FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Harry Mitchell for Congress and	)	
John Benning, in his official capacity as treasurer	)	MUR 5879
	)	
Democratic Congressional Campaign Committee and	)	
Jonathan S. Vogel, in his official capacity as treasurer	)	

STATEMENT OF REASONS of
Chair CAROLINE C. HUNTER and
Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN

The issue in this matter is whether use of a few seconds of campaign video footage to provide background images in a party committee's television advertisement transforms the party's otherwise independent expenditure into an in-kind contribution. Consistent with the Federal Election Campaign Act of 1971, as amended ("the Act"), Commission regulations, and longstanding Commission precedent, we concluded the use of such footage does not constitute "republication of campaign materials" sufficient to violate the Act and Commission regulations.

I. BACKGROUND

On October 27, 2006, in the closing days of the 2006 campaign for the seat in Arizona's Fifth Congressional District, the *Arizona Republic* endorsed the Democratic nominee in the race, Harry Mitchell, over his Republican opponent, J.D. Hayworth. Subsequently, on October 31, 2006, the Democratic Congressional Campaign Committee ("DCCC") began airing a television advertisement highlighting the endorsement, and reported the ad as an independent expenditure. The following day, the Mitchell campaign began airing its own advertisement featuring the *Arizona Republic* endorsement. The Hayworth campaign responded by filing a complaint with the Commission on November 3, 2006, claiming that the DCCC's advertisement constituted an excessive in-kind contribution to the Mitchell campaign, since the ad contained video footage of Mitchell that appeared to be the same as footage used by the Mitchell campaign in its ad.

The DCCC's ad opens with an unflattering color image of J.D. Hayworth on a bright blue background. A male narrator quotes the *Arizona Republic* as saying that Hayworth has "changed." Eight separate quotes appear on the screen, describing Hayworth as, among other things, "a bully," "a cartoonish politician," "overbearing," "obnoxious," and "a demagogue." Then the ad mentions Mitchell for the first time, with the narrator quoting the *Arizona Republic*

as saying that he is respected by both "community leaders" and "Republicans," and is a "consensus builder." The narrator continues to speak, as video footage shows Mitchell standing first with young voters and then with seniors. Mitchell's voice is never heard.

Although the Mitchell campaign's ad also focused on the newspaper endorsement, and contained video footage of Mitchell, it is both visually and thematically distinct. The Mitchell ad begins with a positive image of Mitchell on the editorial page of the newspaper, then pans to a grainy black-and-white image of Hayworth. A female narrator offers three explanations for why the *Arizona Republic* declined to endorse Hayworth, beginning by mentioning the paper's criticism of Hayworth's position on immigration (an issue the DCCC ad did not mention). The narrator then delivers a positive message about Mitchell, quoting the *Arizona Republic* as calling him a "'respected' 'consensus builder'" who "can 'get results.'" Finally, Mitchell himself speaks to the viewer, talking negatively about politicians who go to Washington and forget about voters back home; at the same time, a sequence of video images of Mitchell appear on screen, showing him with young voters and seniors, facing the camera, and then with two young girls and another senior citizen.

The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that the DCCC violated 2 U.S.C. §§ 434(b) and 441a(a) "in connection with its republication of the video footage of the candidate."[1] On October 10, 2007, prior to any of our appointments, the Commission voted to approve OGC's recommendation, and authorized the use of compulsory process, including the issuance of interrogatories and document and deposition subpoenas.[2]

OGC's investigation confirmed that the DCCC did use some footage that was identical to footage used by the Mitchell campaign. As the campaign got underway, the DCCC, through its independent expenditure program, requested video footage from the Mitchell campaign for its video footage library. But the Mitchell Committee was unable to fulfill the request because it had no such footage available. After the *Arizona Republic*'s endorsement, the DCCC decided it wished to run an independent expenditure trumpeting the endorsement, and may have followed up on its earlier request to the Mitchell Committee for footage of the candidate. The Mitchell Committee's media vendor then apparently sent to the DCCC footage of the candidate that it had on hand.[3]

