



FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Common Defense Action Fund, *et al.*) MUR 7495

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

The Complaint¹ in this Matter alleged that, in the 2018 election cycle, Common Defense Action Fund (an independent expenditure only committee, “Common Defense”) and Lancaster Stands Up (an unincorporated association of residents of Lancaster, Pennsylvania, “Lancaster”) failed to properly report independent expenditures supporting Jess King, a candidate for Pennsylvania’s 11th Congressional District, and opposing King’s opponent.² The Complaint further alleged that Facebook ads by Common Defense and Lancaster did not contain disclaimers required by the Federal Election Campaign Act (“FECA”) and Commission regulations.³

Because the record indicates that Common Defense paid for the complained-of activity undertaken by Lancaster, the Office of General Counsel (“OGC”) did not recommend enforcement against Lancaster.⁴ We agreed.⁵ We address the disclaimer and independent-expenditure-reporting allegations against Common Defense in turn.

A. Disclaimers

FECA and Commission regulations require “public communications” made by a political committee and “public communications” expressly advocating the election or defeat of a clearly identified candidate to include a disclaimer setting forth specified information about the person who paid for the communication.⁶ “Public communications” include “general public political advertising,”⁷ which, by Commission regulation, includes “communications

¹ This Matter arose from a Complaint and a Supplemental Complaint, which are collectively referred to as the “Complaint” herein.

² First General Counsel’s Report (“FGCR”) at 2.

³ *Id.* The Commission’s Office of General Counsel (“OGC”) did not recommend enforcement on the other allegations in the Complaint. Because we agreed that the record does not support a reason-to-believe finding on these allegations, we do not address them here.

⁴ *Id.* at 14-15.

⁵ See Certification, MUR 7495 (Common Defense Action Fund, *et al.*) (Dec. 15, 2022).

⁶ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1)-(2), (b)-(d).

⁷ 52 U.S.C. § 30101(22).

MUR 7495 (Common Defense Action Fund, *et al.*)

Statement of Reasons

Page 2 of 4

placed for a fee on another person's Web site."⁸ Commission regulations also contain certain exceptions to these general disclaimer requirements, including for small items⁹ and for circumstances where including a required disclaimer would be impracticable.¹⁰

Common Defense's Response stated that its Facebook ads were "so small in size that a disclaimer could not conveniently fit within them," and therefore it "understood them to fall within the [small items] exceptions of 11 C.F.R. [§] 110.11(f)(1)(i)."¹¹ Common Defense further stated that, in placing its Facebook ads, it relied upon Advisory Opinion 2010-19 (Google), where the Commission concluded that a short text ad that linked to a website with a disclaimer needn't include a disclaimer on the ad itself.¹² Notably, in Google, the Commission was unable to agree on a rationale for its conclusion by the required four votes.¹³ Common Defense maintained that, "[c]onsistent with the facts of AO 2010-19, all of Common Defense's Facebook ads link to a website (www.lancasterstandsup.org) that includes a disclaimer meeting the requirements of 11 C.F.R. § 110.11 on every page."¹⁴

OGC disagreed, concluding that, "as communications placed for a fee on another person's website by a political committee," Common Defense's Facebook ads "are all subject to the disclaimer requirement," and "lacked the required disclaimers."¹⁵ OGC argued that this Matter is less like Advisory Opinion 2010-19 (Google), and more akin to Advisory Opinion 2017-12 (Take Back Action Fund). There, the Commission concluded that a requestor had to include a complete disclaimer on proposed Facebook Image and Video advertising, but—like in Google—did not adopt a consensus rationale explaining that conclusion.¹⁶

Based on its analysis, OGC recommended that the Commission find reason to believe that Common Defense and Perry O'Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30120 and 11 C.F.R. § 110.11 by failing to include proper disclaimers on public communications in the form of paid Facebook ads.¹⁷

Plainly, when Common Defense placed the Facebook ads at issue, the Commission had not provided clear guidance on how the disclaimer requirements and exceptions apply to many types of internet communications. The Commission took a step to rectify that shortly before it considered this Matter. On December 1, 2022, the Commission voted to adopt "final rules to amend its regulations concerning disclaimers on public communications on the

⁸ 11 C.F.R. § 100.26.

