



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF CHAIR SHANA M. BROUSSARD,
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

Audit of the Mississippi Republican Party (A17-15)

The Commission has, for many years, affirmed that the cost of fundraising communications may be independent expenditures if they contain express advocacy. While there have been disagreements among commissioners about what language constitutes express advocacy, it is well-established that fundraising communications, as a matter of law, may qualify as independent expenditures, and that information about them may therefore be subject to public disclosure.

With their votes in this audit, a new group of commissioners casts these well-settled principles in doubt.

On January 28, 2021, three of our colleagues voted against our Audit staff's recommendation to find that the Mississippi Republican Party ("MRP") failed to properly disclose apparent independent expenditures totaling \$37,449 and did not file 24- and 48-hour notices for apparent independent expenditures totaling \$36,969.¹ The recommendation failed by a vote of 3-3.² The Final Audit Report stated that some Commissioners indicated that "they did not consider a solicitation to be an independent expenditure, given the nature of how state parties fundraise and solicit funds."³ We write to explain our strong disagreement.

The Federal Election Campaign Act (the "Act") defines an independent expenditure as an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not coordinated with a candidate or a candidate's agents.⁴ The

¹ See Audit Division Recommendation Memorandum on the Mississippi Republican Party, as set forth in Agenda Document 21-01-A. We voted to approve the Audit staff's recommendation, except that we voted to include Mailer #8 as an additional undisclosed independent expenditure.

² See Vote Certification, Audit Division Recommendation Memorandum, Mississippi Republican Party, Jan. 28, 2021.

³ Final Audit Report, Mississippi Republican Party, at 20. See also recording of Open Session, Jan. 28, 2021, available at <https://www.fec.gov/resources/cms-content/documents/20210128.mp3>.

⁴ See 52 U.S.C. § 30101(17). See also 11 C.F.R. § 100.16.

Act requires political committees to disclose all disbursements for independent expenditures.⁵ In addition, they must report independent expenditures totaling \$1,000 or more that were made less than 20 days but more than 24 hours before an election on the day following the date on which the communication is publicly distributed or disseminated.⁶ Political committees that make independent expenditures totaling \$10,000 or more at any time up to and including the 20th day before the date of an election must file a report describing the expenditures within 48 hours.⁷

A clearly identified candidate is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as “your Congressman,” or through an unambiguous reference to his or her status as a candidate, such as “the Democratic presidential nominee” or “Republican candidate for Senate in this state.”⁸

Expressly advocating means any communication that:

- Uses phrases such as “vote for the President” or “re-elect your Congressman” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates;⁹ or
- When taken as a whole and with limited reference to external events, such as proximity to the election, could be interpreted by a reasonable person only as advocating the election or defeat of one or more clearly identified candidates.¹⁰

In promulgating this regulation in 1995, the Commission stated that “exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy,” and that the “subjective intent of the speaker” is not a relevant consideration.¹¹ The expressions enumerated by the Supreme Court long ago in *Buckley v.*

⁵ See 52 U.S.C. § 30104(b)(4)(H)(iii) and (6)(B)(iii). See also 11 C.F.R. § 104.3(b)(1)(i), (vii).

⁶ See 52 U.S.C. § 30104(g)(1)(A). See also 11 C.F.R. §§ 104.4(f) and 104.5(g)(2).

⁷ See 52 U.S.C. § 30104(g)(2)(A). See also 11 C.F.R. §§ 104.4(f) and 104.5(g)(1).

⁸ See 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

⁹ See 11 C.F.R. § 100.22(a).

¹⁰ See 11 C.F.R. § 100.22(b).

¹¹ Explanation and Justification for Regulations on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures (“E&J”), 60 Fed. Reg. 35292, 35294-95, Jul. 6, 1995.

Valeo included “support,”¹² a term that the Commission noted “encompasses a variety of activities beyond voting.”¹³ As the D.C. District Court stated in *FEC v. Christian Coalition*, “[t]he most obvious electoral action is to vote for or against the candidate. But as the *Buckley* Court recognized when it included the verb ‘support’ in its non-exclusive list, ... express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.”¹⁴

Prior to this audit (indeed, even during an earlier stage of this audit¹⁵), once the Commission determined that a communication satisfies the express advocacy test above, it has historically concluded that, absent coordination, the cost must be disclosed as an independent expenditure. Over the past decade, the Commission has included fundraising communications in independent expenditure reporting-related findings in audits of four different political committees, unanimously approving findings for every communication that it agreed contained express advocacy.¹⁶ For two of these committees, the Commission made reason-to-believe findings regarding the failure to report the independent expenditures.¹⁷ Several years before these audits, the Commission similarly found reason to believe that a failure to file independent expenditure reports for the cost of fundraising letters expressly advocating the election or defeat of clearly identified candidates violated the Act.¹⁸

¹² 424 U.S. 1, 44, fn. 52 (1976).