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[1] MUR 5879 (DCCC / Harry Mitchell), First General Counsel's Report (Sept. 25, 2007) at 2. The General Counsel also recommended that the Commission: (1) find reason to believe that the DCCC made an excessive in-kind contribution and an excessive coordinated party expenditure in the form of a coordinated communication in violation of 2 U.S.C. §§441a(a) and 441a(d), and that the DCCC violated 2 U.S.C. §434(b) by failing to properly report the communication; and (2) find reason to believe that the Mitchell Committee violated 2 U.S.C. §§441a(f) and 434(b) by knowingly accepting an excessive contribution from the DCCC and failing to report the contribution to the Commission. *Id.*

[2] MUR 5879 (DCCC / Harry Mitchell), Certification dated Oct. 10, 2007 (the Commission, however, voted to take no action on OGC's recommendation to find reason to believe that the DCCC violated 2 U.S.C. § 441a(d), and to take no action on OGC's recommendation to find reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 434(b) and 441a(f)). *Id.*

[3] The record is not conclusive as to the date(s) the DCCC requested footage from the Mitchell Committee, and on what date the footage at issue was received by the DCCC, because although the DCCC made a request for footage before September 6, 2006, it is unclear whether, after the endorsement, the DCCC followed up on that request. The

The footage had been shot on September 6 and 8, 2006 (nearly two months before the endorsement), and was approximately three-minutes long. Moreover, the Mitchell campaign had uploaded the footage to an Internet server, making it available for download to the general public.[4] Of this footage, the DCCC used 15 seconds in its ad, with 10 seconds being identical to that used subsequently by the Mitchell campaign (specifically, audio-free clips of Mitchell talking to people at a park and meeting with seniors). The DCCC contends it acted in a manner consistent with its written internal firewall policy, which it had put in place to ensure that its expenditures were not impermissibly coordinated with candidates.[5]

After concluding its investigation, OGC recommended that the Commission find no reason to believe that the Mitchell campaign violated sections 441(a) and 434(b) of the Act. We agreed with that recommendation for the reasons, *inter alia*, set forth in General Counsel's Report #2. OGC also recommended that the Commission enter into conciliation with the DCCC "to settle violations of 2 U.S.C. §441a(a) and 434(b) resulting from the republication of campaign materials."[6] A motion to adopt this recommendation failed, and the Commission then voted to close the file.[7]

Mitchell Committee's media vendor sent two packages to the DCCC, one on September 22, 2006, and October 27, 2006, but cannot confirm which one contained the video footage. OGC surmised that the footage was sent in the October 27, 2006 package. *See* MUR 5879 (DCCC / Harry Mitchell), GCR #2 at 4, n.2.

[4] MUR 5879 (DCCC / Harry Mitchell), Complaint, Ex. 2 at 1 (a newspaper story from the Scottsdale Tribune, quoting Seth Scott, an "aide" to Mitchell).

[5] The DCCC had an internal "firewall" to ensure that its independent expenditures were made without access to information about candidate plans, projects, activities, or needs. These procedures included assigning selected individuals to work specifically on the independent expenditure program, placing them in separate office space outside the DCCC's headquarters, and barring them from contact with affected campaigns. MUR 5879, Response of DCCC (Jan. 3, 2007) at 2. Other employees of the DCCC were barred from discussing House races with those working on the independent expenditure program, and vendors who worked on the independent expenditure program were barred from contact with affected campaigns and their agents. *Id.* Furthermore, the DCCC informed staff and vendors of these restrictions in several ways, including providing staff and vendors with written memorandum detailing the "firewall" procedures, requiring regular staff and those working on the independent expenditure program to attend trainings about the procedures, and holding special training for vendors involved with the independent expenditure program. *Id.* Although not all these procedures are mandated by the law, they are consistent with and satisfy 11 C.F.R. § 109.21(h), which sets forth a "safe harbor" to avoid tripping the conduct prong of the Commission's coordination regulations. The provision provides that the "firewall" must "be designed and implemented to prohibit the flow of information between employees or consultants providing services" for the payor, and those employees or consultants currently or previously providing services" to the candidate. 11 C.F.R. § 109.21(h)(1). The "firewall" must also be described in a written policy that is distributed to all relevant employees and consultants. 11 C.F.R. § 109.21(h)(2).

[6] MUR 5879 (DCCC / Harry Mitchell), General Counsel's Report #2 (Dec. 2, 2009).

