



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**VIA E-MAIL AND CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Mark R. Brown

November 1, 2012

Columbus, OH 43220  
mbrown@law.capital.edu

RE: MUR 6552  
Ohio State Medical Association, *et al.*

Dear Mr. Brown:

On April 11, 2012, the Federal Election Commission (the "Commission") reviewed the allegations in your complaint dated April 3, 2012, and found that on the basis of the information provided in your complaint, information provided by the respondents, and other available information, there is no reason to believe that Sherrod Brown, Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer, and Josh Mandel, Citizens for Josh Mandel, Inc. and Kathryn Kessler in her official capacity as treasurer, violated 2 U.S.C. § 441b(a). In addition, on October 25, 2012, the Commission voted to dismiss this matter with respect to the Ohio State Medical Association. Accordingly, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analyses, which more fully explain the Commission's findings, are enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Anthony Herman  
General Counsel

BY: Emily M. Meyers  
Attorney

Enclosures  
Factual and Legal Analyses

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Ohio State Medical Association

**MUR 6552**

**I. INTRODUCTION**

This matter was generated by a Complaint filed with the Federal Election Commission by Mark R. Brown, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by the Ohio State Medical Association ("OSMA"). The Complainant alleges that OSMA made impermissible corporate in-kind contributions in violation of 2 U.S.C. § 441b(a) and (b) when OSMA posted to the public area of its website links to a video recording of campaign related speeches that Brown and Mandel had delivered to OSMA's restricted class at OSMA's Annual Meeting. Compl. ¶¶ 1, 3, 22, 28 (Apr. 9, 2012). The Complainant also alleges that by broadcasting campaign related speeches to the public beyond its restricted class, OSMA violated the Act and its implementing regulations. *Id.* ¶¶ 2, 23, 26-27.

In its Response, OSMA "admits that it inadvertently violated the Act through the actions of its communications staff, who unwittingly posted on the public area of the OSMA website links to a video of the two candidate[s'] speeches that contained some campaign content." OSMA Resp. at 2 (Apr. 27, 2012). While OSMA does not identify a particular section of the Act or an implementing regulation that it believes it violated, it appears that by making a recording of Brown's and Mandel's campaign related speeches available to the public beyond OSMA's restricted class, OSMA made a prohibited corporate contribution or expenditure in violation of 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a)-(b).

Despite the apparent violation of the Act, this matter does not warrant further expenditure of Commission resources: (1) OSMA's public posting of links to a recording of the candidates'

1 speeches was apparently inadvertent; (2) the links were publicly accessible for only ten days and  
2 OSMA removed them immediately upon notification that the links were public; and (3) the video  
3 recording of the campaign related speeches was accessed only nineteen times while publicly  
4 available. Accordingly, the Commission exercises its prosecutorial discretion and dismisses the  
5 allegations that OSMA violated the Act. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985).

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Factual Summary**

8 OSMA is a 501(c)(6) tax-exempt “membership organization” under 11 C.F.R.  
9 § 114.1(e)(1). OSMA Resp. at 1. OSMA holds an Annual Meeting, which only registered  
10 members in good standing are permitted to attend. *See* OSMA Bylaws at 10-11 (amended Mar.  
11 2012), *available at* [http://www.osma.org/files/documents/about-osma/governance/constitution-](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)  
12 [and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf).

13 At OSMA’s invitation, Brown and Mandel each delivered a campaign related speech to  
14 OSMA’s restricted class at OSMA’s Annual Meeting on March 24, 2012.<sup>1</sup> Compl. ¶¶ 10-12.  
15 According to a local news account of OSMA’s Annual Meeting, in his speech, Mandel  
16 repeatedly referenced Brown by name, “criticized Brown for his support of the health-care law”  
17 and “accused Brown of stalling medical-malpractice reforms because of Brown’s close ties to  
18 lawyers.” Compl. at Ex. A. After Mandel delivered his speech, Mandel’s campaign staff  
19 “passed out materials and collected names, phone numbers and email addresses.” *Id.* In  
20 contrast, Brown delivered his speech a few minutes after Mandel’s, but “made no mention of  
21 Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on with doctors.” *Id.*;

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<sup>1</sup> OSMA’s annual meeting took place eighteen days after Ohio’s primary in which Mandel won the Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

1 OSMA Resp. at 2 n.1 (“Senator Brown’s video does not once mention his campaign and focused  
2 on national health care issues. However, given that he spoke following Mr. Mandel’s speech, the  
3 fact that the speeches occurred during an election season, and the overall context, OSMA does  
4 not contest that both talks were campaign related.”).

