



FEDERAL ELECTION COMMISSION
 1050 FIRST STREET, N.E.
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7147
 Make Am. Number 1, *et al.*)
)

**STATEMENT OF REASONS OF CHAIRMAN ALLEN DICKERSON
 AND COMMISSIONERS JAMES E. “TREY” TRAINOR, III AND SEAN J. COOKSEY**

Although this file did not become public until 2022,¹ the Commission acted on recommendations from the Office of General Counsel (“OGC”) about a year earlier.² At that time, the Commission faced a rapidly running statute of limitations, a substantial backlog of enforcement matters, and a legal analysis reliant on a legally questionable regulation. Taking these considerations together, we voted to dismiss rather than adopt OGC’s recommendation to proceed with an investigation with an eye toward future enforcement.³

¹ Certification at 1, MUR 7147 (Make Am. Number 1, *et al.*), Jan. 11, 2022.

² Certification at 1-4, MUR 7147 (Make Am. Number 1, *et al.*), Feb. 23, 2021. The Commission also voted to approve Factual and Legal Analyses that dismissed allegations against two respondents in April 2021, whom the Commission had dismissed from the Matter in February. Certification at 1, MUR 7147 (Make Am. Number 1, *et al.*), Apr. 8, 2021; Certification at 2, ¶ 3, MUR 7147 (Make Am. Number 1, *et al.*), Feb. 23, 2021.

³ We provide this Statement of Reasons pursuant to governing law, which requires it. *See Democratic Congressional Campaign Comm. v. Fed. Election Comm’n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (“DCCC”) (establishing requirement that “[t]he Commission or the individual Commissioners” must provide a statement of reasons why the agency “rejected or failed to follow the General Counsel’s recommendation”); *Common Cause v. Fed. Election Comm’n*, 842 F.2d 436, 449 (D.C. Cir. 1988) (“A statement of reasons...is necessary to allow meaningful judicial review of the Commission’s decision not to proceed”); *see also id.* at 451 (R.B. Ginsburg, J., dissenting in part and concurring in part) (“I concur in part III of the court’s opinion holding the DCCC rule applicable, prospectively, to all Commission dismissal orders based on tie votes when the dismissal is contrary to the recommendation of the FEC General Counsel”); *Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (“We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale

I. BACKGROUND

The complaint in this Matter made a number of allegations. For some of them, OGC concluded there was insufficient evidentiary support for a reason-to-believe finding, a position adopted by the Commission.⁴ We divided with our colleagues, however, on the question of whether the Commission should “[f]ind reason to believe that Rebuilding America Now and Ryan Call in his official capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30118(a), 30104(b) by making and failing to report an excessive and prohibited in-kind contribution in the form of republishing the [2016 Donald] Trump campaign logo in a digital and television advertisement.”⁵

In 2016, Rebuilding America Now, an independent-expenditure-only political committee, ran an advertisement that contained eight seconds of footage that displayed the Donald Trump for President, Inc. campaign logo. OGC contended that because Rebuilding America Now included this logo in its own ads, it made an in-kind contribution to the Trump for President campaign committee by republishing campaign materials under 11 C.F.R. § 109.23(a).⁶

That regulation implements statutory language stating that “the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered an expenditure.”⁷ However, 11 C.F.R. § 109.23(a) states that the republication of campaign materials “shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.”⁸ As we have noted elsewhere, there are “serious legal

necessarily states the agency’s reasons for acting as it did”) (citation omitted); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm’n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

⁴ First Gen’l Counsel’s Report (“FGCR”) at 37-38, MUR 7147 (Make Am. Number 1, *et al.*), June 5, 2019. Where OGC recommends that the Commission “[t]ake no action at this time,” it is implicitly stating that there is not enough evidence to find RTB on the record before us, although investigation into another aspect of the MUR may unearth further support for the complaint’s allegations. Because we disagreed that the circumstances warranted further investigation, we voted to dismiss these insufficiently supported allegations.

⁵ *Id.* at 37.

⁶ *Id.* at 23-24.

⁷ 52 U.S.C. § 30116(a)(7)(B)(iii).

⁸ 11 C.F.R. § 109.23(a).

infirmities in th[is] regulation,”⁹ which ignores the coordination element and analysis required by the plain text of the statute and other portions of our regulations in order for republication to constitute an in-kind contribution.¹⁰

OGC also requested that we authorize an expansive investigation into “the circumstances surrounding the [alleged] republication of the Trump campaign logo” in Rebuilding America Now’s advertisements.¹¹ It also advised us that the statute of limitations would begin to run on April 25, 2021 and expire entirely by July 19, 2021—146 days from the date on which we undertook the preliminary votes in this matter.¹²

II. LEGAL ANALYSIS

We do not share OGC’s belief that the mere display of a candidate’s logo constitutes republication of campaign materials, and we were unwilling to hitch our consideration of this Matter to 11 C.F.R. § 109.23(a), a flawed regulation that we believe exposes the Commission to significant litigation risk.

And while OGC did suggest that the activity here could plausibly run afoul of our garden-variety coordination regulation, 11 C.F.R. § 109.21, it also advised us that it did “not have sufficient information to conclude whether the republication” of the logo “was coordinated with the Trump campaign under section 109.21, though investigation of the circumstances surrounding the” production and distribution of the ad might “provide such information.”¹³

But the clock simply would not allow us to conduct the investigation that OGC believed necessary. Even the swiftest of investigations would not have left us with enough time to return to this Matter, revisit our RTB vote, and either conciliate or pursue a probable cause finding and eventual litigation, before the statute of limitations expired in July.

⁹ Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 2, MUR 7139 (Maryland USA), Feb. 17, 2022; *id.* at n.9.

¹⁰ *See, e.g.*, 11 C.F.R. § 109.21(c)(2), (d)(6).

¹¹ FGCR at 36.

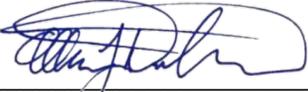
¹² *Id.* at 1 (“EXPIRATION OF SOL: Earliest: 4/25/21 Latest: 7/19/21”).

¹³ FGCR at 24.

Moreover, in February 2021, at one of our first executive sessions after the reconstitution of the quorum, our enforcement resources were unusually meager. At that time, as has been noted publicly, the Commission faced a substantial backlog of enforcement cases.¹⁴ In that position, we determined that our agency's enforcement resources would be best spent addressing other matters where the Commission had a realistic chance of vindicating the interests of the United States in a timely fashion.¹⁵

CONCLUSION

For the foregoing reasons, we voted to dismiss this Matter.



 Allen Dickerson
 Chairman

April 11, 2022

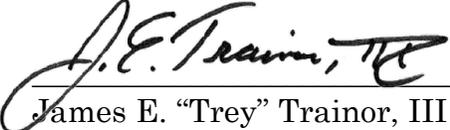
 Date



 Sean J. Cooksey
 Commissioner

April 11, 2022

 Date



 James E. "Trey" Trainor, III
 Commissioner

April 11, 2022

 Date

¹⁴ See Statement of Comm'r Weintraub on the Senate's Votes to Restore the Federal Election Commission to Full Strength, Dec. 9, 2020, available at: <https://www.fec.gov/resources/cmscontent/documents/2020-12-Quorum-Restoration-Statement.pdf>.

¹⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985)