FEDERAL ELECTION COMMISSION

Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Peters for Michigan, *et al.*	)	MURs 7666 & 7675
	)	
VoteVets, *et al.*	)	MURs 7681 & 7715
	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONER JAMES E. "TREY" TRAINOR, III

These Matters involve entities[1] that financed advertisements expressing support for federal candidates[2] that included "b-roll" video footage and still images obtained from those candidate's publicly available campaign websites, YouTube pages, and/or Flickr photo-sharing pages. Complainants in these Matters also alleged that the candidates and campaigns supported by the advertisements impermissibly coordinated with the outside entities that funded them, and thus accepted prohibited in-kind contributions.[3]

Our Office of General Counsel ("OGC") recommended that the Commission find reason to believe that the outside entities impermissibly republished campaign materials and failed to report in-kind contributions to the candidates and their authorized committees, but to dismiss the allegations that the candidates or their authorized committees knowingly accepted and failed to report in-kind contributions.[4]

We joined Commissioner Cooksey in declining to find reason to believe that the outside entities violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by making and failing to report excessive in-kind contributions.[5] We write separately to explain

[1] VoteVets.org Action Fund and Majority Forward in MURs 7666 and 7675; and VoteVets and VoteVets.org Action Fund in MURs 7681 and 7715.

[2] Gary Peters and Peters for Michigan in MURs 7666 and 7675; and Cal Cunningham, Cal for NC, Mary Jennings Hegar, and MJ for Texas in MURs 7681 and 7715.

[3] *See generally* Compl., MUR 7666 (Peters for Michigan, *et al.*); Compl., MUR 7675 (Peters for Michigan, *et al.*); Compl., MUR 7681 (VoteVets, *et al.*); MUR 7715 (VoteVets, *et al.*).

[4] First Gen. Counsel's Rpt. at 3, MURs 7666 and 7675; First Gen. Counsel's Rpt. at 3, MURs 7681 and 7715.

[5] Certification ¶3, MURs 7666 and 7675; Certification ¶3, MURs 7681 and 7715.

why we also voted to dismiss the allegations against these entities as an exercise of the Commission's prosecutorial discretion pursuant to *Heckler v. Chaney*.[6]

In our view, absent coordination, the Act's plain text precludes treating a public communication that republishes campaign materials as an in-kind contribution—but a Commission regulation (11 C.F.R. § 109.23(a)) implicitly reads coordination into every instance of republication, regardless of whether actual coordination has occurred. We believe that this regulation is contrary to law, and that—when the Commission enforces the remaining republication provisions—it must establish actual coordination using the same standards applied to any other form of public communication.[7] Because the record in these Matters did not support a finding that such coordination occurred, pursuing enforcement against these outside entities would have subjected the Commission to significant litigation risk.

We also voted to find no reason to believe that the respondent candidates and authorized committees supported by these advertisements impermissibly coordinated with the entities that financed them, and thus accepted and failed to report in-kind contributions.[8] Although OGC found that the facts in all of these Matters were insufficient to support the reasonable inference that coordination occurred, and did not recommend pursuing enforcement against the candidates or their authorized committees,[9] Respondents have a right under 52 U.S.C. § 30109(a)(2) and 11 C.F.R. § 111.9 to clarification of the facts and inferences that were material to our vote to find no reason to believe, as opposed to dismissal. Accordingly, this Statement of Reasons addresses our views on the "request or suggestion" standard set forth in the conduct prong of the coordination analysis, as well as concerns we have regarding the definition of "campaign materials" for the purposes of republication.

I. FACTUAL BACKGROUND

A. *Advertisements Supporting Candidate Gary Peters (MURs 7666 & 7675)*

Gary Peters was a 2020 candidate for U.S. Senate in Michigan, and Peters for Michigan is his authorized committee.[10] VoteVets.org Action Fund ("VoteVets") and Majority Forward are § 501(c)(4) social welfare organizations.[11]

On November 1, 2019, Peters for Michigan posted material to a subpage of its website entitled "What Michiganders Need to Know." This included: (1) a link to download a "b-roll"

[6] Certification ¶1, MURs 7666 and 7675; Certification ¶1, MURs 7681 and 7715.

[7] Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022).

[8] Certification ¶1, MURs 7666 and 7675; Certification ¶1, MURs 7681 and 7715.

[9] First Gen. Counsel's Rpt. at 21, MURs 7666 and 7675; First Gen. Counsel's Rpt. at 20, MURs 7681 and 7715.