[7] MUR 5879, Certification dated Apr. 13, 2010 (By a vote of 3-3, the Commission rejected the recommendations of the Office of General Counsel to enter into conciliation with the Democratic Congressional Committee and Jonathan S. Vogel, in his official capacity as treasurer, to settle violations of 2 U.S.C. §§ 441a(a) and 434(b) resulting from the republication of campaign materials. By a vote of 6-0, the Commission approved the recommendation of the Office of General Counsel to find no reason to believe that the Harry Mitchell for Congress Committee and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a and 434(b).).

II. DISCUSSION

The Commission has long interpreted the republication provisions in the Act and Commission regulations as not mandating a categorical treatment of any and all use of campaign materials as in-kind contributions. Rather, the Commission has taken a common-sense approach that allows excerpts of campaign materials to be incorporated into a speaker's own independent message, without such use constituting a contribution to the campaign.

Here, the DCCC's advertisement was an expression of its own message. The fact that it excerpted fifteen seconds of B-roll images from three minutes of candidate footage did not result in the dissemination, distribution, or republication of campaign materials, nor did it otherwise convert the independent expenditure by the DCCC into an in-kind contribution. Consistent with prior Commission precedents and interpretations regarding republication, we voted to reject OGC's recommendation to enter into pre-probable cause conciliation with the DCCC prior to finding probable cause.

A. Not Every Third-Party Use of Candidate Campaign Materials Is "Republication" Under the Act

The Act provides that "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."[8] This provision was added by Congress when it redefined "contribution" in the wake of *Buckley v. Valeo*.[9] Congress explained it was acting consistent with *Buckley*, as evidenced by the legislation's accompanying Conference Report, which described the purpose of "distinguish[ing] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."[10]

After Congress enacted the 1976 amendments to the Act, the Commission promulgated a republication rule.[11] In crafting the rule, the Commission recognized Congress' intent to treat as contributions "arrangements or conduct that remove the independent nature of the expenditures."[12] In other words, expressing an individual's or group's own views was beyond the reach of the rule. This approach mirrored the approach taken in other rules concerning

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[8] 2 U.S.C. § 441a(a)(7)(b)(iii).

[9] 424 U.S. 1 (1976).

[10] H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

[11] The provision, 11 CFR § 109.1(d)(1), applied to, in pertinent part, to any "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." As noted *infra*, third parties were permitted to use materials already been used by campaigns under certain circumstances without such use resulting in republication. *See* MURs 1051 (*In re* Congressman Les Aspin), 2272 (American Medical Association, *et al.*), and 2766 (Auto Dealers and Drivers for Free Trade Political Committee).

[12] Explanation & Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, House Doc. No. 95-1, at 55 (Jan. 12, 1977).

republication, such as the rule applicable to corporate and labor communications, which distinguished republication from the "communication[] of the views of the corporation or labor organization. . . ."[13]

McCain-Feingold did not mandate a change to the Commission's approach. Although McCain-Feingold instructed the Commission to revisit its coordination regulations, it did not dictate any particular approach to republication (other than stating that it ought to be addressed). In the subsequent rulemaking, the Commission made clear that it was not making any substantive change to the longstanding interpretation of republication: "The only changes from the former rule are the replacement of one cross-reference to former 11 CFR 100.23 (repealed by Congress in BCRA), a clarification that a candidate does not receive or accept an in-kind contribution unless there is coordination, and minor grammatical changes."[14] Similarly, the Commission could "not discern any instruction from Congress, nor any other basis, that justifies such a departure from the Commission's longstanding interpretation of the underlying republication provision in the Act, now set forth at 2 U.S.C. § 441a(a)(7)(B)(iii)."[15] Critically, the issue of the use of campaign video footage was raised in the course of the Commission's post-McCain-Feingold rulemaking, but the Commission chose not to prohibit what was soon to become a common practice.[16]

Although the Commission noted it was not changing the rule, it did clarify the rule, adding an exemption for the use "of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views . . . ."[17] Additionally, the Commission added a related exception permitting an opponent's use of candidate materials to advocate the defeat of that candidate.[18] Both provisions merely reaffirm the Commission's longstanding approach that wholesale copying of candidate materials constitutes republication,[19] but partial use of such materials in connection with one's own protected speech is not legally problematic.[20]

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[13] 11 C.F.R. § 114.3(c)(1)(ii).

