



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CONFIDENTIAL

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Betty Sutton)
Betty Sutton for Congress and) MUR 5743
Joseph Quolke, in his official capacity as treasurer)
EMILY's List and)
Judy Lichtman, in her official capacity as treasurer)
OH Women's Vote!, a project of EMILY's List)

**STATEMENT OF REASONS OF COMMISSIONERS
HANS A. von SPAKOVSKY AND ELLEN L. WEINTRAUB**

This matter arose from a complaint alleging illegal coordination between Betty Sutton for Congress and EMILY's List. The Commission, by a 4-2 vote, found no reason to believe that Betty Sutton, Betty Sutton for Congress, and David Quolke, in his official capacity as treasurer, accepted excessive in-kind contributions by engaging in coordinated activity with EMILY's List and voted to dismiss the matter as to EMILY's List and Judy Lichtman, in her official capacity as treasurer, with an admonishment. We agree with our colleagues that the case merited dismissal, but dissented because we do not agree that the Commission should issue EMILY's List a letter admonishing it for the "dissemination, distribution, or republication of candidate campaign materials."

I. Background

The facts of this matter are set forth in the First General Counsel's Report and are repeated herein only to the extent they inform our conclusions. EMILY's List, a political action committee, produced eight mail pieces that included "posed and family" photographs of Betty Sutton, a 2006 candidate for U.S. Representative from Ohio's 13th Congressional district.¹ See Complaint. While the photographs of Ms. Sutton are surrounded by text produced independently by EMILY's List, the photographs themselves were obtained by one of EMILY's List's media consultants directly from Betty Sutton for Congress' publicly available Internet website. See Respondent EMILY's List Response to Complaint, June 26, 2006; Affidavit of Julie Cutler ¶ 6, Exhibit A to

¹ Copies of the mail pieces at issue in this MUR are included in the Complaint.

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EMILY's List Response. All available facts indicate that this media consultant acted completely independently of Betty Sutton's campaign, and simply downloaded the photographs from the website, something any member of the public can do. On these facts, our colleagues concluded that EMILY's List republished campaign materials, see 11 C.F.R. § 109.23, which is treated as an in-kind contribution, and which in turn, resulted in a violation of EMILY's List's contribution limits to Betty Sutton for Congress.

II. Discussion

The act of disseminating, distributing, or republishing campaign materials yields an in-kind contribution *to* the committee whose materials are duplicated *from* the person making the derivative communication. The amount of this in-kind contribution is equal to the amount expended on the republication and distribution of the republished communication.

The "classic" republication scenario consists of the duplication of campaign signs or brochures at Kinko's, or the replication of a candidate's billboard in another part of the county. These are easy cases that clearly fall within the applicable statutory and regulatory provisions because they involve complete and exact republication of campaign materials.

Under FECA, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure." 2 U.S.C. § 441a(a)(7)(B)(iii).

Commission regulations implement this provision, providing:

The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

11 C.F.R. § 109.23(a). Following the general rule are five exceptions, which are not treated as in-kind contributions to the candidate who prepared the original materials:

- (1) The campaign material is disseminated, distributed, or republished by the candidate, the candidate's authorized committee, or an agent of either of the foregoing who prepared that material;
- (2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;
- (3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;
- (4) The campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views; or
- (5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

11 C.F.R. § 109.23(b).

The First General Counsel's Report relies on an example found in the 2003 Coordinated and Independent Expenditure rulemaking, which included the most recent version of 11 C.F.R. § 109.23, to support the conclusion that the activity at issue qualifies as republication without exemption under 11 C.F.R. § 109.23(b). *See* First General Counsel's Report at 7; *Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 443 (Jan. 3, 2003) ("2003 Coordination Rulemaking"). In explaining the mechanics of the second exemption set forth above, the 2003 Coordination Rulemaking states:

Person A does not make a contribution to Person B if Person A incorporates part of Candidate B's campaign material into its own public communication that advocates the defeat of Candidate B. However, if the same public communication also urged the election of Candidate B's opponent, Candidate C, *and incorporated a picture or quote* that had been prepared by Candidate's C's campaign, then the result does constitute a contribution to Candidate C.