[10] Gary Peters Amended Statement of Candidacy (Mar. 4, 2020); Peters for Michigan Amended Statement of Org. (Mar. 4, 2020).

[11] VoteVets Resp. at 1, MUR 7666; Majority Forward Resp. at 2., MUR 7675.

video comprising clips of Peters appearing to interact with constituents in various settings; (2) seven still images of Peters; and (3) a PDF document (the "Peters Talking Points") listing talking points about Peters's accomplishments related to national security and links to news articles relating to each claim.[12]

On November 6, 2019, VoteVets posted a video to its YouTube page entitled "Sen. Gary Peters Has Always Been There for Veterans."[13] It then paid $750,000 to distribute the video, entitled "Secure," on television, according to a report by *The Detroit News*, which references a press release by VoteVets.[14] On Dec. 4, 2019, VoteVets posted a second video, entitled "Raise," to its YouTube page.[15] VoteVets spent $700,000 to distribute this ad on television, according to a report by *Politico*, which also references a press release from VoteVets.[16]

"Secure" used two still images of Peters performing military duties and portions of the Peters b-roll, which were posted on the Peters for Michigan webpage.[17] The ad also includes text and spoken audio touting Peters's military service and voting record on national security-related issues, which is thematically similar to issues addressed in the Peters Talking Points.[18] "Raise" includes portions of the Peters b-roll, as well as two photos of Peters overlaid

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[12] https://web.archive.org/web/20191108102221/https://petersformichigan.com/what-michiganders-need-to-know (archived from Nov. 8, 2019) (providing link to download the Peters B-roll, https://www.dropbox.com/s/1jsx00li9qtxrjg/Trailer.mp4?dl=1) (showing Peters in a number of typical settings, such as talking to constituents and touring businesses and government facilities) ("Peters Website Archive"); Compl. at 3, MUR 7666; *id.*, Ex. B ("Peters Talking Points") (describing Peters's military service; legislative record related to border security; efforts to pass legislation authorizing defense contracts for Michigan businesses; and reputation as "one of the most effective and bipartisan members of Congress").

[13] VOTEVETS, *Sen. Gary Peters Has Always Been There for Veterans*, YOUTUBE (Nov. 6, 2019), https://www.youtube.com/watch?v=a17K-i31q-c ("Secure").

[14] Compl. at 4, MUR 7666 (citing Beth LeBlanc & Craig Mauger, *Insider: Dark Money Veterans Group Backs Peters With Ads,* THE DETROIT NEWS (Nov. 7, 2019)) (attached to MUR 7666 Complaint as Ex. C). OGC could not locate the press release referenced in the report.

[15] VOTEVETS, *Raise,* YOUTUBE (Dec. 4, 2019), https://www.youtube.com/watch?v=oz1jZqkX85E.

[16] Compl. at 4, MUR 7666 (citing Zach Montellaro, *Court allows North Carolina congressional map to stand*, POLITICO (Dec. 3, 2019) (attached to MUR 7666 Complaint as Ex. A).

[17] *Compare* "Secure" at 0:07-0:13, 0:18-0:22, 0:26-0:30 *with* Peters Website Archive (still images of Peters in his Navy uniform), Peters B-roll at 0:18-0:46 (visiting what appears to be a security operations office at a federal facility), 2:34-2:45 (mingling with people at a gathering in a residential backyard).

[18] *Compare* "Secure" at 0:06-0:13 ("Standing up for Michigan and helping secure America; that's how Gary Peters has spent his life. After serving as a lieutenant commander in the Navy Reserve, Gary Peters volunteered again after the September 11th attacks. In the Senate, Peters has made keeping Michigan safe a priority, working with Republicans to pass stricter inspections at ports of entry and leading the effort to grow Michigan jobs in the defense industry.") *with* Peters Talking Points at 1–8 (beginning with five headings that read "Gary served as a lieutenant commander in the U.S. Navy Reserve," "Soon after the September 11th attacks, Gary volunteered to serve again," "Gary was a

on portions of the b-roll.[19] "Raise" contains text and spoken audio touting Peters's military service, efforts to get a pay raise for military members, and "work to keep Michigan safe." The messaging in "Secure" appears to be thematically similar to the Peters Talking Points.[20]