[14] Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 441 (Jan. 3, 2003).

[15] *Id.* at 442.

[16] Specifically, in its 2003 rulemaking on coordinated communications, the Commission considered this issue, but expressly declined to make any substantive changes to the 1976 regulations on the dissemination, distribution, or republication of campaign materials. In fact, during the Commission's Oct. 23, 2002, hearing on coordinated communications, Chairman Mason raised this issue with panelists Robert Bauer, counsel to the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, and Donald McGahn, General Counsel to the National Republican Congressional Committee, who opined that additional regulations on this point were unnecessary. Public Hearing on Proposed Rulemaking on Coordinated and Independent Expenditures, *available at*: www.fec.gov/pdf/nprm/coor_and_ind_expenditures/1023fec.doc. Clearly, the Commission was aware of this issue, making a lack of prohibitive regulation all the more significant.

[17] 11 C.F.R. § 109.23(b)(4).

[18] 11 C.F.R. § 109.23(b)(2).

[19] *See, e.g.*, MUR 2804R (American Israel Public Affairs Committee); MURs 5672 and 5733 (Save American Jobs Association, Inc.).

[20] We agree with Respondent that to read the E&J fragment broadly or to differentiate between the use of quotes and pictures would place the Commission in the position of "dictating the content of an ad: permitting the use of some materials (quotes) and not others (images)." MUR 5879, Response of DCCC (Dec. 3, 2007) at 7. Respondent is

Nothing in the regulations or Explanation and Justification suggest that these exemptions were exclusive or in any way overturned past Commission practice.[21] On the contrary, the Commission's long-standing interpretation remained intact.

B. Past Commission Action Supports Our Position

The Commission has consistently rejected reading the republication regulation in a manner that would hinder the ability of third parties to create and disseminate effective independent communications. For example, in 1979, in MUR 1051 (*In re* Congressman Les Aspin), the Commission unanimously found no reason to believe that the Act was violated by an advertisement placed in the *Washington Post* that promoted the sale of a forthcoming issue of *Scientific American* and included the headline "The Congressman Who Is Campaigning Against the High Cost of Living and Dying" and a nearly full-page excerpt of an article written by Congressman Les Aspin. The Department of Justice concurred in the result.[22]

Several years later, in MUR 2272 (American Medical Association, *et al.*), the Commission considered allegations that expenditures by a trade association were not truly independent and, therefore, constituted excessive contributions to the candidate featured in the communications. The Commission unanimously found no reason to believe that the communications were coordinated, thus rejecting the view that the use of information from campaign materials constituted republication. As Commissioner Josefiak explained:

> [T]he [General Counsel's Report] inaccurately suggested a violation is indicated where someone 'utilizes' or 'uses' information within campaign material in order to develop independent expenditure efforts.... The Commission regulations cited do not 'prohibit' gaining information or researching ideas from campaign materials for use in entirely new communications. The regulations do not convert independent expenditures for those communications into contributions based upon a similarity or even identity of themes with the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or 'copying.' Instead, the regulations properly consider a tangible reproduction of campaign materials to be a contribution because such recognizable, identifiable activity constitutes implied or constructive coordination with the campaign.[23]

Similarly, in MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee, *et al.*), the Commission declined to find reason to believe that advertisements run by the Auto Dealers for Free Trade PAC were coordinated, where it was alleged that (1) the political committee used two media vendors who were also employed by a candidate's campaign

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also correct that to read the E&J broadly would be in "considerable tension with First Amendment principles." *Id.* We decline to do so.

[21] This is borne out by the Commission's actions in MURs 5743 (Betty Sutton for Congress/EMILY's List) and 5996 (Education Finance Reform Group / Tim Bee), discussed *infra*.

[22] *See* MUR 1050, Letter from Philip B. Heymann to Don Walsh (Oct. 31, 1979).