5 OSMA subsequently posted links to a video recording of Brown’s and Mandel’s speeches  
6 at the Annual Meeting on the public area of its website, along with other non-political news from  
7 OSMA’s Annual Meeting. Compl. ¶ 19; OSMA Resp. at 2. The video recording included “the  
8 entire 43-minute joint-presentation” of Brown’s and Mandel’s speeches, without any editing by  
9 OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.<sup>2</sup>  
10 *See id.* at Ex. E; *see also* OSMA Resp. at 2 n.1, Ex. 2 ¶ 3 (Affidavit of Jason Koma, Director  
11 Communications and Marketing for OSMA) (“Koma Aff.”). The links to the videos were  
12 available on the public area of OSMA’s website through April 3, 2012, when OSMA removed  
13 them after the Complainant brought the public links to OSMA’s attention. OSMA Resp. at 2;  
14 Koma Aff. ¶ 3. During the approximately ten day period when the links to the videos were  
15 available on the public portion of OSMA’s website, the videos were accessed nineteen times.  
16 OSMA Resp. at 2; Koma Aff. ¶ 3; *see also* Compl. at Ex. E (indicating a total of eighteen plays  
17 as of March 30, 2012).

18 The Complaint does not allege that OSMA violated the Act by inviting Brown and  
19 Mandel to speak to its restricted class at its Annual Meeting. Indeed, the Complaint correctly  
20 acknowledges that the Commission’s regulations permit a membership organization to invite

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<sup>2</sup> As indicated in Exhibit E to the Complaint, OSMA is a “Plus” member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. *See* <http://vimeo.com/help/guidelines>; [http://vimeo.com/help/faq/vimeo\\_plus#/help/faq/vimeo\\_plus](http://vimeo.com/help/faq/vimeo_plus#/help/faq/vimeo_plus); <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

1 candidates to address its restricted class. Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); *see also*  
2 11 C.F.R. § 114.3(a)(2). OSMA also made this point in its Response. OSMA Resp. at 1 (“FEC  
3 regulations permit a nonprofit organization like OSMA to invite any candidate of its choice to  
4 make a campaign speech before its restricted class at a conference.”) (citing 11 C.F.R.  
5 § 114.3(c)(2)).

6 The Complaint alleges instead that OSMA violated the Act and its implementing  
7 regulations by posting to the public area of its website links to a video recording of speeches that  
8 Brown and Mandel made to OSMA’s restricted class, thereby broadcasting campaign related  
9 speech “to an unrestricted audience that included the general public.” Compl. ¶¶ 2, 11 n.3. The  
10 Complaint contends that this broadcast amounts to OSMA’s donation of “something of value” in  
11 violation of section 441b(a) of the Act. *Id.* ¶¶ 3, 26-28.

12 OSMA denies that its posting of links to a video of the speeches contributed something of  
13 value to the candidates, since the videos were accessed only nineteen times during the ten day  
14 period that the links were publicly available. OSMA Resp. at 2, 3.

15 **B. Legal Analysis**

16 The Act and Commission regulations prohibit corporations and other organizations,  
17 including membership organizations, from making contributions from their general treasury  
18 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);  
19 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or  
20 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

21 A “contribution” is “any gift, subscription, loan, advance, or deposit of money or  
22 anything of value made by any person for the purpose of influencing any election for Federal  
23 office.” 2 U.S.C. § 431(8)(A)(i). An “expenditure” is “any purchase, payment, distribution,

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1 loan, advance, deposit, or gift of money or anything of value, made by any person for the  
2 purpose of influencing any election for Federal Office.” 2 U.S.C. § 431(9)(A)(i). “Anything of  
3 value” includes all in-kind contributions and, unless specifically exempted, the provision of  
4 goods and services without charge or at a charge that is less than the usual and normal charge.  
5 11 C.F.R. §§ 100.52(d)(1); 100.111(e)(1).

