FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7340/7609
GREAT AMERICA COMMITTEE, *et al.*	)	
	)	

STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND COMMISSIONER SEAN J. COOKSEY

Collectively, these two Matters raised seven separate allegations that the Respondents violated the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA").[1] Our Office of General Counsel ("OGC") recommended that we dismiss six of those seven allegations, and we voted accordingly for the reasons OGC articulated in its First General Counsel's Report.[2] Conversely, OGC recommended reason to believe regarding one allegation, that then-President Donald Trump's 2020 campaign committee violated the Act "by soliciting soft money."[3]

OGC asked us to find reason to believe this violation occurred because the Trump committee issued a public statement warning the candidate's supporters against groups that the committee considered to be dishonest and fraudulent. We voted to dismiss this allegation under our prosecutorial discretion.

I. FACTUAL BACKGROUND

These Matters came before the Commission on two principal complaints. One, running 348 pages,[4] raised numerous allegations against the Trump committee, the then-sitting President and Vice President, the Great America Committee, the Republican National Committee ("RNC"), America First Action, Inc., America First Policies, Bradley J. Parscale, and Marty Obst. OGC recommended that we dismiss

[1] First Gen'l Counsel's Report ("FGCR") at 30, MUR 7340/7609 (Great America Comm.).

[2] *Id.*

[3] *Id.*

[4] Complaint (MUR 7340).

those allegations.[5] The second complaint raised the soft money allegation OGC recommended we pursue,[6] a charge later echoed in a supplement to the first complaint.[7]

That allegation centered on the Trump committee's statement denouncing what it called "dishonest" groups. OGC recommended finding reason to believe that this statement violated 52 U.S.C. § 30125(e)(1)(A), which prohibits any "candidate" from "solicit[ing]…funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act."[8] Put simply, no federal candidate may raise so-called "soft money"—donations in excess of the base limits—for any organization.

The relevant statement, titled "Trump Campaign Statement on Dishonest Fundraising Groups," was released on May 7, 2019 and reads in full:

> The following is a statement from the Donald J. Trump for President campaign:
>
> President Trump's campaign condemns any organization that deceptively uses the President's name, likeness, trademarks, or branding and confuses voters. There is no excuse for any group, including ones run by people who claim to be part of our 'coalition,' to suggest they directly support President Trump's re-election or any other candidates, when in fact their actions show they are interested in filling their own pockets with money from innocent Americans' paychecks, and sadly, retirements. We encourage the appropriate authorities to investigate all alleged scam groups for potential illegal activities.
>
> There are only four fundraising organizations authorized by President Trump or the RNC: Donald J. Trump for President, the Republican National Committee, and two joint fundraising committees with the RNC, The Trump Make American [*sic*] Great Again Committee (TMAGAC) and Trump Victory. In addition, there is one approved outside non-campaign group, America First Action, which is run by allies of the President and is a trusted supporter of President Trump's policies and agendas.

OGC characterized this statement as a solicitation for soft money donations to America First Action, and recommended enforcement against the Trump committee. We disagreed and voted to dismiss under *Heckler v. Chaney*.[9]

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[5] FGCR at 30.

[6] Complaint (MUR 7609).

[7] Supp. Complaint (MUR 7340).

[8] 52 U.S.C. § 30125(e)(1)(A).

[9] Certification for MURs 7340/7609, at 1-2, Apr. 22, 2021.

II. LEGAL ANALYSIS

This vote took place shortly after the Commission had reacquired a quorum and faced a substantial backlog of hundreds of Matters—many of which were imperiled by the statute of limitations.[10] OGC's scarce resources had already been spent evaluating this matter and determining that most of the allegations merited dismissal. And while one of our colleagues has speculated that this Matter may have involved "potentially multi-million dollar violations"[11] of the Act, OGC recommended a penalty, which would be subject to further negotiation, of a mere [redacted]—a sum unlikely to exceed the Commission's expenses in obtaining it. In these circumstances, we concluded the Commission's scarce resources would be best spent elsewhere.

These prudential concerns were buttressed by the likelihood of a successful and costly legal challenge to enforcement on these facts.

Under the regulations implementing 52 U.S.C. § 30125(e)(1)(A), we have defined a solicitation as "an oral or written communication that, construed as reasonably understood in the context in which it is made, contains *a clear message* asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value."[12] The regulation goes on to note that this "clear message" can be "made…indirectly."[13] We have also stated that this standard is an objective test, which "does not turn on the subjective interpretations of the speaker or the recipients,"[14] yet also "hinges on whether the recipient should have reasonably understood that a solicitation was made."[15] This guidance is hardly a model of clarity.

Were the speech at issue direct and clear—had the Trump campaign committee, for instance, sent out letters to specific individuals asking the recipients to each give $100,000 to America First Action and directed them to a webpage to make the contribution—this lack of clarity would have been largely immaterial. But the speech at issue here was neither direct nor clear: it was a press statement directed to no one in particular, bearing none of the hallmarks of a traditional fundraising

[10] *See* Statement of Comm'r Weintraub on the Senate's Votes to Restore the Federal Election Commission to Full Strength, Dec. 9, 2020.

[11] Statement of Reasons of Comm'r Weintraub at 3, MURs 7340/7609, June 11, 2020.

[12] 11 C.F.R. § 300.2(m) (emphasis supplied).

[13] *Id.*

[14] Statement of Reasons of Comm'rs Hunter and Petersen at 8, MUR 6798 (Vitter), Aug. 30, 2019.

[15] Definitions of "Solicit" and "Direct," 71 Fed. Reg. 13926, 13928, Mar. 20, 2006.

solicitation. A reasonable person reading this statement would not have likely understood it as a request for contributions. Enforcement against this statement could have risked opening our regulation, which purports to police "indirect" "clear messages," to a judicial challenge predicated on "the constitutional requirement of definiteness."[16] Rather than spend significant resources to litigate these questions, all while risking both this enforcement decision and the viability of the underlying regulation, we elected to exercise our prosecutorial discretion.

Moreover, public policy considerations militated in favor of exercising our discretion. The statement at issue here is perhaps best read as a warning against groups active during the 2020 election cycle considered, by the Committee, to be "deceptive[]" fraudsters only "interested in filling their own pockets." The statement went so far as to "encourage the appropriate authorities to investigate all alleged scam groups for potential illegal activities."

Sadly, despite our repeated requests to Congress, we are not such an authority.[17] And it would be unwise to suggest that efforts to distinguish fraudulent organizations from *bona fide* political committees might lead to Commission enforcement. Such warnings should be encouraged, not chilled.

CONCLUSION

For the foregoing reasons, we voted to dismiss this allegation pursuant to our prosecutorial discretion under *Heckler v. Chaney*.[18]

Allen Dickerson
Vice Chair

June 25, 2021
Date

Sean J. Cooksey
Commissioner

June 25, 2021
Date

[16] *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (*per curiam*). *See also NAACP v. Button,* 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

[17] *See* 52 U.S.C. § 30124.

[18] 470 U.S. 821 (1985).