Majority Forward purchased a Facebook ad that appears to be a fifteen-second version of the "Secure" ad and paid between $25,000-$30,000 to disseminate the untitled ad from November 26, 2019, to December 23, 2019.[21] This ad included footage from the b-roll taken from the Peters for Michigan webpage.[22]

B. *Advertisements Supporting Candidate Cal Cunningham (MUR 7681)*

Cal Cunningham was a 2020 candidate for U.S. Senate in North Carolina, and Cal for NC is his authorized committee.[23] VoteVets is a § 501(c)(4) social welfare organization, and VoteVets PAC is a hybrid political committee registered with the Commission.[24]

leader on the Homeland Security Committee and a member of the Armed Services Committee," "Gary made border security his top priority with the passage of key security bills he wrote," and "Gary led efforts to boost Michigan's defense industry") (case changed from all caps in original to sentence case for readability).

[19] *Compare* "Raise" at 0:03-0:07, 0:08-0:14, 0:26-0:30 *with* Peters Website Archive (still images of Peters in his Navy uniform), Peters B-roll at 1:50-2:01 (riding a motorcycle), 2:34-2:45 (mingling with people at a gathering in a residential backyard), 2:09-2:17 (speaking to what appears to be a group of veterans in motorcycle riding apparel).

[20] *Compare* "Raise" ("He's been called one of the most effective members of the U.S. Senate. Gary Peters served in the Navy Reserve and after the September 11th attacks, volunteered to serve again.") *with* Peters Talking Points at 1, 9 (including headings that read: "Gary was named one of the most effective and bipartisan members of the US senate," "Gary served as a lieutenant commander in the U.S. Navy Reserve," "Soon after the September 11th attacks, Gary volunteered to serve again") (case changed from all caps in original to sentence case for readability).

[21] Facebook Ad Library, https://www.facebook.com/ads/library/?id=1246348528907738 (last accessed Mar. 29, 2022).

[22] *Compare* Majority Forward Ad at 0:02-0:04, 0:06-0:09, 0:12-0:15 *with* Peters B-roll at 2:46-2:55 (talking to people in an office building), 0:18-0:46 (visiting what appears to be a security operations office at a federal facility), 2:34-2:45 (mingling with people at a gathering in a residential backyard).

[23] Cal Cunningham, Amended Statement of Candidacy (July 15, 2020); Cal for NC, Amended Statement of Org. (July 15, 2020).

[24] VoteVets PAC, Statement of Org. at 2 (Dec. 6, 2019). As a hybrid PAC, VoteVets PAC maintains a non-contribution account, from which it can deposit and withdraw funds raised in unlimited amounts from individuals, corporations, labor organizations, and other political committees. VoteVets Misc. Text (Form 99) (July 5, 2016); *see* FED. ELECTION COMM'N, *Press Release, FEC Statement on Carey v. FEC, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011), https://www.fec.gov/updates/fec-statement-on-carey-fec/.

On or about December 25, 2019, VoteVets began running a television ad entitled "Stood Up."[25] The ad used five photographs of Cunningham from Cal for NC's Flickr page (each depicting Cunningham prior to his candidacy, including four in military uniform and one from college); a photograph of Cunningham from a still shot of a video on Cal for NC's YouTube page; and three photographs of Cunningham from the Flickr page of his 2010 Senate campaign.[26] On or about January 14, 2020, VoteVets began running a second television ad in North Carolina, entitled "Answered the Call."[27] The ad used four photographs of Cunningham from Cal for NC's Flickr page (including one depicting him in military uniform prior to his candidacy); five video clips depicting Cunningham from a "b-roll" video on Cal for NC's YouTube page; and a headshot of Cunningham from the Flickr page of his 2010 Senate campaign.[28] VoteVets reportedly spent at least $2 million and as much as $3.3 million to air "Stood Up" and "Answered the Call."[29]

On or about February 7, 2020, VoteVets PAC began running an ad in North Carolina, entitled "Won't Let That Happen."[30] The ad used two video clips depicting Cunningham from a b-roll video on Cal for NC's YouTube page, a photograph of Cunningham in uniform prior to his candidacy from Cal for NC's Flickr page, and a headshot of Cunningham from the Flickr page of Cunningham's 2010 Senate campaign.[31] VoteVets PAC reported independent expenditures ("IEs") totaling $2,551,906, which appear to have been for "Won't Let That Happen."[32] On or about February 24, 2020, VoteVets PAC began running a second television

[25] Compl. at 2, MUR 7681; *see also* VoteVets.org Action Fund, *Cal Cunningham: Stood Up*, YOUTUBE (Dec. 24, 2019), https://www.youtube.com//watch?v=vI8lXe4YtOw.

