ASUCI JUDICIAL BOARD

"The Judicial Board has final judicial authority for ASUCI, which extends to all cases arising under the governing documents of ASUCI, all official actions of ASUCI officials and staff, and any matters delegated to the Judicial Board by the Senate or Student Advocate General."

JUDICIAL RULING ON Petrosyan v. Elections Commission ex rel. Natoolo

MENTER, J., delivered the opinion of the Board, in which SHANTHARAJ, C.J., and ANDERSON and BOKAEI, JJ., joined. SHIN, J., took no part in the consideration or decision of the case.

JUSTICE MENTER delivered the opinion of the Board.

The ASUCI Elections Code requires candidates to disclose campaign contributions of "goods", but not "services". Elections Code Art. XVII § A. This case requires us to determine whether the creation of a video and a website constitutes the contribution of goods, or services. We hold that the Elections Commission correctly identified these contributions as services. We also specify criteria that the Commission and the Judicial Board should consider in future cases when distinguishing between goods and services pursuant to the Elections Code.

I

This case arises out of the Spring 2017 ASUCI Elections. Presidential candidate Lydia Natoolo commissioned Craig Hung to create a promotional video and website for her campaign. Natoolo listed the video and website on her Financial Statement Form as donations[1], valuing the video at $70.00, and the website at $20.43. In total, these amounts add up to $90.43. The Elections Code places a $75 cap on the amount any individual can donate to a candidate. Elections Code Art. XVII § A. However, the Code only requires that contributions of goods, and not services, be counted as donations for the purposes of financial disclosure. *Id.* The operative question in this case is therefore whether the production of the video and website constitute contributions of goods, or services. If they constitute goods, then Natoolo has violated the Elections Code by accepting donations in excess of maximum allowable amount. If they constitute services, she is in the clear.

Appellant Robert Petrosyan filed a complaint before the Elections Commission. He alleged that Hung's contributions should be classified as goods, and therefore that Natoolo violated Elections Code Art. XVII § A by accepting those contributions. The Commission rejected the complaint, determining that, for something to be classified as a good, it must be a "tangible object". *Petrosyan v. Natoolo*, Elections Commission (Spring 2017). Because neither a video nor a website are tangible objects, the Commission reasoned, it follows that they are not goods, and that Natoolo was therefore not guilty of violating the Elections Code.

[1] The testimony and filings in this case are inconsistent as to whether the video and website were purchased (and therefore constitute an expense), or were donated. Because the Elections Commission decided the case under a section of the Elections Code applicable only to donations, we assume that the video and website were donated, rather than purchased.

Petrosyan appealed the Commission's ruling to this Board, arguing that both Supreme Court precedent and considerations of transparency in the elections process require us to classify video and website creation as a good, rather than a service.

We consider each of appellant's arguments, but do not find them compelling. Though appellant cites Supreme Court precedent in support of his case, he misconstrues its holding. And though we are sympathetic to appellant's transparency concerns, we do not think these concerns are best served by a definition of "goods" as broad as he recommends. We therefore lay out our own test distinguishing between goods and services, to be used in this case and in future cases requiring interpretation of Elections Code Art. XVII § A. Applying this test, we hold that the production of a video and a website constitute services.

II

A

Though the difference between goods and services resists easy or absolute delineation, there are two factors that we must consider when called upon to make a determination. The first factor is tangibility. The Elections Commission was correct to hold that a good must be a tangible object. In the field of products liability, courts must often differentiate between goods and services, as strict liability may be imposed only for a defect in a good, and not in a service. Though there is no bright-line test to distinguish between the two, it is a generally accepted rule that a good must be tangible. *See* Restatement (Third) of Torts § 19(a) (Am. Law Inst. 2013). *See also* California Revenue and Taxation Code § 6051 (imposing a sales tax on the sale of "tangible personal property").