6 Commission regulations include several exceptions permitting corporate activity that  
7 would otherwise constitute an expenditure or in-kind contribution. See 11 C.F.R.  
8 § 114.1(a)(2)(x) (excluding from the definition of “contribution” and “expenditure” any  
9 corporate, union, or membership organization activity “specifically permitted by [11 C.F.R.] part  
10 114”). For example, a membership organization may invite particular candidates to address  
11 members, executive and administrative personnel (or all employees), and their families at a  
12 meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R.  
13 §§ 114.3(a)(2), (c)(2)(i).<sup>3</sup> Furthermore, a membership organization may allow a candidate to  
14 address all of its employees, its members, and their families at a meeting, convention, or other  
15 function, without making a contribution to the candidate, provided it meets certain conditions.  
16 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may  
17 sponsor an election-related appearance by a candidate before the general public without making  
18 a contribution to the candidate. Advisory Op. 1996-11 at 5 (Nat’l Right to Life Conventions,  
19 Inc.).

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<sup>3</sup> See also Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.”).

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1 Although Brown's and Mandel's speeches were campaign related, which OSMA  
2 concedes, the speeches themselves do not constitute a prohibited corporate contribution because  
3 they fall under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA's restricted  
4 class. However, once OSMA made a video recording of those speeches available to the public  
5 beyond its restricted class, the exceptions to the definitions of "contribution" and "expenditure"  
6 provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA  
7 making Brown's and Mandel's speeches available to a broader audience constitute something of  
8 value to the candidates, an impermissible contribution or expenditure by OSMA in violation of  
9 2 U.S.C. § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6  
10 ("[T]he Commission cautions that an impermissible contribution would result if NRL were to  
11 distribute the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the  
12 general public, since the taping and distribution of the candidates' views on the issues addressed  
13 at the convention is something of value to the candidates.") (citing Advisory Op. 1980-90  
14 (Atlantic Richfield Company) (taping and free distribution to television stations of candidates'  
15 views on energy issues is a corporate contribution)).

16 Notwithstanding the potential violation by OSMA, under the circumstances presented  
17 here, the Commission exercises its prosecutorial discretion to dismiss the allegations that OSMA  
18 violated the Act because: (1) the public links to the video recording of Brown's and Mandel's  
19 speeches were available for merely ten days; (2) the video recording was accessed only nineteen  
20 times; and (3) OSMA prevented further public access of the video recorded speeches  
21 immediately upon learning of it.<sup>4</sup> OSMA Resp. 2; Koma Aff. ¶ 3.

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<sup>4</sup> Because posting the links to a video recording of Brown's and Mandel's speeches on OSMA's public website constituted an expenditure or contribution to Brown and Mandel of "something of value," and it is possible that the amount OSMA spent to host the event at which it recorded Brown's and Mandel's speeches exceeded \$250,

- 1           Accordingly, the Commission dismisses the allegations that Ohio State Medical  
2 Association violated 2 U.S.C. § 441b(a) and (b) in an exercise of prosecutorial discretion as  
3 outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985).

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OSMA may have triggered a reporting obligation. *See* 2 U.S.C. § 434(c). Nonetheless, the Commission exercises its prosecutorial discretion to dismiss an additional violation of the Act on this basis.

In addition, no disclaimer was required on the video because it is not a “public communication” under 11 C.F.R. § 100.26. *See* 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1), (2). The definition of “public communication” includes “general public political advertising” pursuant to 11 C.F.R. § 100.26. But all internet communications, except those posted for a fee on another’s website, are excluded from “general public political advertising” and consequently are not “public communications.” Here, the public links to the video recording of Brown’s and Mandel’s speeches were posted on OSMA’s own website for no fee, so the video is not general public political advertising, and therefore not a “public communication.” 11 C.F.R. § 100.26. Although OSMA paid a minimal amount to join Vimeo as a monthly or annual member, we have previously determined that payment of such a nominal fee does not disqualify the videos from exclusion from the definition of “public communication” that 11 C.F.R. § 100.26 grants to “communications over the Internet[.]” *See* Internet Communications, 71 Fed. Reg. 18,589, at 18,594-95, 18,603, 18,607 (Apr. 12, 2006) (explanation and justification) (exempting from definition of “contribution” a communication over the internet that requires payment of a “nominal fee” to a host site). Accordingly, OSMA did not violate the Act by failing to include a disclaimer on video that it posted on its website. *See* 2 U.S.C. § 441d(a); 11 C.F.R. § 100.11(a)(1), (2); *see also* Advisory Op. 2008-10 (WideOrbit, Inc. d/b/a VoterVoter.com) at 8 (stating that a disclaimer need not appear on an ad posted without a fee to a website).