[26] Compl. at Ex. A, MUR 7681 (listing "Stood Up" visuals). Cunningham's principal campaign committee in 2010 was Cunningham for U.S. Senate. Cunningham for U.S. Senate, Amended Statement of Org. (Apr. 21, 2010); Cunningham for U.S. Senate, Termination Report (Oct. 1, 2018). The 2010 committee's Flickr page is publicly available at https://www.flickr.com/photos/calfornc/ (last accessed Mar. 29, 2022).

[27] Supp. Compl. at 1–2, MUR 7681; *see also* VoteVets.org Action Fund, *Answered the Call*, YOUTUBE (Jan. 14, 2020), https://www.youtube.com/watch?v=KGB_CBn-Qf8.

[28] Supp. Compl. at Ex. A, MUR 7681 (listing "Answered the Call" visuals).

[29] Zach Montellaro, *Cunningham Gets Outside Boost in North Carolina*, POLITICO (Jan. 21, 2020) (cited by Supp. Compl. at 2, MUR 7681). The article states that, based on ad buys captured by media tracking company Advertising Analytics, VoteVets Action Fund had "already" spent $2.2 million on two ads (which can be identified as "Stood Up" and "Answered the Call" based on the timing) and, based on "future reservations through the end of January," planned to ultimately spend $3.3 million. However, it is unclear whether the additional spending was for the same or new ads, or whether the spending occurred.

[30] Second Supp. Compl. at 3, MUR 7681 (Mar. 9, 2020); *see also* VOTEVETS, *Won't Let That Happen*, YOUTUBE (Feb. 7, 2020), https://www.youtube.com/watch?v=Jv7L-6bN7yU.

[31] Compl. at Ex. A, MUR 7681 (listing "Won't Let That Happen" visuals).

[32] VoteVets, 24/48 Hour IE Report, FEC Sched. E at 1–2 (Feb. 7, 2020) (reporting disbursements to its media vendor, Waterfront Strategies, for TV ad supporting Cunningham disseminated on February 7, 2020, including $12,892 for production of the ad and $2,551,906 for placing the ad), https://docquery.fec.gov/pdf/393/202002079186487393/202002079186487393.pdf; Zach Montellaro,

ad in North Carolina, entitled "Fought."[33] The ad used a photograph of Cunningham from Cal for NC's Flickr page and a video clip depicting Cunningham from a b-roll video posted on Cal for NC's YouTube page.[34] VoteVets PAC reported IEs of $1,563,402, which appear to have been for "Fought."[35]

C. *Advertisement Supporting Candidate Mary Jennings Hegar (MUR 7715)*

Mary Jennings Hegar was a 2020 candidate for U.S. Senate in Texas, and MJ for Texas is her principal campaign committee.[36] VoteVets PAC is a hybrid political committee registered with the Commission.[37]

On or about February 4, 2020, VoteVets PAC began running a television ad in Texas, entitled "Fight of Her Life."[38] The ad used three video clips depicting Hegar from a b-roll video on MJ for Texas's YouTube page.[39]

Chaos in Iowa Looms Over the New Hampshire Debate, POLITICO (Feb. 7, 2020) ("VoteVets ... is spending $2.5 million on a new ad campaign launching Friday and running for two weeks, according to information shared with [*Politico* journalist James Arkin]") (quotations omitted) (cited by Second Supp. Compl. at 3 n.9, MUR 7681).

[33] *See* Second Supp. Comp. at 3, MUR 7681; VOTEVETS, *Fought*, YOUTUBE (Feb. 18, 2020), https://www.youtube.com/watch?v=qpZLlGpXiWU. The Complaint suggests VoteVets PAC began airing "Fought" on February 18, 2020, but the available information suggests that it was February 24, 2020.

[34] Compl. at Ex. A, MUR 7681 (listing "Fought" visuals).

[35] *See* VoteVets, 2020 Mar. Monthly Report at 149–50 (Mar. 20, 2020), http://docquery.fec.gov/cgi-bin/fecimg/?202003209204669802 (reporting disbursements to Waterfront Strategies for a TV ad supporting Cunningham disseminated on February 24, 2020, including $20,977.56 for production of the ad and $1,563,402 for placing the ad); Zach Montellaro, *Trump's Counterprogramming Democrats with Campaign Blitz*, POLITICO (Feb. 19, 2020) (stating, based on FCC filings, that "VoteVets is dumping another $1.5 million" on TV ad identified as "Fought").