Though this criterion is helpful, it does not entirely resolve the issue. The provision of services may incidentally involve a tangible object. For example, it is possible that the video file in this case was delivered to Natoolo via a physical storage medium, such as a DVD. This incidental use of a tangible object, however, cannot convert the provision of a service into the donation of a good. To determine whether the involvement of a tangible object renders a contribution a service, we look to whether the candidate primarily benefit from the tangible object itself, or from the contributor's time and skill. In the former case, the contribution

may be considered the donation of a good; in the latter case, it should be considered a service.

Our focus on the contributor's time and skill is, like our focus on tangibility, informed by existing case law distinguishing between goods and services in the field of products liability. In *Magrine v. Krasnica*, 94 N.J. Super. 288 (N.J. Super App. Div. 1967), a New Jersey superior court considered whether to impose strict liability in a case where a dentist injured a patient with a defective hypodermic needle. After deciding that strict liability could only be imposed through the sale of a good, not the provision of a service, the court had to determine whether the patient's transaction with the dentist qualified as the former or the latter. The court held that the dentist was providing a service, explaining the distinction as follows:

> "[T]he essence of the transaction between the retail seller and the consumer relates to the article sold. The seller is in the business of supplying the product to the consumer. It is that, and that alone, for which he is paid. A dentist or physician offers, and is paid for, his professional services and skill. That is the essence of the relationship between him and his patient."[2] *Id.* at 235.

Though this test originates from the law of torts, we feel that it is helpful in this context as well. To determine whether a campaign contribution was a contribution of a good or a service, we look not only to the tangibility or intangibility of the contribution, but also to whether the value of the contribution derives itself primarily from the contributor's time and expertise.

B

Analyzing the campaign contributions in this case, we easily conclude that each one should be classified as a service. Both the production of a video and the creation of a website derive their value almost entirely from the time and skill of the producer or developer, respectively. In either case, the transference of any tangible object between the contributor and the candidate is

[2] The Supreme Court of California adopted this test in *Murphy v. E. R. Squibb & Sons, Inc.*, 40 Cal.3d 672 (1985).

incidental. Thus for both a video and a website, each prong of our test points us towards a classification as a service.

With respect to the production of a video, Jason Chamness, appellant's own amicus and a "professional filmmaker and video editor", makes our point for us. *See Exhibit E*, Brief for Chamness as Amicus Curiae. Chamness emphasizes and enumerates the various kinds of equipment and technology that go into making a video. As with the dentist and his needle, a professional's use of specialized technology is a tell-tale sign that we are looking at the provision of a service, rather than the sale of a good. Furthermore, a video is not a tangible object. Though the video may be *stored* on a tangible object, the value of a single DVD, or even a small USB flash drive, is *de minimis* relative to the value of the video itself. When a filmmaker produces a video, he presumably demands to be paid regardless of whether he delivers the product in person or online. The value of the contribution is therefore derived not from the donation of any tangible object, but from the filmmaker's time and expertise.

Our analysis of the website is more or less identical to our analysis of the video. When a website is created for a campaign, no tangible object is donated from the developer to the candidate. The domain name registration, underlying code, and images on the website are all intangible; they are stored as information rather than embedded in physical space[3]. Instead, the value of the website is derived from the time the developer spends making it, as well as from her expert knowledge of HTML, CSS, Javascript, and other web technologies. Under both prongs of our test, the creation of a website must be classified as a service.

III

Our definitions of goods and services largely align with those of the Elections Commission. Appellant, however, argues that the Commission's definition of a service was unreasonably broad, and its definition of a good unreasonably narrow. He

[3] Appellant points to the website's server as an example of a tangible asset donated when a website is made. *Formal Petition to Disqualify Candidate Natoolo*, at 5. However, neither Natoolo nor Hung are likely to actually own the server. Most small websites are hosted on shared hosting plans, in which they share a physical server with other websites. As such, the item being donated here is not a server (which could be tangible), but processor time, storage, and memory on a server (which are not tangible).

therefore urges us to adopt different definitions. We consider each of his arguments, but find none that demonstrate any serious flaw in our test for distinguishing goods from services.

