



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Robert J. Ritchie p/k/a Kid Rock, *et al.*) MUR 7273
)

**STATEMENT OF REASONS OF CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN**

“Kid Rock” is the stage name for musician Robert J. Ritchie. The complaint in this matter alleges that Ritchie became a candidate for Senate in 2017 when he authorized the sale of T-shirts and other merchandise bearing the legend “Kid Rock for US Senate,” but failed to register a principal campaign committee and file disclosure reports with the Commission.¹ The Commission’s Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that Ritchie violated the Federal Election Campaign Act of 1971, as amended (the “Act”).² A majority of the Commission rejected OGC’s recommendations and instead voted to dismiss the matter as an exercise of prosecutorial discretion.³ We write to explain the rationale behind our vote.

In the summer of 2017, Ritchie published a website at “kidrockforsenate.com,” through which users could purchase “Kid Rock for US Senate” merchandise.⁴ Ritchie also posted a message on the website explaining that (1) he had “decided to take a hard look to see if there was real support for me as a candidate,” (2) he had created a 501(c)(4) organization dedicated to promoting voter registration, and (3) the 501(c)(4) entity would receive proceeds from merchandise sales.⁵ Over several weeks, Ritchie tweeted the website’s URL and images of “Kid

¹ See MUR 7273 (Robert J. Ritchie, *et al.*), Complaint.

² MUR 7273 (Robert J. Ritchie, *et al.*), First General Counsel’s Report at 14.

³ MUR 7273 (Robert J. Ritchie, *et al.*), Vote Certification (Oct. 23, 2018). The complaint also alleged that Warner Brothers Records Inc. violated the prohibitions on corporations facilitating contributions and acting as conduits for earmarked contributions when Warner Brothers Records permitted its website to be used to sell “Kid Rock for US Senate” merchandise. See Compl. at 16 (citing 11 C.F.R. §§ 110.6, 114.2(f)). We agreed with OGC’s conclusion that Warner Brothers Records did not violate the Act. See First Gen. Counsel’s Rpt. at 12-13. We therefore do not further address that allegation here.

⁴ See Compl. at 2-3; First Gen. Counsel’s Rpt. at 2-5.

⁵ Compl. at 4-5.

Rock for US Senate” merchandise.⁶ In an October 2017 interview with Howard Stern, however, Ritchie colorfully and clearly disclaimed that he would be running for Senate.⁷ He shortly thereafter released a new album (“Sweet Southern Sugar”) and announced an accompanying “patriotic pro-American” tour.⁸ In a notarized affidavit filed with his response, Ritchie declared under oath that Kid Rock’s “run for office” was a “concert promotion.”⁹

OGC recommended that the Commission find reason to believe and investigate Ritchie for violating the Act’s registration and reporting provisions. In doing so, OGC dismissed Ritchie’s sworn statement that “Kid Rock for US Senate” was an artistic and commercial undertaking that tied in with the theme of his upcoming album, related concert tour, and promotional materials; that Michigan law precluded Ritchie from gaining ballot access using the persona “Kid Rock”;¹⁰ that Ritchie explicitly and publicly disclaimed an interest in running for Senate more than a year before the election; and that proceeds from the sale of merchandise bearing the offending statement went not to an exploratory committee (which Ritchie never established) or to a campaign committee (which he also never established), but to help support a 501(c)(4) entity’s get-out-the-vote efforts. On this record, we and Commissioner Walther agreed

⁶ *Id.* at 2-6; First Gen. Counsel’s Rpt. at 2-6. The merchandise was promoted online under the Twitter handles “@KidRock” and “@KidRockSenator.” See Compl. at Ex. 1-7. In his Response, Ritchie stated “@KidRockSenator” is not owned by him or authorized by him or his management company. See MUR 7273 (Robert J. Ritchie, *et al.*), Ritchie Response at 10.

⁷ See Ritchie Resp. at 6 (noting Kid Rock’s “political campaign” is but one in a “long line of celebrity *parodies* of running for office”) (emphasis added); MUR 7273, Affidavit of Robert J. Ritchie at ¶ 12 (“[A]s I said to Howard Stern, I am not running now; and if I ever do, there will be no doubt about it.”); see also *Stern Show Exclusive: Kid Rock Announces New Album, New Tour, and Whether or Not He’s Running for U.S. Senate* (Oct. 24, 2017), <https://www.howardstern.com/show/2017/10/24/stern-show-exclusive-kid-rock-announces-new-album-new-tour-and-whether-or-not-hes-running-us-senate>.

Howard Stern: Are you going to be the candidate that is running against Debbie Stabenow?

Robert J. Ritchie: [Expletive] no I’m not running for Senate! Are you [expletive] kidding me!?

Howard Stern: Thank God.

Robert J. Ritchie: Like who [expletive] couldn’t figure that out? I’ve released a new album . . . I’m going on tour too . . . I have people that work for me they’re on the in. I’m like [expletive] no we’re not doing it . . .

⁸ MUR 7273, Affidavit of Lee Trink at ¶ 9; Ritchie Resp. at 3.