[36] Mary Jennings Hegar, Amended Statement of Candidacy (Oct. 3, 2020); MJ for Texas, Amended Statement of Org. (Oct. 3, 2020).

[37] VoteVets, Statement of Org. at 2 (Dec. 6, 2019). As a hybrid PAC, VoteVets PAC maintains a non-contribution account, from which it can deposit and withdraw funds raised in unlimited amounts from individuals, corporations, labor organizations, and other political committees. VoteVets Misc. Text (Form 99) (July 5, 2016); *see* FED. ELECTION COMM'N, *Press Release, FEC Statement on Carey v. FEC, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011), https://www.fec.gov/updates/fec-statement-on-carey-fec/.

[38] Compl. at 1, 5, MUR 7715; Patrick Svitek, *Hegar Gets Heavy Outside Support in Crowded Democratic Primary to Challenge Cornyn*, TEX. TRIBUNE, Feb. 3, 2020 (cited by MUR 7715 Compl. at 5 n.15); VOTEVETS, *Fight of Her Life – MJ Hegar*, YOUTUBE (Feb. 3, 2020).

[39] Compl. at Ex. A, MUR 7715 (listing "Fight of Her Life" visuals).

II. APPLICABLE LAW

The Act prohibits any person from making, and any candidate or committee from knowingly accepting, an excessive contribution.[40] For the 2020 election cycle, contributions by persons other than multicandidate committees to any candidate and his or her authorized political committee were limited to $2,800 per election.[41] Multicandidate committees could contribute up to $5,000 per election to a candidate and his or her authorized committee.[42]

Committee treasurers are required to disclose the name, address, employer, and occupation of each person who makes one or more contributions to the committee aggregating in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee), together with the date and amount of any such contribution.[43] Committee treasurers are also required to disclose each political committee that makes a contribution to the reporting committee during the reporting period, along with the date and amount of any such contribution.[44] If a committee makes a contribution, it must disclose the name and address of the recipient.[45]

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*…."[46] 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 agent.[47] Thus, under the Act, *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. The Act does not define "coordination," but two Commission regulations attempt to address it, including in the republication context.

First, 11 C.F.R. § 109.23 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."[48] The benefitting candidate "does not

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[40] 52 U.S.C. §§ 30116(a), (f); 11 C.F.R. §§ 110.1(b)(1), 110.2(b)(1), 110.9.

[41] 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

[42] 52 U.S.C. § 30116(a)(2)(A); 11 C.F.R. § 110.2(b)(1).

[43] 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a).

[44] 52 U.S.C. § 30104(b)(3)(B); 11 C.F.R. § 104.3(a).

[45] 52 U.S.C. § 30104(b)(6)(B)(i); 11 C.F.R. § 104.3(b).

[46] 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added).

[47] *Id.* § 30116(a)(7)(B)(i).

[48] 11 C.F.R. § 109.23(a). Under this provision, "[t]he candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless

receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21."[49]

Second, 11 C.F.R. § 109.21 sets out a three-prong test for whether a public communication is a "coordinated communication" 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).[50] A public communication must satisfy all three prongs to qualify as "coordinated" under this test.[51]

The payment prong is satisfied where a communication "[i]s paid for, in whole or in part, by a person other than [the] candidate, authorized committee, or political party committee."[52] The content prong is satisfied if, *inter alia*, the communication is a "public communication" that "disseminates, distributes, or republishes in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee"[53] (the term "public communication" includes a communication "by means of any broadcast, cable, or satellite communication" and ads placed for a fee on another person's website[54]). The conduct prong is satisfied by one of five types of interactions between the payor and the candidate or authorized committee regarding the communication: a request or suggestion, material involvement, substantial discussion, use of a common vendor, or involvement of a former employee or independent contractor.[55]

The Commission has opined that a request or suggestion is the "most direct form of coordination," whereby "the candidate or political party committee communicates desires to another person who effectuates them," and that the determination of whether a third party acted in response to a request or suggestion must be "based on specific facts, rather than

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the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21."