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1     **II.     FACTUAL AND LEGAL ANALYSIS**

2             **A.     Factual Summary**

3             Brown has served as U.S. Senator from Ohio since 2008. Friends of Sherrod Brown is  
4     Brown's designated principal campaign committee, and Judith Zamore is its treasurer. OSMA is  
5     a 501(c)(6) tax-exempt "membership organization" under 11 C.F.R. § 114.1(e)(1). OSMA holds  
6     an Annual Meeting, which only registered members in good standing are permitted to attend.  
7     Response of Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer  
8     ("Brown Resp.")<sup>1</sup> at 1, 2 n.1, 3 (June 5, 2012) (stating that Brown understood that attendance at  
9     the meeting was limited to members of OSMA and not open to the general public).

10            At OSMA's invitation, Brown and Mandel each delivered a campaign related speech to  
11     OSMA's restricted class at OSMA's Annual Meeting on March 24, 2012.<sup>2</sup> Compl. ¶¶ 10-12; *see*  
12     Brown Resp. at 1. According to a local news account of OSMA's Annual Meeting, in his  
13     speech, Mandel repeatedly referenced Brown by name, "criticized Brown for his support of the  
14     health-care law" and "accused Brown of stalling medical-malpractice reforms because of  
15     Brown's close ties to lawyers." Compl. at Ex. A. After Mandel delivered his speech, Mandel's  
16     campaign staff "passed out materials and collected names, phone numbers and email addresses."  
17     *Id.* In contrast, Brown delivered his speech a few minutes after Mandel's, but "made no mention  
18     of Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on with doctors." *Id.*

19            OSMA subsequently posted links to a video recording of Brown's and Mandel's speeches  
20     at the Annual Meeting on the public area of its website, along with other non-political news from

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<sup>1</sup>            Sherrod Brown did not submit a Response in his individual capacity.

<sup>2</sup>            OSMA's annual meeting took place eighteen days after Ohio's primary in which Mandel won the  
Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

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OSMA's Annual Meeting. Compl. ¶ 19. The video recording included "the entire 43-minute joint-presentation" of Brown's and Mandel's speeches, without any editing by OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.<sup>3</sup> *See id.* at Ex. E.

The Complaint does not allege that Brown violated the Act by accepting OSMA's invitation to speak to its restricted class at its Annual Meeting. Indeed, the Complaint correctly acknowledges that the Commission's regulations permit a membership organization to invite candidates to address its restricted class. Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); *see also* 11 C.F.R. § 114.3(a)(2). Brown also made this point in his Response. Brown Resp. at 3 (OSMA "was squarely within its rights in inviting Senator Brown to speak and Senator Brown was squarely within his rights in accepting that invitation with no resulting contribution.") (citing 11 C.F.R. §§ 114.3, 114.4). The Complaint alleges instead that Brown knowingly accepted or received "something of value" in violation of section 441b(a) of the Act when OSMA posted to the public area of its website links to a video recording of Brown's speech to OSMA's restricted class. Compl. ¶¶ 4, 28.

While Complainant's theory of liability on this allegation is unclear, Brown in his Response interpreted the Complaint to allege that the posted video was a "coordinated communication," resulting in an in-kind contribution to the candidates under 11 C.F.R. § 109.21(b)(1). Brown Resp. at 2 n.3, 3 n.8. Brown asserts that in order for OSMA's communication beyond its restricted class to qualify as an in-kind contribution to him, the communication must satisfy the three prongs of the coordination test—payment, content, and

<sup>3</sup> As indicated in Exhibit E to the Complaint, OSMA is a "Plus" member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. *See* <http://vimeo.com/help/guidelines>; [http://vimeo.com/help/faq/vimeo\\_plus#/help/faq/vimeo\\_plus](http://vimeo.com/help/faq/vimeo_plus#/help/faq/vimeo_plus); <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

1 conduct—outlined in 11 C.F.R. § 109.21. *Id.* at 3. Brown denies that the public posting of links  
2 to a recording of his speech on OSMA’s website constitutes a coordinated communication, and  
3 on that basis denies that he violated the Act.<sup>4</sup> *Id.*

4 **B. Legal Analysis**

5 The Act and Commission regulations prohibit corporations and other organizations,  
6 including membership organizations, from making contributions from their general treasury  
7 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);  
8 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or  
9 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

