



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
Kirby Hollingsworth ) MUR 6113  
Kirby Hollingsworth for State Representative )

**STATEMENT OF REASONS**

**COMMISSIONER CYNTHIA L. BAUERLY  
COMMISSIONER ELLEN L. WEINTRAUB**

This matter concerns a mailer and a radio ad paid for by the Kirby Hollingsworth for State Representative committee. Both the mailer and the radio ad advocated the election of John McCain and Sarah Palin for President and Vice President and advocated the defeat of Barack Obama. The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that Kirby Hollingsworth violated 2 U.S.C. § 441i(f) and that his committee violated 2 U.S.C. §§ 434(c), 434(g) and 441d of the Federal Election Campaign Act of 1971, as amended ("the Act"), by paying for the mailer and radio ad with funds that were not subject to the limitations, prohibitions and reporting requirements of the Act, failing to include the proper disclaimers on the mailer and in the ad, and failing to report the mailer and the ad as independent expenditures. In this Statement, we will address what we believe to be the most indisputable violation.<sup>1</sup>

The mailer uses Senator McCain's own campaign slogan, declaring: "Kirby Hollingsworth and John McCain: Real Experience. Real Solutions. Both Are Ready to Lead." In the mailer Hollingsworth asserts: "Northeast Texas is firmly behind John McCain and Sarah Palin - and so am I." The radio ad explicitly endorses the McCain-Palin ticket, stating "Hollingsworth thinks Sarah Palin is the breath of fresh air we need. That's why he proudly endorses the McCain-Palin team."<sup>2</sup>

<sup>1</sup> Although we are perplexed as to how our colleagues could find that Hollingsworth's use of McCain's "Ready to Lead" campaign slogan is not express advocacy under 11 CFR § 100.22(a), our Statement focuses on Mr. Hollingsworth's clear violation of 2 U.S.C. § 441i(f).

<sup>2</sup> OGC's review of Texas Ethics Commission reports indicates that Mr. Hollingsworth spent \$92,500 on the production and broadcasting of "radio/cable buys". The same reports also contain an entry of \$26,472.42 for "Sulphur Springs and Early Voting Auto Dials; Design/Print'n Mailers; Renew postage permit," part of which appears to have been spent on producing and disseminating the mailers. MUR 6113 (Kirby Hollingsworth et al.), First General Counsel's Report at 2.

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Section 441i(f) states that a candidate for State or local office, like Mr. Hollingsworth, may only use "hard money" (funds subject to the limitations, prohibitions, and reporting requirements of the Act) for any public communication that promotes, supports, attacks, or opposes a Federal candidate, regardless of whether the communication contains express advocacy, and regardless of whether the communication also mentions a State or local candidate. Thus the law, by its terms, covers a communication that is paid for by a State candidate and promotes both that State candidate and a Federal candidate.

The "promote," "support," "attack," or "oppose" (commonly abbreviated as "PASO") standard at issue in this MUR was upheld in *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003). As the Supreme Court wrote in that case, "[t]hese words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* at 170. Subsequent opinions, including *Federal Election Com'n v. Wisconsin Right to Life*, 551 U.S. 449, 451 (2007), have left this holding undisturbed. The Supreme Court, however, apparently did not anticipate that some would reject the Court's conclusion and continue to insist that those who participate in the electoral process would not understand the plain meaning of these basic words.

We agreed with OGC's legal analysis, and thus we voted to approve OGC's recommendation to find reason to believe that the law had been violated.<sup>3</sup> However, Mr. Hollingsworth's argument that, taken in context, the mailer and the radio ad were principally intended to advance his own candidacy for election as Texas State Representative was not without merit. After all, while Mr. Hollingsworth lost the State Representative race by a narrow margin, the McCain-Palin team won that district with over 70% of the vote.<sup>4</sup> For that reason, when Commissioner Weintraub made the motion to approve OGC's recommendations, which we both supported, it also included a recommendation to counsel that no more than a minimal penalty would be warranted under the circumstances if the investigation were to lead to a recommendation to enter into pre-probable cause conciliation.

When this motion failed, we offered to support a motion to dismiss the MUR as a matter of prosecutorial discretion, provided that the accompanying Factual and Legal Analysis would clearly state that the mailer and the ad promoted and supported John McCain and Sarah Palin. Dismissing the MUR while acknowledging the violation would have provided guidance to the regulated community, without penalizing a State candidate who most likely inadvertently strayed over the line of the Federal law.

