



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	
1820 PAC, <i>et al.</i>	)	MUR 7646
	)	
Peters for Michigan, <i>et al.</i>	)	MURs 7666 & 7675
	)	
VoteVets, <i>et al.</i>	)	MURs 7681 & 7715
	)	
Fight for the American Dream PAC	)	MUR 7781
	)	

**STATEMENT OF REASONS OF  
COMMISSIONER ELLEN L. WEINTRAUB**

The Federal Election Commission has the authority and the obligation to enforce the Federal Election Campaign Act of 1971, as amended (the “Act”)<sup>1</sup> and its implementing regulations. The matters listed above all involved significant expenditures made by theoretically independent super PACs to support candidates *using media materials created by the candidates’ committees*. The Commission’s non-partisan Office of General Counsel (“OGC”) had recommended that we find reason to believe that the republication of those campaign materials had violated the Act. Although I, along with Vice Chair Walther and Commissioner Broussard,<sup>2</sup> supported OGC’s recommendations, our Republican colleagues have demonstrated their continued unwillingness to enforce the plain language of 11 C.F.R. § 109.23 and there were insufficient votes to move forward. I write to address my concerns about this unwillingness to enforce our republication regulation and also to address our coordination regulation’s inability to capture the “coordination in the open” that has been occurring with greater frequency.

<sup>1</sup> 52 U.S.C. § 30101, *et seq.*

<sup>2</sup> See Cert. MUR 7646 (1820 PAC, *et al.*) (Feb. 17, 2022); Cert. MURs 7666 & 7675 (Peters for Michigan, *et al.*) (Feb. 15, 2022); Cert. MURs 7681 & 7715 (VoteVets, *et al.*) (Feb. 15, 2022); Cert. MUR 7781 (Fight for the American Dream PAC) (Feb. 15, 2022).

## I. Republication

Republication has been a longstanding concern of mine, and I have written on the subject in previous instances where the Commission has lacked sufficient votes to pursue republication matters.<sup>3</sup> As I have noted before, the law on republication was clear then and remains clear now.

The Act defines “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>4</sup> A “contribution,” as defined in the Act, is “any gift, subscription, loan, advance, or deposit of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”<sup>5</sup> The Act prohibits any person from making, and any candidate or committee from knowingly accepting, an excessive contribution.<sup>6</sup> Additionally, independent expenditure-only committees (“IEOPCs,” commonly called super PACs) are prohibited from making contributions to federal candidates;<sup>7</sup> candidates and their authorized committees are prohibited from accepting contributions not subject to the limits and prohibitions of the Act.<sup>8</sup>

A subset of contributions are expenditures that have been coordinated with a candidate or candidate’s authorized committee.<sup>9</sup> Consistent with the definitions of both contribution and expenditure, the Act further provides 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 committee, or their authorized agents shall be considered to be an “expenditure” for the purposes of the coordinated expenditure provisions.<sup>10</sup> As I have previously written:

Republication of campaign materials is akin to paying the campaign’s media bills, which the Supreme Court has found is “virtually indistinguishable” from simply

<sup>3</sup> See Statement of Reasons of Comm’rs Broussard and Weintraub, MUR 7139 (Maryland USA, *et al.*); Statement of Reasons of Comm’r Ellen L. Weintraub, MUR 7432 (John James for Senate, Inc.); Statement of Reasons of Comm’rs Weintraub, Bauerly, and Walther, MUR 6357 (American Crossroads).

<sup>4</sup> 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

<sup>5</sup> 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).

<sup>6</sup> 52 U.S.C. § 30116(a), (f); 11 C.F.R. §§ 110.1(b)(1), 110.9.

<sup>7</sup> *See* 52 U.S.C. § 30116(a) (prohibition on excessive contributions); *id.* § 30118(a) (prohibition on corporate contributions); Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2 (quoting Advisory Op. 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011)); *see also* Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

<sup>8</sup> In rejecting an exception for “fair use” of campaign materials, the Commission distinguished republication in the context of intellectual property law, where republication of another person’s work is generally viewed as undesirable by the original author, from the context of campaign finance law, “where the candidate/author generally views republication of his or her campaign material, *even in part*, as a benefit” and “can be reasonably construed only as for the purpose of influencing an election.” Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 443 (Jan. 3, 2003) (emphasis added).