[49] *Id.* As one of us has noted previously, this regulation does not require coordination for the person who republished the campaign materials to be considered to have made a contribution. We believe that this directly contradicts the Act's requirement that an expenditure does not become a contribution to a candidate unless 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 agent, and is therefore facially invalid. *See* Interpretive Statement of Chairman Allen J. Dickerson (March 24, 2022).

[50] 11 C.F.R. § 109.21(a).

[51] *Id.* For instance (and relevant here), one way that a communication can satisfy the content prong is if it republishes campaign materials prepared by a candidate or a candidate's committee. 11 C.F.R. § 109.21(c)(2).

[52] *Id.* § 109.21(a)(1).

[53] *Id.* § 109.21(c)(2).

[54] 11 C.F.R. § 100.26.

[55] 11 C.F.R. § 109.21(d).

presumed."[56] Moreover, we have explained that a "request or suggestion" must be privately made or targeted to a select audience; it cannot be inferred based solely on the existence of information or materials that the campaign makes available to the general public, including on a website.[57] And while the Commission, in 2006, added a safe harbor for "publicly available information" to every conduct standard except the "request or suggestion" standard, the Explanation & Justification released at the time explicitly notes that the Commission made this decision to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate's privately conveyed request or suggestion.[58] Simply put, unless a private request or suggestion occurred, similarities between a campaign's public materials and an outside actor's public communication alone are insufficient to transmogrify an independent expenditure into a coordinated one.[59]

III. ANALYSIS

A. *Absent a Finding of Coordination Under §109.21, Republication is an Independent Expenditure—Not an In-Kind Contribution*

In determining whether to pursue enforcement, the Commission has prosecutorial discretion as set forth in *Heckler v. Chaney*.[60] When exercising that discretion, it is incumbent upon us to "not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts,

[56] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

[57] *Id.*; *see also* Factual & Legal Analysis at 1–3, 7–8, MUR 6821 (Shaheen for Senate) (finding no coordination when IEOPC released advertisements conveying information that Shaheen campaign and Democratic Senatorial Campaign Committee had previously posted to campaign website and Twitter); Factual & Legal Analysis at 9–10, MUR 7124 (Katie McGinty for Senate) (finding no coordination when IEOPC and § 501(c)(4) released advertisements conveying similar language and themes that McGinty's campaign had previously posted on its website); First Gen. Counsel's Rpt. at 7–9, MURs 7138 and 7229 (Friends of Patrick Murphy, *et al.*) (recommending finding no coordination when IEOPC released advertisement targeted to geographic areas and containing information referenced on "Media" page on Murphy campaign's website); Statement of Reasons of Comm'rs Hans A. von Spakovsky and Ellen L. Weintraub, MUR 5743 (Betty Sutton, *et al.*) (noting that an outside group's incidental use of a photograph downloaded from a candidate's publicly available website does not constitute coordination).

[58] Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

[59] *See* Interpretive Statement of Chairman Allen J. Dickerson (March 24, 2022).

[60] 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion ... [and] often involves a complicated balancing of a number of factors which are peculiarly within its expertise."); *CREW v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018) ("The Supreme Court has recognized that federal administrative agencies in general, and the Federal Election Commission in particular, have unreviewable prosecutorial discretion to determine whether to bring an enforcement action.") (citing *Heckler v. Chaney*, 470 U.S. at 831; *FEC v. Akins*, 524 U.S. 11, 25 (1998); *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007)).

whether the particular enforcement action requested best fits the agency's overall policies[,]"[61] among other factors.

One of us has previously explained our view that—to the extent that 11 C.F.R. § 109.23 treats non-coordinated republication as an in-kind contribution—this regulation directly contradicts the Act's text and is therefore contrary to law.[62] We are not alone in observing this legal infirmity.[63] 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. Failing such a finding, the independent republication of campaign material is just that: an independent expenditure. This is the inevitable result of the statutory text. Consequently, were the Commission to follow OGC's recommendations in these Matters and pursue enforcement against VoteVets, VoteVets PAC, and Majority Forward under 11 C.F.R. § 109.23 without an independent finding of coordination, it seems probable that a reviewing court could simply invalidate § 109.23 as directly contradictory to our governing statute.

Accordingly, in light of § 109.23's legal infirmities, we voted to exercise the Commission's prosecutorial discretion to dismiss the allegations against VoteVets, VoteVets PAC, and Majority Forward.