¹³ E&J, 60 Fed. Reg. at 25294.

¹⁴ 52 F.Supp.2d 45, 61-62 (D.D.C. 1999), quoting *Buckley*, 424 U.S. at 44, n.52.

¹⁵ The independent expenditure finding that did not receive majority support on January 28, 2021, was approved unanimously in 2019 at the Interim Audit Stage, albeit under a different group of Commissioners. See Vote Certification, Interim Audit Report, Mississippi Republican Party, May 7, 2019.

¹⁶ See Final Audit Report on National Campaign Fund at 9, 12-13 (approved Oct. 12, 2012); Final Audit Report on the Legacy Committee Political Action Committee at 8, 10 (approved July 31, 2012); Final Audit Report on the Conservative Majority Fund at 16-17 (approved Dec. 6, 2017); Final Audit Report on the Freedom’s Defense Fund at 12-13 (approved Dec. 6, 2017).

¹⁷ See MUR 6716 (National Campaign Fund), Factual & Legal Analysis (Jan. 16, 2013) (finding reason to believe that the committee failed to file independent expenditure reports for fundraising mailers); MUR 6715 (Legacy Committee Political Action Committee), Factual & Legal Analysis (Jan. 16, 2013) (finding reason to believe that the committee failed to file independent expenditure reports for fundraising mailers). The Commission reached settlements with the committees in both of these matters that include admissions of violations of the independent expenditure provisions of the Act and Commission regulations.

¹⁸ See MUR 5809 (Christian Voter Project), Factual & Legal Analysis (Sept. 20, 2006) (finding reason to believe that the committee failed to file independent expenditure reports for fundraising letters), General Counsel’s Report #2 (Apr. 16, 2007) and Conciliation Agreement (May 5, 2007). See also MURs 5511 and 5525 (Swiftboat Veterans and POWs for Truth), Conciliation Agreement, para. 23-24 (fundraising communications constituted express advocacy under 11 C.F.R. § 100.22(a)) (Dec. 14, 2006).

MRP’s mailers, the costs of which MRP failed to report as independent expenditures, included the following examples of express advocacy:

- “We must elect a Republican President in 2016”¹⁹
- “If we unite to support Donald Trump, we still have a chance to save our country for the future”²⁰
- “Stop Hillary!”; “STOP HILLARY from becoming President of the United States” and “support Donald Trump”²¹
- “... you can make a difference to support Donald Trump and stop Hillary Clinton from moving back into the White House”²²
- “Donald Trump ...will nominate Supreme Court Justices who will protect the Constitution.... I’m asking you to please stand up in defense of our Constitution by making a contribution today...”; “The Mississippi Republican Party has been hard at work not only to ensure that Donald Trump wins Mississippi by a wide margin, but also that he wins swing states such as Florida and Ohio”; and “Your generous contribution today will help keep Trump from losing the presidency...”²³
- “I am asking you to please contribute \$100 to make sure that Donald Trump’s message of Making America Great Again can be delivered untainted by the media to undecided voters here in Mississippi and in key battleground states”²⁴
- “The Mississippi Republican Party is working hard to make sure Republicans in Mississippi turn out to vote and send Donald Trump to a landslide victory here. And the Party is doing the same thing in the critical battleground state of Florida... Will you please contribute \$50, \$75, \$100 or more to enable our Party

¹⁹ LRA 1077, p. 4, Mailer #1.

²⁰ LRA 1077, p. 4, Mailer #2.

²¹ LRA 1077, p. 4, Mailer #3.

²² LRA 1077, p. 4, Mailer #4.

²³ LRA 1077, p. 5, Mailer #5.

²⁴ LRA 1077, p. 5, Mailer #6.

to do everything it can in these last days to turn out Republican voters in Mississippi and Florida?”²⁵

- “Recent polls suggest the presidential election is dead even and that’s good news for Donald Trump and Mike Pence as they build momentum to win the White House... NOW is the time for a final surge in the momentum. Will you help make sure that happens?”²⁶

The language in some of these mailers is very similar to examples the Commission has provided in its regulations as words that convey a message of express advocacy, e.g., “Vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for the U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’12.”²⁷ Other mailers qualify as express advocacy – and therefore independent expenditures – because they advocate for or against clearly identified candidates and contain unambiguous references to the 2016 presidential election.