2003 Coordination Rulemaking at 443 (emphasis added).

The quoted language does not, in our view, settle this matter. First, this example in the E&J *could* contradict the plain language of the regulation itself. The example states that incorporating a quote from the campaign would result in an in-kind contribution to the campaign. However, the fourth exception explicitly excludes the incorporation of a quote from the definition of an in-kind contribution under this regulation, assuming that quote was used to "demonstrate a candidate's position as part of a person's expression of its own views." This provision appears to contemplate exempting from regulation the incidental use of campaign materials to further one's own independent communication.

Second, the Commission recently adopted two rulemakings that inform our decision here. In regulations that specifically considered communications over the Internet, the Commission took a decidedly deregulatory approach, emphasizing the unique nature of the Internet as a communications medium. *See Final Rules on Internet Communications*, 71 Fed. Reg. 18,589, 18,589-18,590 (April 12, 2006) ("Through this rulemaking, the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."). In the most recent coordination rulemaking, the Commission created a safe harbor for the use of publicly available information. *See* 11 C.F.R. § 109.21(d)(2)-(5); *Final Rules on Coordinated Communications*, 71 Fed. Reg. 33,190 (June 8, 2006). We are reluctant to apply the republication regulation to a case involving the use of downloaded photographs, from an unrestricted website, that were only a small part of larger mailers created by EMILY's List.

The photographs comprise only a small portion of the mailers, and are surrounded by EMILY's List's own text and design. In several instances, the photograph used is only a small, smiling "head shot" of Betty Sutton. The borrowed photographs are certainly not the central elements of the mailers. No fee was paid to acquire the photographs included in the EMILY's List mail pieces, because the photographs were available to the entire world free of charge on the Betty Sutton for Congress website. Similarly, no usage or licensing fee was paid for placing the photographs in the mailers. It seems highly unlikely that the inclusion of the photographs had a material effect on the total production cost of the mailer. As the Office of General Counsel speculated, "it is not clear that a photograph obtained from a publicly available website without coordination with the candidate or her committee and inserted into [EMILY's List's] own publication would have any more than *de minimis* value." First General Counsel's Report at 8.

The republication of the photographs did not increase the costs of disseminating the mailers and the republication was not the goal of the mailers. To treat an incidental republication of a photograph, which is part of an otherwise permissible independent expenditure, as an "in-kind contribution" makes no intuitive sense. Rather, where a standard photograph from a website is reproduced, but only as an incidental portion of the document being disseminated, we do not think a finding that the entire document is a republication of campaign materials is warranted.²

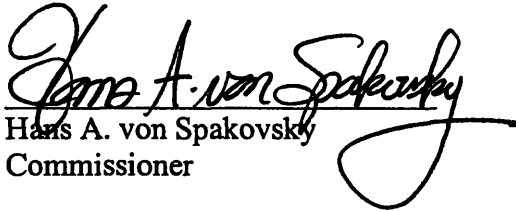
III. Conclusion

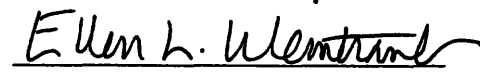
No admonishment letter should be sent to EMILY's List. The downloading of a photograph from a candidate's website that is open to the world, for incidental use in a

² Consider also voter guides that include pictures of the candidates and compare those candidates' positions by quoting them. If the photographs or quotations come from a candidate's website, these voter guides could very well be considered exercises in republication. This, however, has never been the Commission's position.

larger mailer that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute the "dissemination, distribution, or republication of candidate campaign materials." It is not an "in-kind" contribution from the committee to the candidate.

January 23, 2007


Hans A. von Spakovsky
Commissioner


Ellen L. Weintraub
Commissioner