<sup>3</sup> Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively to find reason to believe that Mr. Hollingsworth violated 2 U.S.C. § 441i(f), and that Kirby Hollingsworth for State Representative violated 2 U.S.C. §§ 434(c), 434(g) and 441d by failing to report independent expenditures and by failing to include proper disclaimers on the mailer and the radio advertisement. Vice Chairman Petersen and Commissioners Hunter and McGahn II dissented. See MUR 6113 (Kirby Hollingsworth, *et al.*), Certification dated September 1, 2009. The matter was held over for two months in order to determine whether a compromise could be reached on a factual and legal analysis supporting dismissal, as discussed above. Failing to reach a compromise, the Commission voted to close the file on November 3, 2009. See MUR 6113, Certification dated November 3, 2009.

<sup>4</sup> MUR 6113 (Kirby Hollingsworth, *et al.*), Response at 1.

Our colleagues, however, declined this proposal and refused to agree, for example, that the statement, "Northeast Texas is firmly behind John McCain and Sarah Palin – and so am I," is a statement of support for McCain and Palin. Apparently our colleagues believe that until a word is defined in the Code of Federal Regulations, it has no discernible meaning to those of ordinary intelligence.

Thus, unfortunately, the Commission as a whole could not even agree to dismiss this case on prosecutorial discretion and issue a Factual and Legal Analysis that stated the mailer and ad included PASO, but that the Commission declined to take further action based upon the circumstances. Instead, our colleagues proposed drafting a Factual and Legal Analysis that would have indicated that a majority of commissioners could not determine whether the statements at issue supported McCain and Palin. We declined to follow this path, fearing that such an analysis (or lack thereof, really) would not only sow confusion, but utterly mystify the regulated community.

While ambiguity about the outer reaches of the PASO standard could inform the Commission's analysis in marginal cases, it should not prevent us from applying this legal standard, adopted by Congress and upheld by the Supreme Court, to statements that plainly fall within its core, by any definition. If the phrase "I endorse the McCain-Palin team" is not a statement of support, it is hard to imagine what is.<sup>5</sup>

As Commissioners, we are required to enforce the law as written by Congress unless a Court of law strikes it down. We do not wear black robes, and we are required by the doctrine of separation of powers to leave the judging to those who do. We should not devise our own Constitutional challenges to provisions of the Act, or let our enforcement of the law be guided by conjecture as to how a Court might decide such challenges.<sup>6</sup> This is most certainly so where, as here, the provision in question has been upheld by the Supreme Court. In declining to apply the PASO standard in this matter "to avoid unnecessarily getting mired in constitutional thickets," our colleagues are substituting their judgment for that of the Court.<sup>7</sup> Instead, we should continue to apply the PASO standard as written. *See* MUR 5714 (Montana State Democratic Party).

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<sup>5</sup> The Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn, at 6-7, places heavy emphasis on Senator Feingold's statement that "it is not our intent to prohibit State candidates from spending non-Federal money to run advertisements that mention that they have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate . . ." 148 Cong. Rec. S2143 (Mar. 20, 2002). This emphasis is misplaced for two reasons. First, Senator Feingold's statement addressed endorsements by Federal candidates, not of Federal candidates. Second, Senator Feingold's statement was limited to situations where the communications "do not support, attack, promote or oppose the Federal candidate." Senator Feingold plainly did not intend to create an exception to the PASO standard, much less one so broad that it would risk swallowing the entire rule. *See also* Advisory Opinion 2003-25 (Weinzapfel).

<sup>6</sup> *See Johnson v. Robison*, 415 U.S. 361,368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *see also Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995)("[i]t [i]s hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it [i]s in some respect unconstitutional.").

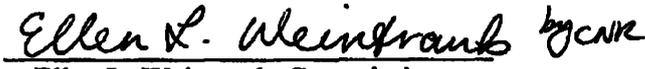
<sup>7</sup> MUR 6113 (Hollingsworth), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 9.

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There can be no question that the language employed in the mailer and the ad meets the PASO standard. That these statements promote and support Senator McCain should be beyond dispute. There may have been reasons to exercise prosecutorial discretion on the facts of this particular matter, but there was no reason to confuse the plain meaning of the law.

  
Cynthia L. Bauerly, Commissioner

12/18/09  
Date

  
Ellen L. Weintraub, Commissioner

12/18/09  
Date

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