⁹ See Affidavit of Robert J. Ritchie at ¶ 3.

¹⁰ See Ritchie Resp. at 7-8 n.17 (citing M.C.L.A 168.560(b)(2)) (requiring Michigan candidates to use their legal name); Affidavit of Robert J. Ritchie at ¶ 1 (“[M]y legal name remains my birth name: Robert James Ritchie.”).

that this case was properly resolved through an exercise of prosecutorial discretion under *Heckler v. Chaney*.¹¹

* * *

Ritchie — who respondents credibly argue is barred from being identified as “Kid Rock” on a Michigan election ballot — does not appear to have taken even the most basic steps to become a candidate. There is no evidence that Ritchie ever established a committee or campaign account, sought ballot access, hired a campaign staff or political consultants, sought to participate in a candidate debate, opened a campaign office, or solicited contributions for a campaign. Nor does the record show that Ritchie made statements indicating he was a candidate under his legal name. In contrast to all these steps not taken, Ritchie explicitly disclaimed that he was running for Senate, or that he had ever intended to do so, more than a year before the general election. Accordingly, we do not believe the record in this matter — the sale of concert-themed merchandise by a musician who explicitly disclaimed candidacy — implicates concerns which are central to the Commission’s regulatory mission or deserving of its resources.

Even assuming that Ritchie’s conduct technically violated FECA, further pursuing this matter would have been an unwise use of Commission resources.¹² This is especially true where, as here, the Commission would be called upon to analyze Ritchie’s actions under its testing-the-waters regulations and precedents in order to make a candidacy determination. Investigations into these types of allegations consist of difficult, fact-intensive inquiries and require the Commission to gather and test evidence about an individual’s state of mind.

Compounding the difficulty of the inquiry, this matter also presents legal questions that would likely consume inordinate Commission resources and lead us to doubt the likelihood of success.¹³ First, OGC and the complaint claim that Ritchie’s use of “Kid Rock for US Senate” and sale of “Kid Rock for US Senate” merchandise automatically trigger candidacy, because Commission regulations identify “mak[ing] or authoriz[ing] written or oral statements that refer to [an individual] as a candidate” as an example of activity which “objectively evince[s]” a decision to become a candidate has been made.¹⁴ We question this inflexible application of the regulation, especially where the record includes contrary evidence regarding Ritchie’s subjective decision-making (including statements from Ritchie himself) and where Ritchie would almost

¹¹ *Heckler v. Chaney*, 470 U.S. 821 (1985); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), *pet’n for reh’g en banc filed*, No. 17-5049, Doc. #1742905 (July 27, 2018).

¹² *Id.* at 831.

¹³ *Id.* (“[T]he agency must not only assess whether a violation has occurred, but whether . . . the agency is likely to succeed if it acts.”).

¹⁴ *See* First Gen. Counsel’s Rpt. at 8 (citing Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC)); *see also* Compl. at 8-9.

certainly be unable to obtain Michigan ballot access under the name “Kid Rock.”¹⁵

Second, this matter implicates a broad set of fundamental First Amendment rights.¹⁶ Ritchie is a musical artist and argues that “Kid Rock” is a stage name imbued with the artistic persona Ritchie has worked to cultivate.¹⁷ Ritchie states under oath that he had no intention of being a candidate and that “Kid Rock for US Senate” was a slogan, part-and-parcel of his expression as an artist, including his music, staging, merchandising, and advertising.¹⁸ He and his manager argue it conveys a deeper meaning than a simple call to vote. According to them, “Kid Rock for US Senate” expresses the idea that “middle America should not lose faith in our country and ourselves” and provides concertgoers a patriotic experience.¹⁹ Finally, their assertion that the slogan was created for commercial advertising purposes and to entertain fans of “Kid Rock” also raises commercial speech concerns.²⁰

Third, the Commission has previously dismissed matters when actions forming the basis for a violation are revealed to be part of a joke, parody, or otherwise unserious.²¹ Here, Ritchie

¹⁵ The Commission’s testing-the-waters regulations have never been a simple check-the-box exercise. Accordingly, we declined to apply them in the mechanical manner that OGC and the complainant propose.

¹⁶ See Ritchie Resp. at 5-7.

¹⁷ See Ritchie Resp. at 2, 5-8. See generally Affidavit of Robert J. Ritchie.

¹⁸ See Ritchie Resp. at 6 (citing Affidavit of Robert J. Ritchie at ¶ 2).

¹⁹ See *id.* at 5; see also Affidavit of Lee Trink at ¶ 6-9 (stating that the Kid Rock for Senate promotion was a “campaign theme” to give concertgoers a patriotic experience,” and encourage middle America to have confidence in themselves, while “pok[ing] fun at Washington”). Artistic expression, including expression which may bring about political and societal change, is clearly protected by the First Amendment. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (remarking that painting, music, poetry, and other forms of art are “unquestionably shielded” by the First Amendment”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment”); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected . . . and live entertainment, such as musical and dramatic works[,] fall within the First Amendment guarantee.”); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (“[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“[Art] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946) (“[A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.”). Accordingly, the Commission must permit the maximum amount of unrestrained expression consistent with its mandate under the Act.

