terms "contribution" and "expenditure" are defined to reach funds given or paid "for the purpose of influencing any election for Federal office."³ On its face, this term "political committee" would even reach a law firm that makes a single \$2,000 contribution to a federal candidate. In construing the statutory definition of "political committee," however, the Supreme Court has held the term only includes an organization "under the control of a candidate or the major purpose of which is the nomination or election of a candidate."⁴ Later, in *FEC v. MCFL*, the Court affirmed this limiting construction of the term "political committee" when it clarified that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as *campaign activity*, the [organization] would be classified as a political committee. . . . As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to *influence political campaigns*."⁵ Thus, only when an organization has received more than \$1,000 in contributions or made more than \$1,000 in expenditures *and* has met the major purpose test, does it become a political committee pursuant to 2 U.S.C. § 431.⁶

In its request to the Commission, Fired Up indicated that it "intends to endorse, expressly advocate, and urge readers to donate funds to the election of *Democratic* candidates for federal, state, and local office." Advisory Opinion Request 2005-16 at 2 (August 22, 2005)(emphasis added). Moreover, the request states that its web site "contains links to *Democratic* and progressive organizations." *Id.* (emphasis added). The request indicates that Fired Up "intends aggressively to support progressive candidates and causes at all levels." *Id.* at 7. Indeed, the launch of Fired Up and its role in Democratic politics has been described this way:

[Jean] Carnahan is returning to politics—not on the ballot but on the Internet. She and longtime Democratic operative Roy Temple have launched a new Web initiative called www.firedupmissouri.com.

² 2 U.S.C. § 431(4).

³ 2 U.S.C. §§ 431(8)(A), (9)(A). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)("Buckley").

⁵ 479 U.S. at 262 (emphasis added).

⁶ Based upon *Buckley* and *FEC v. MCFL*, the Commission has stated that "[w]hen determining if an entity should be treated as a political committee, . . . the standard used is whether an organization's major purpose is campaign activity; that is, making payments or donations to influence any election to public office." Advisory Opinion 1996-13, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6199 (emphasis added).

Carnahan said the site would include an interactive blog of *Democratic* commentary (former Sen. Thomas F. Eagleton is among the first featured pundits). *The site is also seeking to sign up 10,000 Democratic loyalists who are "fired up and fighting back," she added.*

St. Louis Post-Dispatch (March 7, 2005)(emphasis added). At this point, though, we can see no indication from Fired Up's activities that its major purpose has been other than to conduct the dissemination of news and commentary over the Internet.

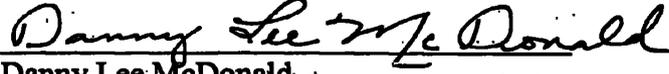
Qualification for the press exception is a fact specific determination. As the Supreme Court has warned, the press exemption must be narrowly construed. To do otherwise would threaten to "eviscerate" the Act. *FEC v. MCFL*, 479 U.S. at 251. Without specific facts, we do not believe it is appropriate to give some sort of blanket press exception to any entity that sets up a website. Based upon the present facts before us here,⁷ however, we conclude that Fired Up is a press entity and is not controlled by a political party or a candidate and is not a "political committee" under the Act. Accordingly, we voted to approve Advisory Opinion 2005-16.

11/29/05
Date



Scott E. Thomas
Chairman

11-29-05
Date



Danny Lee McDonald
Commissioner

by J. J. J.

⁷ Significantly, Advisory Opinion 2005-16 expressly limits its reach: "You do not ask, and the Commission does not address, whether any other activities Fired Up may wish to conduct, whether on the Internet or not, would be within the scope of Fired Up's press function." Advisory Opinion 2005-16 at 6 n.12.