⁹ *Id.* § 110.11(f)(1)(i) (exception to disclaimer requirements for "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed").

¹⁰ *Id.* § 110.11(f)(1)(ii) (exception to disclaimer requirements for "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable").

¹¹ Common Defense Resp. at 3 (Oct. 12, 2018).

¹² *Id.*; Advisory Op. 2010-19 (Google) at 2.

¹³ Advisory Op. 2010-19 (Google) at 2.

¹⁴ Common Defense Resp. at 3.

¹⁵ FGCR at 17.

¹⁶ Advisory Op. 2017-12 (Take Back Action Fund) at 1 & n.1.

¹⁷ FGCR at 26.

MUR 7495 (Common Defense Action Fund, *et al.*)

Statement of Reasons

Page 3 of 4

internet.”¹⁸ The new rules were adopted “in light of technological advances since the Commission last revised its rules governing internet disclaimers in 2006, and to address questions from the public about the application of those rules to internet communications.”¹⁹ The new rules not only reflect a change in the law in this area, but also emphasize a lack of clarity when the conduct at issue here occurred.

This lack of clarity counsels in favor of dismissing the disclaimer allegations in this Matter as an exercise of our prosecutorial discretion under *Heckler v. Chaney*.²⁰ After all, due process forecloses *post hoc* application of a new regulation for the same reason that it bars enforcement based on conduct that occurred when the applicable rule was unclear. Moreover, the record indicates that Common Defense considered the guidance the Commission had provided at the time and attempted to comply with the law.²¹ Accordingly, we voted to dismiss the disclaimer allegations against Common Defense in this Matter as an exercise of prosecutorial discretion.²²

B. Independent-Expenditure Reporting

FECA and Commission regulations require persons including nonconnected political committees to report independent expenditures,²³ *i.e.*, any expenditure for a communication that expressly advocates the election or defeat of a clearly identified federal candidate that is not coordinated with the candidate or their authorized committee.²⁴ Nonconnected committees must itemize each independent expenditure which exceeds \$200 or which, when added to previous independent expenditures made on behalf of (or in opposition to) the same candidate, aggregates over \$200 during a calendar year.²⁵

It is undisputed that Common Defense initially misreported \$7,863 in independent expenditures as operating expenses, and that it corrected this error in subsequent reports.²⁶ Based on this, OGC recommended that the Commission find reason to believe that Common Defense and Perry O’Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by misreporting independent expenditures.²⁷ Accordingly, OGC recommended that the Commission enter into pre-probable-cause conciliation with Common Defense with a modest opening settlement offer.²⁸

Given our decision to dismiss the disclaimer allegations, the small penalty amount at issue, and the fact that Common Defense corrected the reporting error, we do not consider it

¹⁸ Internet Communication Disclaimers and Definition of “Public Communication,” 87 Fed. Reg. 77467 (Dec. 19, 2022).

¹⁹ *Id.*

²⁰ 470 U.S. 821 (1985).

²¹ *See, e.g.*, Common Defense Resp. at 2, 3.

²² Certification, MUR 7495 (Common Defense Action Fund, *et al.*).

²³ 52 U.S.C. § 30104(b); 11 C.F.R. § 104.4.

²⁴ 52 U.S.C. § 30101(17).

²⁵ *Id.* § 30104(b)(6)(B)(iii).

²⁶ FGCR at 15.

²⁷ *Id.* 11 C.F.R. § 104.4(b) governs “[r]eports of independent expenditures made at any time up to and including the 20th day before an election.”

²⁸ FGCR at 25.

MUR 7495 (Common Defense Action Fund, *et al.*)

Statement of Reasons

Page 4 of 4

a prudent use of the Commission's limited resources to pursue enforcement on the independent-expenditure-reporting violation alone. Accordingly, we voted to dismiss this Matter in its entirety as an exercise of our prosecutorial discretion under *Heckler v. Chaney*.²⁹



Dara Lindenbaum
Chair

January 17, 2023
Date



Sean J. Cooksey
Vice-Chairman

January 17, 2023
Date



Allen Dickerson
Commissioner

January 17, 2023
Date



James E. "Trey" Trainor, III
Commissioner

January 17, 2023
Date

²⁹ 470 U.S. 821.