B. *A "Request or Suggestion" Must Involve a Private, Targeted Communication*

With respect to the coordination analysis at §109.21, the Complaints in these Matters allege that each respondent candidate committee satisfied the conduct prong because their actions amounted to a "request or suggestion" to republish the pictures, video, and/or content hosted on their respective campaign website, YouTube page, and/or Flickr page.[64] The Complainants' arguments rest variously on the assertions that (a) the candidate committee used "code words" indicative of a request or suggestion;[65] (b) it is unusual for a candidate committee to post video footage using a link to download the video, rather than streaming the video, and therefore the manner in which the footage was posted indicated a candidate committee's preference on how the candidate should be presented in terms of imagery and messaging;[66] (c) the short time between when the b-roll, images, and talking points were posted and the dates the ads were disseminated provided a basis for concluding that

[61] *Heckler*, 470 U.S. at 831.

[62] Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022).

[63] *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Lee E. Goodman at 2 n.4, MURs 6603, 6777, 6801, 6870, and 6902; *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).

[64] Compl. at 8, MUR 7666 (Peters for Michigan, *et al.*); Compl. at 8, MUR 7675 (Peters for Michigan, *et al.*); Compl. at 9–10, MUR 7681 (VoteVets, *et al.*); Compl. at 6–7, (VoteVets, *et al.*), MUR 7715.

[65] Compl. at 8, MUR 7666; Compl. at 8, MUR 7675.

[66] Compl. at 9–10, MUR 7675.

coordination occurred;[67] (d) thematic or linguistic similarities between a candidate's talking points or b-roll and an outside group's advertisements evidenced coordination;[68] (e) solicitation emails sent in close temporal proximity by a candidate and an outside group gave rise to the inference that coordination between the two occurred;[69] and (f) Twitter posts made by a DCCC representative were "requests or suggestions" that an outside group should disseminate ads supporting a particular candidate.[70]

Importantly, however, nothing in the Complaints or the record in any of these Matters suggests that the images, footage, or talking points put forth by the campaigns were not available to the general public. There is also no information in the record suggesting that the candidates or their authorized committees or agents privately communicated with the outside organizations that ultimately disseminated the advertisements. As discussed above, in promulgating § 109.21, the Commission specifically clarified that the "request or suggestion" definition "is intended to cover requests or suggestions made to a select audience but not those offered to the public generally."[71] The Commission has analyzed previous cases alleging "request or suggestion" based on similar facts using this framework, concluding that a campaign's simply posting information or content on a public website does not satisfy the meaning of "request or suggest" under the conduct standard,[72] notwithstanding temporal proximity[73] or thematic similarities[74] between that information or content and a subsequent public communication.

We have not been presented with credible evidence supporting the contention that Gary Peters, Cal Cunningham, or Mary Jennings Hegar or their respective campaigns or agents privately communicated with VoteVets, VoteVets PAC, or Majority Forward. And the record does not allege that these three entities used anything other than publicly available images, video footage, and themes in their advertisements. As a result, OGC reasonably concluded—and we agree—that the record in these Matters did not include sufficient

[67] Compl. at 8–9, MUR 7666; Compl. at 8, MUR 7675; Compl. at 10, MUR 7681; Compl. at 6–7, MUR 7715.

[68] Compl. at 12–13, MUR 7666; Compl. at 9, MUR 7675; Compl. at 6, MUR 7681.

[69] Compl. at 3–4, 10, MUR 7681.

[70] Second Supp. Compl. at 3, MUR 7681.

[71] *See supra* n.56 and accompanying text.

[72] Factual & Legal Analysis at 8, MUR 6821 (Shaheen for Senate) ("a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate's campaign website, does not satisfy the conduct standards"); Factual & Legal Analysis at 8–9, MUR 7124 (Katie McGinty for Senate) ("the 'request or suggestion' 'conduct' standard refers to requests or suggestions 'made to a select audience, but not those offered to the public generally.'").

[73] *See* Factual & Legal Analysis at 8, MUR 6821 (Shaheen for Senate); Factual & Legal Analysis at 5–6, MUR 5963 (Club for Growth PAC).

[74] *See* Factual & Legal Analysis at 8, MUR 6821 (Shaheen for Senate); Factual & Legal Analysis at 10–11, MUR 7124 (Katie McGinty for Senate); Factual & Legal Analysis at 9–10, MUR 6613 (Prosperity for Michigan).

information to support the reasonable inference that the conduct prong was satisfied. We therefore voted to find no reason to believe that these candidates or their authorized committees violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting excessive in-kind contributions, or 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report in-kind contributions.