[23] MUR 2722, Statement of Reasons, Commissioner Thomas J. Josefiak at 8.

committee, and (2) that a meeting took place between representatives of the PAC and the media vendors at which the subject of working for the campaign committee was discussed. In recommending reason to believe, OGC advanced a theory of "similarity" – suggesting that the use of a few sentences could constitute republication. In rejecting this position, Commissioner Josefiak explained that, "[t]he practical reality is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate."[24] Ultimately, "[t]he Commission cannot turn independent expenditures into presumptively illegal activity."[25]

Recent Commission actions reaffirm those earlier MURs. In 2007, the Commission dismissed an allegation that an independent group, EMILY's List, republished campaign materials in an independent expenditure when it used photographs obtained from a campaign's publicly available website. As Commissioners von Spakovsky and Weintraub explained:

> [D]ownloading a photograph from a candidate's website that is open to the world, for incidental use in a large mailer that is designed, created, and paid for by a political committee as part of an independent expenditure without any coordination with the candidate, does not constitute the 'dissemination, distribution, or republication of candidate campaign materials.'[26]

In a more recent matter, the Commission voted unanimously to dismiss an allegation that a third party coordinated a television advertisement with a candidate where the advertisement included a "head shot" photograph of a candidate obtained from the candidate's website.[27] Although we supported a dismissal on the basis of prosecutorial discretion, we wrote separately to explain that there was no violation in the matter and reaffirm that the republication of photographs that appear on a candidate's publicly available website does not constitute the dissemination, distribution, or republication, in whole or in part, of campaign materials.[28]

Accordingly, dismissing this matter is in line with thirty years of Commission precedent. The DCCC crafted a message without any coordination with the candidate, and used a fifteen-second excerpt from three minutes of campaign footage to express its own views about the Arizona congressional race. The ad clearly did not fit within the traditional view of republication as "the reprinting and dissemination of a candidate's mailers, brochures, yard signs, billboards,

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[24] MUR 2766, Statement of Reasons, Commissioner Thomas J. Josefiak at 23.

[25] MUR 2766, Statement of Reasons, Chairman Lee Ann Elliot and Commissioners Joan Aikens and Thomas Josefiak at 3.

[26] MUR 5743 (EMILY's List), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub. The Commission dismissed the matter but admonished EMILY's List for using candidate photographs obtained directly from the candidate's website in several mail pieces. However, we have declined the invitation to admonish committees as a form of punishment because the statute does not list admonishment as a power vested with the Commission, and for that reason we read MUR 5743 as a dismissal by the Commission.

[27] MUR 5996 (Education Finance Reform Group / Tim Bee), Certification dated Oct. 20, 2009.

[28] *Id.*, Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

or posters – in other words, materials that copy and convey a campaign's message."[29] Instead, it constituted an expression of the sponsor's own views. In no way could the DCCC's use of this background video constitute the use of resources to aid a candidate in a manner tantamount to a cash transfer. To view this otherwise would tread upon the Supreme Court's clear and long-standing aversion to limiting independent political speech.[30]

Even if this matter did not turn on a question of law, the facts of this matter leave no doubt as to the result. The silent footage at issue contains no discernable message. In fact, the exact footage from the same source could have been used in a negative advertisement attacking the candidate and would not be considered republication under 11 C.F.R. § 109.23(b)(2). Moreover, as OGC acknowledges, the DCCC and the campaign committee used the same footage differently. The DCCC advertisement did not discuss Hayworth's position on immigration, whereas the campaign's advertisement emphasized that issue. Furthermore, the campaign's advertisement avoided any mention of party affiliation, whereas the DCCC's advertisement highlighted it.

That this current matter concerns background video footage, as opposed to the head-shot stills permitted in MURs 5743 and 5996, is of no legal significance.[31] Candidate head shots and action shots of candidates (either with actors or real constituents) are generated under similar circumstances and for the same reasons. Besides, like photographs of candidates, footage is essentially a series of still images of the candidate. Therefore, it makes little sense to argue that a background image of the candidate is permissible only so long as that image does not move. In this matter, neither the still images individually nor the moving images created by them collectively contain any sort of messaging that could cloud the issue of the communication being the party's speech. In short, the DCCC used this footage to create its own message.

Nor is it relevant whether the DCCC received the video from the Mitchell committee's media consultant or from publicly available sources. Neither the Act nor Commission regulations include any conduct factors within the republication test. It is solely content-based. We agree with OGC that no coordination took place. To claim that contact between a third party and a candidate can turn a communication that, on its face, does not constitute republication into a violation of the Act would create an extra-regulatory back-door into a coordination finding and,

[29] MUR 5996 (Education Finance Reform Group / Tim Bee), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 3.