A

All parties are in agreement that a good must be a "tangible object", but disagree as to the meaning of that term. Appellant relies heavily on the Supreme Court's decision in *Yates v. United States*, No. 13-7451 (2015) to support his definition of a tangibility. Appellant construes *Yates* as holding that a tangible object is "something 'used to record or preserve information'". *Formal Petition to Disqualify Candidate Natoolo*, at 4. He then proceeds to argue that, because both a website and a video contain information, they must be "tangible objects". However, this misunderstanding of *Yates* is in precise opposition to its actual holding. Rather than *expanding* the definition of "tangible object" beyond its ordinary meaning, the Supreme Court *limited* the definition to only those tangible objects used to preserve or record information.

We provide a brief summary of the facts of *Yates*, in order to clarify its implications for this case. In *Yates*, the Supreme Court reviewed a criminal conviction under the Sarbanes-Oxley Act of 2002. Petitioner Yates was a fisherman in the Gulf of Mexico who caught the attention of a federal agent. The agent suspected that Yates had captured undersized red grouper, in violation of federal environmental regulation, and ordered Yates to keep any undersized fish separate from the rest of his catch until he returned to port. Instead of complying with the officer's instruction, Yates ordered his crew to throw all undersized fish overboard. Yates was subsequently convicted of violating a section of the Sarbanes-Oxley Act that creates a criminal penalty for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. 18 U.S.C. § 1519. He appealed his conviction to the Supreme Court, arguing that fish did not constitute a "record, document, or tangible object" within the meaning of the statute.

A majority of the Supreme Court agreed with petitioner Yates. Though fish clearly fall within the normal meaning of "tangible object", the Court found that it made no sense to apply

the term to fish in this case. The text of the statute surrounding the term "tangible object" made it clear that the statute was not meant to reach fish. One cannot, for example, "falsify" or "make a false entry in" a fish. Nor is a fish a similar kind of object to a "record" or "document". Given this context, a plurality of the Court held that the phrase "tangible object" in § 1519 referred only to one "used to record or preserve information". *Yates v. United States*, *supra*, (Ginsburg, J., plurality) (slip op. at 20). As a fish is not used to record or preserve information, the Supreme Court reversed Yates' conviction.

When discussing *Yates* in relation to this case, it is important to understand what the Supreme Court did *not* hold. First, the Court did not prescribe a general definition of "tangible object" to be used universally. The majority's interpretation of the term was heavily dependent on the text of the statute in which it was found. These same considerations do not apply to our ruling here; we are interpreting the ASUCI Elections Code, not the Sarbanes-Oxley Act of 2002. Second, the Supreme Court did not *expand* the definition a tangible object to encompass any record of information. Instead, it *limited* the definition of a "tangible object", within the context of 8 U.S.C. § 1519, to only those tangible objects that are "used to record or preserve information". In other words, for something to be considered a tangible object, tangibility is still a requirement. It is just not the *only* requirement. Because *Yates* does not hold what appellant insists it holds, we must still examine whether the video or the website in this case are tangible objects. If they are not, it is unlikely that they can be considered goods.

B

Appellant points out that Natoolo originally believed each of the contributions in this case to be contributions of goods. Indeed, during the hearing before the Elections Commission, Natoolo admitted that she believed the contributions constituted goods, opting to defend herself on other grounds. Appellant would have us give Natoolo's admission authoritative weight. He argues that, because Natoolo agreed that Hung's contributions are goods, and because acceptance of such goods would constitute a violation of the Elections Code, we must find that Natoolo violated the Elections Code.

We see no reason to give Natoolo's statements definitive weight. Indeed, we see no reason to give them any weight at all. The factual nature of the contributions are not in dispute, therefore their classification as goods or services is a pure question of law. As the Judicial Board, we have the authority to "interpret all parts of the governing documents of ASUCI", including the Elections Code. ASUCI Constitution, Art. VII, § 2(a). In other words, it is "emphatically the province and duty" of the Judicial Board "to say what the law is". *Marbury v. Madison*, 5 U.S. 177 (1803). Though a candidate's admission of guilt may reasonably influence a finding of fact by the Election Commission, it cannot force us to adopt any particular legal interpretation of the Elections Code. We therefore need not accept Natoolo's understanding of the distinction between a good and a service.