<sup>9</sup> 52 U.S.C. § 30116(a)(7).

<sup>10</sup> *Id.* § 30116(a)(7)(B)(iii) (emphasis added); *see also* 11 C.F.R. § 109.23(a). For republication, the Commission has concluded that “campaign materials” include any material belonging to or emanating from a campaign. *See, e.g.*, MUR 5672 (Save American Jobs) (video produced and used by candidate’s campaign subsequently hosted on association’s website).

making a contribution. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 624 (1996). Given the potential for corruption and the appearance of corruption that could result from unlimited contributions, Congress chose to treat republication, in whole or in part, as an in-kind contribution subject to the contribution limitations and prohibitions of the Act. *See* [52 U.S.C. §§ 30116, 30118].<sup>11</sup>

The law is clear. And yet, the Commission’s well-known inability to meaningfully enforce a plainly stated regulation, in a time, post-*Citizens United*, where campaign spending abounds, has resulted in overt efforts to place footage for republication into the hands of deep-pocketed and supportive groups. Campaign committees are subject to contribution limits that do not similarly restrict IEOPCs, but they have better access to the candidate. They have been using this access to create flattering footage of the candidate and have been placing such footage in the public domain, either through subpages on the candidate committee’s webpage or through YouTube channels. Supportive super PACs then gather the footage (and often thematic outlines for their advertisements), create advertisements consistent with the committee’s vision, and foot the (often sizable) bill to air the advertisements. This behavior eviscerates the limitations and prohibitions contained within the Act and our regulations.

Each of these matters involved the republication of a significant amount of campaign committee material. Additionally, in each of the matters, the entity that republished a campaign committee’s materials admitted to doing so. The violations were apparent and are summarized below.

- In one matter, VoteVets.org Action Fund (“VoteVets Action Fund”), a 501(c)(4) organization, spent \$1,450,000 airing two videos supporting Senator Gary Peters on television.<sup>12</sup> The videos were crafted using still images and “b-roll” footage of the Senator that were accessed on the webpage for his authorized committee, Peters for Michigan, and contained messaging that was thematically similar to those contained in talking points supportive of Senator Peters that was available on the Peters Committee’s webpage.<sup>13</sup> For one of the advertisements, 22 of its 30 seconds were taken from b-roll on the Committee’s webpage.<sup>14</sup>
- Another 501(c)(4) organization, Majority Forward, spent between \$25,000 and \$30,000 to air a 15-second advertisement on Facebook supporting Senator Peters.<sup>15</sup> Nine of those fifteen seconds contained the Peters Committee’s b-roll footage.<sup>16</sup>
- In another matter, VoteVets Action Fund, as well as with its related multicandidate, hybrid political action committee, VoteVets, (“VoteVets PAC”) each spent millions

<sup>11</sup> Statement of Reasons of Comm’rs Weintraub, Bauerly, and Walther at 1-2, MUR 6357 (American Crossroads); *see also* Statement of Reasons of Comm’r Ellen L. Weintraub, MUR 7432 (John James for Senate, Inc.).

<sup>12</sup> First Gen. Counsel’s Rpt. at 4-5, MURs 7666 & 7675 (Peters for Michigan, *et al.*) (citing a VoteVets press release).

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.*

of dollars on advertisements to support the campaign of Cal Cunningham where anywhere from 43-93% of the content was derived from either webpages associated with Cunningham's committee, Cal for NC, or from a Flickr page associated with a former campaign of Cunningham's.<sup>17</sup>

- Fight for the American Dream PAC spent \$86,000 distributing four online advertisements to support Mondaire Jones.<sup>18</sup> In one of the advertisements, all of the visual content consisted of the Committee's b-roll footage and photographs, and in the other advertisements at issue approximately half (47-53%) of the material was admittedly taken from the Committee's YouTube page and website.<sup>19</sup>
- 1820 PAC admitted to paying to produce and distribute a 30 second advertisement , 22 seconds of which was b-roll footage taken from Susan Collins's committee's webpage.<sup>20</sup>

The amount of money spent on these advertisements is striking. Collectively, they also demonstrate a widespread pattern of committees creating footage in order to facilitate other organizations' so-called "independent" expenditures. OGC recommended that the Commission find reason to believe that each of the entities that republished committee content had violated 52 U.S.C. § 30116 by making excessive contributions to the candidate committees. While I agreed with our attorneys' assessment, I also felt that a number of the organizations that republished campaign materials had also made prohibited contributions, in violation of their status as independent expenditure-only political committees, and I voted accordingly.<sup>21</sup>

## II. Coordination

OGC recommended that we dismiss the allegations that the campaign committees had coordinated the republication of their campaign materials by making a request or suggestion when they posted candidate footage and talking points on their webpages. This recommendation, while frustrating, is consistent with the Commission's regulations as they currently stand and is among the reasons why our coordination regulations desperately need updating.