[30] The Supreme Court, in *Buckley v. Valeo*, explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures, and that "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures," and struck down the limit on independent expenditures by individuals. 424 U.S. 1, 45 (1976). The Court subsequently reaffirmed the right of national political parties to make unlimited independent expenditures. *Colorado Fed. Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996). And most recently, the Court struck down the ban on independent expenditures by corporations, finding that independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

[31] The background footage, shot two months before the advertisement at issue, was filmed by the campaign committee over several days and in several locations for use in future advertisements. The timing raises the question: Under OGC's theory, if the campaign committee had never aired its advertisement, would the DCCC's advertisement still constitute republication of campaign materials?

thus, bar permissible speech. As we have explained in other contexts, political activity cannot be limited simply by characterizing it in the abstract as a "contribution"; on the contrary, the courts have made clear that it is the nature of the activity that is controlling.[32]

Finally, taking the republication concept as far as OGC recommended in this matter would require the Commission to make subjective judgments about the content and stylistic elements of political advertising in determining whether it complied with Commission rules.[33] After all, what is at issue here is background video,[34] and not a copy, in whole or in part, of a candidate's campaign materials. Allowing speakers to excerpt any picture or video used by a political campaign only under the regulatory safe harbor for "a communication that advocates the defeat of the candidate or party that prepared the material"[35] could perversely incentivize speakers to resort to the so-called "negative advertising" that the sponsors of McCain-Feingold sought to discourage. Similarly, were we to permit speakers to excerpt pictures and video footage only under the regulatory safe harbor for "campaign material. . . disseminated, distributed, or republished in a news story, commentary, or editorial," certain speakers (*i.e.*, "the media") would be favored over others.[36] As stated above, nothing indicates that the Commission intended the exceptions to the republication regulations to be the exclusive means by which pictures or videos could be used in a third party's communications. Rather, they are safe harbors for the most common uses of quotes, photos, and video of a candidate.

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[32] *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 10, n. 42 ("Simply because one puts salt in the pepper shaker does not make it pepper – it is still salt."). This view of the Commission's jurisdictional limits was subsequently affirmed by the U.S. Court of Appeals for the District of Columbia, when it held that the Commission cannot regulate an advertisement sponsored by a non-candidate, non-party grassroots organization that is not run in that politician's home state and does not mention his election simply because it references that politician. *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). *See also* Statement Regarding *EMILY's LIST v. FEC* of Vice Chairman Matthew S. Petersen and Commissioners Caroline Hunter and Donald F. McGahn at 1, *available at*: http://www.fec.gov/members/mcgahn/statements/EmilysList20091022.pdf (agreeing that "the regulations go too far and functioned as an impermissible spending limit," and therefore declining to seek rehearing *en banc*).

[33] The problem with such a test is that its inherent vagueness forces a speaker to guess as to what is and is not permissible political speech. *See also Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) ("Because the FEC's 'business is to censor, there inheres the danger that [it] may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression.'") (internal citations omitted).

[34] As OGC acknowledged, there is no legally significant difference between using still photographs or video footage in a campaign advertisement, *see* MUR 5879 (DCCC / Harry Mitchell), GCR #2 (Dec. 2, 2009) at 12, because what is really at issue here is the constitutionality of a contribution limit.

[35] 11 C.F.R. § 109.23(b)(4).

[36] The lesson of *Citizens United* was not simply that corporations have the power to spend money to speak (as the court noted, "television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times"), but also that the government could not treat speakers differently simply due to their identity. *Citizens United*, 130 S. Ct. at 906; *id.* at 905 (finding "no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not"). Corporate "media" entities regularly use photographs and video footage obtained directly from candidate committees (for example, in newscasts or newspapers), but to deny other speakers the same right raises constitutional concerns that we cannot ignore.

III. CONCLUSION

For these reasons, we voted against OGC's recommendation to enter into pre-probable cause conciliation with the DCCC and, instead, voted to close the file.

CAROLINE C. HUNTER
Chair

2/28/12
Date

DONALD F. McGAHN II
Commissioner

2/28/12
Date

MATTHEW S. PETERSEN
Commissioner

Feb. 28, 2012
Date