



Here, we agreed with our colleagues who recognized the fruitlessness of investigating this matter (in no small part because of the difficulty in being able to get information from the people involved in inherently transient activity nearly five years prior),<sup>5</sup> but disagreed about whether to move forward with this matter. The disagreement centered around what to do about the fact that, as a result of technical improvements in the production, preparation, and distribution of political materials, state and local political party committees have evolved their practices, thereby rendering the forty-year-old VME framework somewhat outdated. Our view is that the Commission has failed to provide adequate guidance to the public, and therefore moving forward on this matter, especially in light of how much time has passed since the events at issue, would be unfair and not the best use of Commission resources.<sup>6</sup> Accordingly, we voted to dismiss this matter pursuant to *Heckler v. Chaney*.<sup>7</sup>

There is much water under the VME bridge at the Commission. The exemption dates to the 1979 amendments to the Federal Election Campaign Act of 1971, as amended, wherein Congress established an exemption from the definition of “contribution” and “expenditure” for the cost of campaign materials purchased by a state or local political party committee that support a federal candidate who has received the party’s general election nomination and are used by the party committee in connection with volunteer activity. However, over the past forty years, political campaigns have been fundamentally transformed by innovation and technology, and today’s volunteer activity looks a lot different than it did forty years ago. For example, for many election cycles, state and local party committees recruited volunteers to affix address labels and postage to envelopes used to distribute candidate materials, and to sort the mail by zip code for postal preprocessing (colloquially known as “bagging and tagging,” a phase no doubt familiar to those who have been in the trenches with volunteers at party committee offices); however, more recently, those functions have been automated and, in some cases, rendered obsolete.

Unsurprisingly, over the past several election cycles, the Commission has struggled to apply a 1979 law to modern campaigns, resulting in a patchwork of regulatory guidance that fails to provide a clear rule to the public. As far back as 2009, in matter arising from the 2004 election cycle, a bipartisan majority of the Commission has recognized the “complicated history of the volunteer materials exemption” and pledged to “issue more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies.”<sup>8</sup> To date, the

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contemporaneous emails demonstrating the participation of volunteers in the distribution of the materials. Resp. (URP) at 2, MUR 7330 (Mia Love, *et al.*).

<sup>5</sup> Amended Certification (Aug. 31, 2021), MUR 7330 (Mia Love, *et al.*).

<sup>6</sup> In considering this matter, we also noted that the 2016 coordinated party spending limit, of which none was actually spent by URP, was \$96,200, and that URP could have contributed an additional \$5,000 to the Committee directly; so even assuming *arguendo* that the materials at issue were not exempt under the VME, the amount of any excessive contribution would have been relatively small.

<sup>7</sup> 470 U.S. 821 (1985).

<sup>8</sup> Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Cynthia Bauerly, Caroline Hunter, and Ellen Weintraub, MUR 5598 (John Swallow) at 4.

Commission has been unable to issue such guidance, despite several attempts.<sup>9</sup> And it would be unfair for the Commission to require state and local party committees to choose between taking advantage of more modern campaign techniques and engaging volunteers in its activities.

Here, the respondents assert that the materials were volunteer exempt materials, and they provided some evidence in support of that assertion (none of which is contradicted). In the absence of a clear rule about the application of that exemption (and disagreement among Commissioners about what it *should* be), and in light of the amount of time that had passed since the activity at issue (and that Love is no longer a federal candidate), we could not support OGC's recommendation to investigate further, including though the use of compulsory process. Nor could we support finding reason to believe that URP and the Committee violated the law (by impermissibly coordinating the materials) and seek a monetary penalty based thereupon. Instead, we voted to exercise the Commission's prosecutorial discretion to dismiss this matter. But we continue to urge our colleagues to join with us in the process of developing a rule that can be fairly enforced going forward.

10/27/2021

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Date



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Allen Dickerson  
Vice Chair

10/27/2021

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Date



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Sean J. Cooksey  
Commissioner

10/27/2021

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Date



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James E. "Trey" Trainor, III  
Commissioner

<sup>9</sup> See Proposed Interim Enforcement Policy (Volunteer Materials Exemption) (2010 and 2012), Agenda Document No. 12-16, Drafts A, B, C, and D, available here: <https://www.fec.gov/legal-resources/policy-other-guidance/> (accessed Oct. 2, 2021).