10 A “contribution” is “any gift, subscription, loan, advance, or deposit of money or  
11 anything of value made by any person for the purpose of influencing any election for Federal  
12 office.” 2 U.S.C. § 431(8)(A)(i). An “expenditure” is “any purchase, payment, distribution,  
13 loan, advance, deposit, or gift of money or anything of value, made by any person for the  
14 purpose of influencing any election for Federal Office.” 2 U.S.C. § 431(9)(A)(i). “Anything of  
15 value” includes all in-kind contributions and, unless specifically exempted, the provision of  
16 goods and services without charge or at a charge that is less than the usual and normal charge.  
17 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

18 Commission regulations include several exceptions permitting corporate activity that  
19 would otherwise constitute an expenditure or in-kind contribution. *See* 11 C.F.R.  
20 § 114.1(a)(2)(x) (excluding from the definition of “contribution” and “expenditure” any

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<sup>4</sup> Brown’s denial on this basis is valid because the recording of Brown’s speech posted via links from the public area of OSMA’s website was neither an electioneering communication nor a public communication, and therefore fails the content prong of the coordinated communications test. 11 C.F.R. §§ 109.21(a), (c). Because the Commission does not dispute Brown’s denial that he knowingly accepted or received an impermissible in-kind contribution from OSMA, the Commission declines to analyze further his denial under the coordinated communications test.

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1 corporate, union, or membership organization activity “specifically permitted by [11 C.F.R.] part  
2 114”). For example, a membership organization may invite particular candidates to address  
3 members, executive and administrative personnel (or all employees), and their families at a  
4 meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R.  
5 §§ 114.3(a)(2), (c)(2)(i).<sup>5</sup> Furthermore, a membership organization may allow a candidate to  
6 address all of its employees, its members, and their families at a meeting, convention, or other  
7 function, without making a contribution to the candidate, provided it meets certain conditions.  
8 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may  
9 sponsor an election-related appearance by a candidate before the general public without making  
10 a contribution to the candidate. Advisory Op. 1996-11 at 5 (Nat’l Right to Life Conventions,  
11 Inc.).

12 Although Brown’s speech was campaign related, which Brown does not contest, the  
13 speech itself does not constitute a prohibited corporate contribution or expenditure because it  
14 falls under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA’s restricted  
15 class. However, once OSMA made a video recording of Brown’s speech available to the public  
16 beyond its restricted class, the exceptions to the definitions of “contribution” and “expenditure”  
17 provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA  
18 making Brown’s speech available to a broader audience constitute something of value to the  
19 candidate, an impermissible contribution or expenditure by OSMA in violation of 2 U.S.C.  
20 § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6 (“[T]he

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<sup>5</sup> *See also* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.”).

1 Commission cautions that an impermissible contribution would result if NRL were to distribute  
2 the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the general  
3 public, since the taping and distribution of the candidates' views on the issues addressed at the  
4 convention is something of value to the candidates.") (citing Advisory Op. 1980-90 (Atlantic  
5 Richfield Company) (taping and free distribution to television stations of candidates' views on  
6 energy issues is a corporate contribution)).

7         Nonetheless, there is no evidence that Brown was aware that his campaign related speech  
8 would be made available to the public beyond OSMA's restricted class, and the Complainant  
9 provides no evidence either from personal knowledge or otherwise to support his contention that  
10 Brown knowingly accepted or received something of value. Accordingly, the Commission finds  
11 no reason to believe that Sherrod Brown and Friends of Sherrod Brown and Judith Zamore in her  
12 official capacity as treasurer violated 2 U.S.C. § 441b(a) by knowingly accepting or receiving an  
13 impermissible in-kind contribution from OSMA.

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Josh Mandel MUR 6552  
Citizens for Josh Mandel, Inc.  
and Kathryn Kessler in her official  
capacity as treasurer

**I. INTRODUCTION**

This matter was generated by a Complaint filed with the Federal Election Commission by Mark R. Brown, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Josh Mandel. The Complainant alleges that Mandel knowingly accepted or received an impermissible corporate in-kind contribution in violation of 2 U.S.C. § 441b(a) when the Ohio State Medical Association ("OSMA") posted to the public area of its website links to a video recording of a campaign related speech that Mandel had delivered to OSMA's restricted class at OSMA's Annual Meeting. Compl. ¶¶ 1, 4, 22, 28 (Apr. 9, 2012).