When the Commission first formulated its republication regulations, the Commission acknowledged that expenditures resulting from republication "could be made without the knowledge or control of the candidate."<sup>22</sup> Accordingly, the candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign material is also a coordinated communication.<sup>23</sup> Under the Commission's regulations, republication only results in a

<sup>17</sup> First Gen. Counsel's Rpt. at 4-6, MURs 7681 & 7715 (VoteVets, *et al.*).

<sup>18</sup> First Gen. Counsel's Rpt. at 3, MUR 7781 (Fight for the American Dream PAC).

<sup>19</sup> *Id.*

<sup>20</sup> First Gen. Counsel's Rpt. at 2, MUR 7646 (1820 PAC, *et al.*).

<sup>21</sup> *See* Cert. ¶3(a), MUR 7646 (1820 PAC, *et al.*) (Feb. 17, 2022); Cert. MURs ¶3(a), 7666 & 7675 (Peters for Michigan, *et al.*) (Feb. 15, 2022); Cert. ¶3(a), MURs 7681 & 7715 (VoteVets, *et al.*) (Feb. 15, 2022); Cert. ¶3(a), MUR 7781 (Fight for the American Dream PAC) (Feb. 15, 2022).

<sup>22</sup> H.R. Doc. No. 95-1-A, at 33 (1977).

<sup>23</sup> 11 C.F.R. § 109.23(a).

coordinated communication when it also satisfies one of the regulation’s six “conduct” standards.<sup>24</sup> Some of these matters involved allegations that the candidate committees had made a “request or suggestion,” one of the six types of conduct enumerated in the regulation.

In 2003, when the Commission last made significant updates to its coordination regulations, *Citizens United* had not yet been decided and corporations were still wholly prohibited from making contributions or expenditures. YouTube and Facebook did not exist, and video footage could not be posted and shared in a matter of seconds. At that time, the Commission explained that the “request or suggestion” conduct standard was intended to “cover requests or suggestions made to a select audience, but not those offered to the public generally.”<sup>25</sup> The Commission then explicitly distinguished “a request that is posted on a web page,” from a “request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients,” and also distinguished a request in a public campaign speech or a newspaper advertisement from “a request during an invitation-only dinner” or during a “membership organization function.”<sup>26</sup> At that time, the Commission had no idea of the explosion in political spending that awaited following the *Citizens United* decision, and did not foresee how internet technology was about to revolutionize campaign practices.

In one matter, the respondent committee’s webpage had created a subpage titled “What Michiganders Need to Know,” which contained a link to download videos of the candidate interacting with constituents, seven still images of the candidate, and an Adobe Acrobat PDF document with talking points about the candidate, with links to relevant news articles.<sup>27</sup> The materials provided on the webpage seem to contain an implicit request for someone to take the materials the committee created and use them to create ads echoing the campaign’s message. But because they were placed on a website, our regulations consider this to be an exempt statement to the general public, rather than the making of a targeted request to a selected audience. In fairness, this respondent was following in the footsteps of numerous other campaigns, and the Commission has dismissed every complaint based on this type of conduct based on the same exception in our regulations for requests made to the general public.<sup>28</sup> But what all these cases show is that the Commission’s regulations were not built for this “coordination in the open” and are in dire need of an update.

March 25, 2022

Date

Ellen L. Weintraub  
 Commissioner

<sup>24</sup> 11 C.F.R. § 109.21(d).

<sup>25</sup> See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) (explanation and justification).

<sup>26</sup> *Id.*

<sup>27</sup> First Gen. Counsel’s Rpt. at 4, MURs 7666 & 7675 (Peters for Michigan, et al.).

<sup>28</sup> See, e.g., MUR 7139 (Maryland USA, et al.); MUR 7432 (John James for Senate, Inc.); MUR 6357 (American Crossroads).