²⁰ See Affidavit of Robert J. Ritchie at ¶ 8; Ritchie Resp. at 6-7 (claiming protection as commercial speech).

²¹ *Heckler*, 470 U.S. at 831 (“[T]he agency must not only assess whether a violation has occurred, but whether . . . the particular enforcement action requested best fits the agency’s overall policies.”). See, e.g., MUR 6939 (Mike Huckabee, *et al.*), Factual and Legal Analysis at 1 (dismissing allegations against Mike Huckabee because his statement was “in jest”); MUR 3690 (National Republican Congressional Committee), Factual and Legal Analysis at 3-4 (finding no reason to believe national political party violated prohibition on fraudulent misrepresentation when context revealed purposeful misrepresentation in flyer was satirical); see also MUR 7135 (Donald J. Trump, *et al.*), First Gen. Counsel’s Rpt. at 7 (citing MUR 6939 (Mike Huckabee, *et al.*)).

states that the “Kid Rock for US Senate” effort was not a sincere attempt to seek federal office, but rather continued a “long line of celebrity *parodies* of running for office.”²² Because the record indicates that Ritchie never seriously considered becoming a candidate, and in the interest of fairness and consistency in Commission enforcement, this matter merits dismissal.²³

Nor will the Commission’s ability to enforce the Act or its regulations with respect to candidates be impaired as a result of the Commission dismissal here. The facts in the record are especially novel, even for the fact-intensive nature of testing-the-waters and candidate-status allegations. Further, every election cycle brings fresh testing-the-waters complaints against individuals who actually run for office. There is no shortage of allegations that individuals have failed to timely register and report their activities. Moreover, the volume of total complaints filed with the Commission is near record levels.²⁴ Thus, dismissal of this matter as an exercise in ordering Commission enforcement priorities was not only reasonable, but proper.²⁵

* * *

Celebrities do not enjoy immunity from Commission enforcement. By the same token, the Commission must be cautious to avoid interference with the “unfettered interchange of ideas for the bringing about of political and social changes.”²⁶ The free speech rights of many artists would be hollow indeed if, to avoid government investigation, they must parse their words when touching upon political issues and campaigns. In light of the factual record of this matter, the

²² See Ritchie Resp. at 6 (citing Will Rogers, Gracie Allen, Pat Paulson, Joe Walsh and Jimmy Kimmel) (emphasis added). Jimmy Kimmel for instance, reportedly announced in 2016 that he was “officially running for Vice President of the United States” and continues today to solicit donations via his campaign website, which includes an “issues” page and links to Kimmel’s “campaign” videos. See *Jimmy Kimmel, Kimmel for Vice President* <http://jk4vp.com/>; Christina Manduley, *Jimmy Kimmel announces he’s running for Vice President*, CNN (May 13, 2016), <https://www.cnn.com/2016/05/12/politics/jimmy-kimmel-vice-president-cnn/index.html>. And in 2007 Stephen Colbert announced that he was running for President and reportedly sought ballot access in South Carolina. See Caroline McCarthy, *Stephen Colbert announces presidential bid, but is it the truth or truthiness?*, CNET (Nov. 1, 2007), <https://www.cnet.com/news/stephen-colbert-announces-presidential-bid-but-is-it-the-truth-or-truthiness/>.

²³ See, e.g., *County of Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999) (an agency’s permissible discretion does not include “a license to . . . treat like cases differently”).

²⁴ See *Heckler*, 470 U.S. at 831 (“[T]he agency must not only assess whether a violation has occurred, but whether . . . the agency has enough resources to undertake the action at all.”). See Agenda Document X18-41, Status of Enforcement Fiscal Year 2018, Third Quarter (4/1/2018 – 6/30/2018) (Aug. 6, 2018) at 3, https://www.fec.gov/resources/cms-content/documents/status_enforcement_fy20183rdQ_publicv.pdf (showing 174 complaints received in first three quarters of the fiscal year 2018).

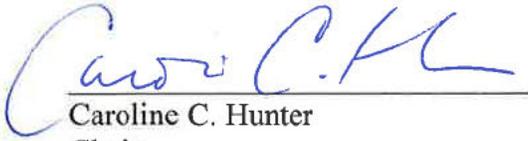
²⁵ See *Heckler*, 470 U.S. at 832 (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”).

²⁶ See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see also *Roth*, 354 U.S. at 488 (“The door barring federal . . . intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests”). Because we do not believe Ritchie decided to become a candidate, the interests embodied in the Act (prevention of *quid pro quo* corruption and its appearance) are not implicated.

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Statement of Reasons

considerations articulated in *Heckler*, and the First Amendment sensitivities at issue here, our votes constituted a proper exercise of the Commission's prosecutorial discretion.

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Statement of Reasons



Caroline C. Hunter
Chair

11/20/2018
Date



Matthew S. Petersen
Commissioner

11/20/2018
Date