While 2 U.S.C. § 441b(a) prohibits OSMA from making a contribution or expenditure in connection with any federal election, in order for Mandel to violate 2 U.S.C. § 441b(a) and (b), he must "knowingly . . . accept or receive any contribution prohibited by [2 U.S.C. § 441b.]" Here, because there is no evidence that OSMA did not inadvertently post to the public area of its website a video recording of Mandel's speech, Mandel could not have been aware that his speech would be made available to the public beyond OSMA's restricted class. Accordingly, Mandel did not knowingly accept or receive an impermissible in-kind contribution from OSMA, and the Commission finds no reason to believe that Josh Mandel and Citizens for Josh Mandel, Inc. and Kathryn Kessler in her official capacity as treasurer violated the Act.

1     **II.     FACTUAL AND LEGAL ANALYSIS**

2             **A.     Factual Summary**

3             Josh Mandel is the Republican candidate for Ohio's 2012 U.S. Senate seat. Citizens for  
4 Josh Mandel, Inc. is Mandel's designated principal campaign committee, and Kathryn Kessler is  
5 its treasurer. OSMA is a 501(c)(6) tax-exempt "membership organization" under 11 C.F.R.  
6 § 114.1(e)(1). OSMA holds an Annual Meeting, which only registered members in good  
7 standing are permitted to attend. Joint Response of Josh Mandel, Citizens for Josh Mandel, Inc.,  
8 and Kathryn Kessler in her official capacity as treasurer ("Mandel Resp.") at 2 (May 11, 2012)  
9 (citing OSMA Bylaws at 10-11 (amended Mar. 2012), *available at* [http://www.osma.org/files/](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)  
10 [documents/about-osma/governance/ constitution-and-bylaws/20120325-constitution-and-bylaws-](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)  
11 [officialversion.pdf](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)).

12             At OSMA's invitation, Brown and Mandel each delivered a campaign related speech to  
13 OSMA's restricted class at OSMA's Annual Meeting on March 24, 2012.<sup>1</sup> Compl. ¶¶ 10-12; *see*  
14 Mandel Resp. at 2. According to a local news account of OSMA's Annual Meeting, in his  
15 speech, Mandel repeatedly referenced Brown by name, "criticized Brown for his support of the  
16 health-care law" and "accused Brown of stalling medical-malpractice reforms because of  
17 Brown's close ties to lawyers." Compl. at Ex. A. After Mandel delivered his speech, Mandel's  
18 campaign staff "passed out materials and collected names, phone numbers and email addresses."  
19 *Id.* In contrast, Brown delivered his speech a few minutes after Mandel's, but "made no mention  
20 of Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on with doctors." *Id.*

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<sup>1</sup> OSMA's annual meeting took place eighteen days after Ohio's primary in which Mandel won the Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

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OSMA subsequently posted links to a video recording of Brown's and Mandel's speeches at the Annual Meeting on the public area of its website, along with other non-political news from OSMA's Annual Meeting. Compl. ¶ 19. The video recording included "the entire 43-minute joint-presentation" of Brown's and Mandel's speeches, without any editing by OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.<sup>2</sup> *See id.* at Ex. E.

The Complaint does not allege that Mandel violated the Act by accepting OSMA's invitation to speak to its restricted class at its Annual Meeting. Indeed, the Complaint correctly acknowledges that the Commission's regulations permit a membership organization to invite candidates to address its restricted class. Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); *see also* 11 C.F.R. § 114.3(a)(2). Mandel also made this point in his Response. Mandel Resp. at 2 ("Mandel's speech at OSMA's annual meeting was in full compliance with federal law"). The Complaint alleges instead that Mandel knowingly accepted or received "something of value" in violation of section 441b(a) of the Act when OSMA posted to the public area of its website links to a video recording of Mandel's speech to OSMA's restricted class. Compl. ¶¶ 4, 28.