MRP asserts that the primary purpose of these mailings was to solicit donors for contributions and to explain the potential uses of the donated funds, and that any mention of federal candidates was “incidental” to the purpose of the mailings.²⁸ MRP also argues that, even assuming the mailers are considered independent expenditures, it should have been permitted to allocate the total cost of each mailer between the express advocacy content and other content that did not contain express advocacy.²⁹

These types of arguments have been rejected by the Commission in the past. The Commission has repeatedly concluded that mailers that contain express advocacy are considered independent expenditures, whether or not the asserted purpose is to raise funds, and regardless of the “quantity” of express advocacy as compared to the rest of communication.³⁰ While there

²⁵ LRA 1077, p. 5, Mailer #7.

²⁶ LRA 1077, p. 6, Mailer #9.

²⁷ See 11 C.F.R. § 100.22(a).

²⁸ See Response to Draft Final Audit Report of the Audit Division of the Mississippi Republican Party, Nov. 22, 2019.

²⁹ *Id.*

³⁰ See Final Audit Report on National Campaign Fund; Final Audit Report on Legacy Committee Political Action Committee; Final Audit Report on Freedom’s Defense Fund; and Final Audit Report on Conservative Majority Fund, *supra* fn. 16. Regarding the question of allocation between express advocacy and non-express advocacy components of a communication, the Commission stated in its E&J for the express advocacy regulations that the rules “treat communications that include express electoral advocacy as express advocacy, *despite the fact that the communications happen to include issue advocacy, as well.*” E&J at 35295 (emphasis added). The Commission also noted that the Supreme Court in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) made

have been disagreements among various Commissioners as to whether a given solicitation contained express advocacy and thus constituted an independent expenditure, our colleagues' position that they do not "consider a solicitation to be an independent expenditure" – without regard for whether the solicitation contains express advocacy – is a significant departure from Commission precedent.³¹ There is no exemption for solicitations in the definitions of "express advocacy" and "independent expenditure" in the Act, and the Commission has in fact refuted that notion in explaining the applicable regulation.³²

The potentially severe consequences of the Commission's failure to support our staff's recommended finding here should not be underestimated. The lifeblood of groups engaging in political activity is the *raising* and the *spending* of money to support candidates; segregating these two concepts – which our colleagues have essentially done by ignoring the express advocacy component of the mailers – misconstrues the necessary communicative aspects that link them together. Raising funds to use for political activities frequently involves advocating the election or defeat of those candidates that a group wants to support or oppose. It is of course possible to solicit without triggering an independent expenditure disclosure obligation, but if the solicitation includes advocacy that meets the test set forth in our regulations, that should be the end of the analysis – there is no need to delve into the purpose of the communication or the intent of the speaker.³³ The existence of express advocacy in a communication *ipso facto* indicates an election-influencing purpose.

The exclusion of an entire class of communications from being treated as independent expenditures has anti-disclosure implications that stretch far beyond this particular audit. This was an audit of a longstanding state party committee that is required to disclose all of its financial activity; our staff was able to review the content and cost of the mailers to determine how each mailer should have been reported. Here, it was more a matter of misclassification of disbursements and a lack of pre-election notices as opposed to a complete failure to report the costs of such expenditures in its disclosure reports. But what if the spender was instead an unregistered group that engaged in similar fundraising activity? The public would be deprived of information about clearly election-related spending, and depending on the overall nature of that group's financial activity, there might be no spending trail that could raise the issue of whether the group should have registered as a political committee. This is a recipe for widespread

clear that "isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy." *Id.*

³¹ See *supra* fn. 3.

³² As noted earlier, the Commission stated in its E&J that "exhortations to contribute ... money to a candidate" would fall within the regulatory definition. See *supra* fn. 11.

³³ As noted, the "subjective intent of the speaker" is not a relevant consideration when deciding whether a communication contains express advocacy. *Id.*

circumvention of the Act; groups spending large amounts on express advocacy advertisements could hide those costs from public view simply by inserting a brief “ask” in the communication.

The Act is intended to ensure the disclosure of information about communications advocating for or against federal candidates, and the Commission – whose very mission is to provide transparency regarding the amounts and sources of money raised and spent in federal elections – is obligated to enforce the applicable requirements. This transparency is what “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”³⁴ We are greatly concerned that the Commission’s failure to uphold these principles in this audit upends decades of solid precedent and sends exactly the wrong message about the Commission’s commitment to ensure effective disclosure.

April 15, 2021
Date



Shana M. Broussard
Chair

April 15, 2021
Date



Steven T. Walther
Commissioner

April 15, 2021
Date



Ellen L. Weintraub
Commissioner

³⁴ *Citizens United v. FEC*, 558 U.S. 310, 371; 130 S.Ct. 876, 916 (2010).