Appellant argues, in that alternative, that if Hung's contributions were contributions of services, then Natoolo has perjured herself by testifying that she received a contribution of goods. To the extent that this Board has the authority to issue a penalty for perjury, we find that Natoolo's statements cannot be classified as such. The controlling precedent on this subject is *United States v. Dunnigan*, 507 U.S. 87 (1993), which lays out the elements of perjury. Under *Dunnigan*, a person only commits perjury "if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory", *Id.* at 94.

Natoolo's testimony contains almost none of these components. Appellant's brief does not allege that Natoolo's statements were made "with the wilful intent to provide false testimony". The fact that she reported the contributions on her financial disclosure form suggests that she truthfully believed that the contributions were goods. Nor can her statements be considered material. As we have explained, Natoolo's opinion as to the appropriate classification for Hung's contributions carries no weight in our determination of the correctness of that classification. Because Natoolo's testimony satisfies neither the intent requirement nor the materiality requirement, we hold that Natoolo has not committed perjury.[4]

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[4] Appellant also argues that Natoolo perjured herself by claiming that her website was new, when in fact Hung had simply updated a website previously used in the presidential campaign of Tracy La. Because this issue does not bear on whether the creation of the website was a good or a service, Natoolo's

C

Appellant expresses concern that our classification of Hung's contributions as services, rather than goods, will create a slippery slope to the virtual elimination of campaign finance transparency. Appellant points out that candidates can derive tremendous benefit from promotional websites, videos, or other advertising services. If candidates do not have to disclose the source of these services, they could be masking the identities of individuals with significant influence over them and their campaigns. Appellant also worries that an overbroad definition of services will exacerbate these transparency problems, encouraging candidates to disingenuously hide donations of goods that they think they may be able to get away with characterizing as services.

Though we are sympathetic to appellant's transparency concerns, we do not think that they are best served by extending the definition of "goods" to the contributions in this case. Appellant is correct to argue that contributors of promotional materials can exert significant influence over a campaign. But this can easily be true for any contributor of a pure service. A volunteer donating nothing but her labor, handing out fliers or putting up campaign posters, may be a valuable asset to a campaign. But even under the broadest reasonable interpretation of the definition of a "good", such a contribution would constitute a service that the campaign need not disclose. We therefore cannot impose campaign finance reporting requirements on any contribution that significantly helps a campaign. Such a rule would eliminate the distinction between goods and services. The Senate and Elections Commission may choose to amend the Elections Code to require the disclosure of services, either with or without imposing a limit on the dollar amount of services that can be contributed. In the meantime, however, we cannot use the absence of a reporting requirement for services as an excuse to rewrite the Elections Code.

We are not worried, as appellant is, that our holding today will let candidates get away with hiding donations of goods that they unreasonably or disingenuously mischaracterize as services. Though we do not impose as absolute a rule as appellant might

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statements on the matter are immaterial regardless of their veracity, and thus cannot constitute perjury.

desire, there are manageable criteria, well-established in the law, that can be used to distinguish between goods and services. We trust that, in future cases, the Elections Commission and the Judicial Board will be able to employ these criteria in a consistent way that gives candidates fair notice about what they need or need not disclose.

* * *

When distinguishing between a good and a service under Elections Code Art. XVII § A, we have specified two factors that must be considered. To determine whether a contribution is the donation of a good or a service, we look to whether the contributor donated a tangible object to the candidate, and to whether the value of the contribution is derived primarily from the contributor's time and skill. Analyzed under this framework, we find that the contributions of a website and a video are contributions of services. Because there is no cap on the dollar amount a person can donate in services to a campaign, Natoolo did not violate the Elections Code by accepting a donation of a website and a video. The judgment of the Elections Commission, accordingly, is affirmed.

It is so ordered.

Suchith Shantharaj, Chief Justice

Laura Anderson, Associate Justice

Roxana Bokaei, Associate Justice

Aviel Menter, Associate Justice