While Complainant's theory of liability on this allegation is unclear, Mandel in his Response interpreted the Complaint to allege that the posted video was a "coordinated communication," resulting in an in-kind contribution to the candidates under 11 C.F.R. § 109.21(b)(1). Mandel Resp. at 4. Mandel asserts that in order for OSMA's communication beyond its restricted class to qualify as an in-kind contribution to him, the communication must satisfy the three prongs of the coordination test—payment, content, and conduct—outlined in 11

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<sup>2</sup> As indicated in Exhibit E to the Complaint, OSMA is a "Plus" member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. *See* <http://vimeo.com/help/guidelines>; [http://vimeo.com/help/faq/vimeo\\_plus#/help/faq/vimeo\\_plus](http://vimeo.com/help/faq/vimeo_plus#/help/faq/vimeo_plus); <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

1 C.F.R. § 109.21. *Id.* Mandel denies that the public posting of links to a recording of his speech  
2 on OSMA's website constitutes a coordinated communication, and on that basis denies that he  
3 violated the Act.<sup>3</sup> *Id.*

4 **B. Legal Analysis**

5 The Act and Commission regulations prohibit corporations and other organizations,  
6 including membership organizations, from making contributions from their general treasury  
7 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);  
8 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or  
9 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

10 A "contribution" is "any gift, subscription, loan, advance, or deposit of money or  
11 anything of value made by any person for the purpose of influencing any election for Federal  
12 office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution,  
13 loan, advance, deposit, or gift of money or anything of value, made by any person for the  
14 purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). "Anything of  
15 value" includes all in-kind contributions and, unless specifically exempted, the provision of  
16 goods and services without charge or at a charge that is less than the usual and normal charge.  
17 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

18 Commission regulations include several exceptions permitting corporate activity that  
19 would otherwise constitute an expenditure or in-kind contribution. *See* 11 C.F.R.  
20 § 114.1(a)(2)(x) (excluding from the definition of "contribution" and "expenditure" any

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<sup>3</sup> Mandel's denial on this basis is valid because the recording of Mandel's speech posted via links from the public area of OSMA's website was neither an electioneering communication nor a public communication, and therefore fails the content prong of the coordinated communications test. 11 C.F.R. §§ 109.21(a), (c). Because the Commission does not dispute Mandel's denial that he knowingly accepted or received an impermissible in-kind contribution from OSMA, the Commission declines to analyze further his denial under the coordinated communications test.

1 corporate, union, or membership organization activity “specifically permitted by [11 C.F.R.] part  
2 114”). For example, a membership organization may invite particular candidates to address  
3 members, executive and administrative personnel (or all employees), and their families at a  
4 meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R.  
5 §§ 114.3(a)(2), (c)(2)(i).<sup>4</sup> Furthermore, a membership organization may allow a candidate to  
6 address all of its employees, its members, and their families at a meeting, convention, or other  
7 function, without making a contribution to the candidate, provided it meets certain conditions.  
8 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may  
9 sponsor an election-related appearance by a candidate before the general public without making  
10 a contribution to the candidate. Advisory Op. 1996-11 at 5 (Nat’l Right to Life Conventions,  
11 Inc.).

12 Although Mandel’s speech was campaign related, which Mandel does not contest, the  
13 speech itself does not constitute a prohibited corporate contribution or expenditure because it  
14 falls under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA’s restricted  
15 class. However, once OSMA made a video recording of Mandel’s speech available to the public  
16 beyond its restricted class, the exceptions to the definitions of “contribution” and “expenditure”  
17 provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA  
18 making Mandel’s speech available to a broader audience constitute something of value to the  
19 candidate, an impermissible contribution or expenditure by OSMA in violation of 2 U.S.C.  
20 § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6 (“[T]he

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<sup>4</sup> *See also* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.”).

1 Commission cautions that an impermissible contribution would result if NRL were to distribute  
2 the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the general  
3 public, since the taping and distribution of the candidates' views on the issues addressed at the  
4 convention is something of value to the candidates.") (citing Advisory Op. 1980-90 (Atlantic  
5 Richfield Company) (taping and free distribution to television stations of candidates' views on  
6 energy issues is a corporate contribution)).

7         Nonetheless, there is no evidence that Mandel was aware that his campaign related  
8 speech would be made available to the public beyond OSMA's restricted class, and the  
9 Complainant provides no evidence either from personal knowledge or otherwise to support his  
10 contention that Mandel knowingly accepted or received something of value. Accordingly, the  
11 Commission finds no reason to believe that Josh Mandel and Citizens for Josh Mandel, Inc. and  
12 Kathryn Kessler in her official capacity as treasurer violated 2 U.S.C. § 441b(a) by knowingly  
13 accepting or receiving an impermissible in-kind contribution from OSMA.

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