

“[f]ind reason to believe that 1820 PAC violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive in-kind contribution and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by misreporting the in-kind contribution as an independent expenditure.”⁴ OGC also recommended dismissing “the allegations that [the respondents]...violated” the law “by knowingly accepting an excessive in-kind contribution” and “by failing to report [that] in-kind contribution.”⁵

We disagreed with this approach,⁶ and we write now to explain our reasoning.

I. FACTUAL BACKGROUND

In 2019, the Collins committee “published a 6-minute video on its YouTube page...comprised of different segments of video showing [Senator] Collins interacting with individuals in various settings, such as a factory, pharmacy, and school, as well as footage of Collins working in her office.”⁷ This footage, shorthanded by OGC as “B-roll,”⁸ was set to music, concluded with the slogan “Our Senator, Susan Collins,” and bore a paid-for-by proclamation stating the Collins committee was responsible for its publication.⁹

Several months after the Collins committee posted this six-minute video, 1820 PAC made an independent expenditure of \$276,780, consisting of an advertisement that “was 30 seconds long and incorporated 22 continuous seconds of the Collins B-roll overlaid with a voiceover and on-screen text describing the candidate’s policy positions and her work supporting the interests of constituents in Maine.”¹⁰

⁴ *Id.* at 14.

⁵ *Id.*

⁶ Certification at 1-4, MUR 7646 (1820 PAC, *et al.*), Feb. 17, 2022.

⁷ FGCR at 4.

⁸ This is a description loosely derived from the vocabulary of filmmaking. B-roll is “recorded video of subjects or locations used to provide supplementary material for a film or television show,” which is contrasted with the “A-roll,” the primary footage of the film’s subject matter. Merriam-Webster, “B-roll.” Thus, the use of this term implies that the six-minute video posted by the Collins committee, complete with a logo and disclaimer, is not a finished, final product.

⁹ FGCR at 4.

¹⁰ *Id.* at 4-5.

II. THE LAW REGARDING REPUBLICATION

The Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) characterizes the republication of a campaign committee’s advertisements as an expenditure. Specifically, FECA 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 committees, or their authorized agents shall be considered to be an expenditure.”¹¹

As has been explained elsewhere, our regulations do not give that effect to the statute. Rather, 11 C.F.R. § 109.23(a) states that “[t]he financing 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, the candidate’s authorized committee, or an agent of either of the foregoing *shall be considered a contribution* for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.”

FECA distinguishes between contributions (which are subject to amount and source limitations and are reportable by the candidate) and expenditures (which are not subject to amount or source limitations and are reportable by the spender).¹² The Act 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 committees, or their authorized agents shall be considered to be an *expenditure*....”¹³ Such expenditure is considered a *contribution* to a candidate when it is “made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of” that candidate, their authorized committee, or their agents.¹⁴ Thus, only if a person cooperates or consults with a candidate or committee on an expenditure (*i.e.*, only if the expenditure is “coordinated”) does that expenditure become an in-kind contribution under FECA.

¹¹ 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis supplied).

¹² This distinction is foundational to campaign finance jurisprudence, which relies on the application of distinct standards of review when reviewing First Amendment challenges to state action burdening contributions and expenditure regulations. *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 199 (2014).

¹³ 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis supplied).

¹⁴ 52 U.S.C. § 30116 (a)(7)(B)(i).

III. THE LAW REGARDING COORDINATION

FECA also limits the ability of speakers to coordinate their expenditures with authorized candidate committees and those committees' agents. As one of us has noted elsewhere, “[t]he Act, as amended, does not define the term ‘coordinated’ or set forth concrete standards for when a public communication is made ‘in cooperation, consultation, or concert, with, or at the request or suggestion of’ a federal candidate or political party.”¹⁵

11 C.F.R. § 109.21 sets out a three-prong test for whether a public communication is a “coordinated communication”¹⁶ based on the source of the payment (the payment prong), the subject matter of the communication (the content prong), and the interaction between the person paying for the communication and the candidate or political party committee (the conduct prong).¹⁷ A public communication must satisfy all three prongs to qualify as “coordinated” under this test.¹⁸

IV. ANALYSIS

To the extent that 11 C.F.R. § 109.23 treats non-coordinated republication as an in-kind contribution—this regulation contradicts FECA’s text and is therefore contrary to law.¹⁹ We are not alone in observing this legal infirmity.²⁰ Thus, in order to remain faithful to our enabling legislation, when the Commission enforces the republication provisions, it must establish actual coordination using the same standards applied to any other form of public communication.

There was no evidence of such conduct here. OGC conducted that analysis and determined that “the available information [was] insufficient to support a reasonable inference that all three prongs of the coordinated communication test are satisfied,”²¹

¹⁵ Interpretative Statement of Chairman Dickerson at 2, Mar. 24, 2022.

¹⁶ 11 C.F.R. § 109.21.

¹⁷ 11 C.F.R. § 109.21(a).

¹⁸ *Id.*

¹⁹ *See* Interpretative Statement of Chairman Dickerson at 1-5, Mar. 24, 2022.

²⁰ *See* MURs 6603, 6777, 6801, 6870, and 6902, Statement of Reasons of Vice Chairman Petersen and Comm’rs Hunter and Goodman at 2 n.4. *See also* Interpretative Statement of Comm’r Sean J. Cooksey, Nov. 30, 2021 (concurring in the view that § 109.23 is contrary to law because it improperly departs from and conflates the terms “contribution” and “expenditure” used in the underlying statute).

²¹ FGCR at 13.

and instead relied entirely on 11 C.F.R. § 109.23(a) in recommending that we find reason to believe 1820 PAC violated FECA. But absent evidence of the coordination required by 11 CFR § 109.21, 1820 PAC's republication of the Collins video was an independent expenditure—just as the PAC reported. Similarly, there was no reason to believe that the Collins committee illegally coordinated with 1820 PAC, and we voted accordingly.

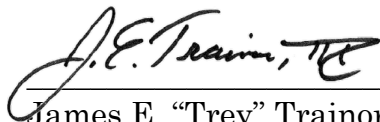
Furthermore, were the Commission to pursue enforcement on the theory that 1820 PAC's non-coordinated republication of committee materials was an in-kind contribution, it seems to us extremely probable that a reviewing court would simply invalidate § 109.23 as directly contradictory to FECA. At the very least, a court would likely conclude that the regulation could not be lawfully applied in this case. Therefore, we voted to dismiss those allegations pursuant to the agency's prosecutorial discretion under *Heckler v. Chaney*.²²



Allen Dickerson
Chairman

April 15, 2022

Date



James E. "Trey" Trainor, III
Commissioner

April 15, 2022

Date

²² 470 U.S. 821 (1985).