C. *Defining "Campaign Materials"*

As discussed above, the record in these Matters did not support a finding that the respondent candidates or their authorized committees triggered the conduct prong of the coordination analysis, and thus a comprehensive exegesis of the images, content, and footage at issue in these Matters is not warranted or necessary. Nevertheless, we feel it is worthwhile to address OGC's and Complainants' tendency to characterize any content that a campaign happens to use or disseminate as "campaign materials."

The term "campaign materials," while defined elsewhere in the Act and our regulations,[75] is not defined for the purposes of republication beyond the phrase "broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents."[76] Given this context, the term can be properly understood to include a campaign's finished advocacy products, such as broadcast or paid internet ads, as well as the "pins, buttons, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs" referenced elsewhere in the Act.[77] Private work product created and paid for by a campaign, for that campaign's purposes—such as internal polling that is not shared with the public—would also seem to qualify. But over the years, the Commission has characterized a vast swath of other content as "campaign materials" in enforcement matters. As a result, there is a significant lack of clarity over what these materials are with respect to our regulations governing republication.

In our view, the idea that pictures, video, and other content created long before a candidate chooses to run for federal office axiomatically qualifies as "campaign materials" is problematic. It is true that the Commission has directly addressed the issue of whether an advertisement prepared by a candidate's first presidential campaign constitutes "campaign

[75] *See, e.g.*, 52 U.S.C. §§ 30101(8)(B)(viii); 30101(8)(B)(ix); 30101(8)(B)(x) (defined as including "pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs," but not "the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising" in the context of volunteer materials); 11 C.F.R. §§ 100.87; 100.147 (defined as including "pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs" in the context of volunteer activity for party committees); 11 C.F.R. § 100.88(a) (defined as including "pins, bumper stickers, handbills, brochures, posters, and yard signs" in the context of volunteer activity for candidates); 11 C.F.R. § 9034.4(e)(4) (defined as including "bumper stickers, campaign brochures, buttons, pens and similar items," in the context of qualified campaign expenses); 11 C.F.R. § 106.2(ii) (defined as including mass mailings, as well as "pins, bumperstickers, handbills, brochures, posters and yardsigns" in the context of matching funds regulation).

[76] 52 U.S.C. § 30116(a)(7)(B)(3).

[77] *See supra* n.75.

materials" when it is republished in an advertisement disseminated by an outside group during the same candidate's second presidential campaign.[78] To our knowledge, however, the Commission has not directly addressed whether images, video, or content created *before a person ever becomes a federal candidate* automatically qualifies as "campaign materials."[79] And the presumption that any content that merely passes through a campaign's hands qualifies as "campaign materials"—regardless of when it was created, or the purpose for which it was created—creates some tension with the language of the Act, which provides that these materials must be "prepared by" a candidate or his or her authorized committee or agents.[80]

An additional concern we wish to highlight arises in one of the Matters presently before us—MUR 7681—where five photographs of candidate Cal Cunningham posted on his campaign's Flickr page (each depicting Cunningham prior to his candidacy, including four in uniform and one from college) are characterized as "campaign materials" in both the Complaint and the First General Counsel's Report.[81] Although the Complaint alleges that the five photographs were marked with the designation "All Rights Reserved" and could only be used upon receiving permission from the Cunningham campaign,[82] this argument begs the question by failing to address whether other parties possess intellectual property rights in the images at issue.

Generally speaking, copyright initially vests in the person who creates the work, not the object of the work.[83] Given that the images depict Cunningham, it is more than plausible

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[78] Factual & Legal Analysis at 6, MUR 6535 (Restore Our Future, Inc.) (explaining that "the Act defines republication to include materials prepared by the candidate's 'campaign committees,' in the plural form and there is nothing in the statute or Commission regulations or precedent that limits republication to within the same election cycle," in a matter where an IEOPC republished nearly 100% of a candidate's 2008 campaign advertisement to support that same candidate during the 2012 election cycle).

[79] *But c.f. id.* at 5 (recognizing that the statute and regulation "do not state whether there is any temporal limitation").

[80] 52 U.S.C. § 30116(a)(7)(B)(3). OGC has noted its view that "the use of the words 'prepared by' in the republication provision indicates a scope that covers not simply the creation of materials but also the act of making them available for use." *See, e.g.*, First Gen. Counsel's Rpt. at 12, MURs 7681 and 7715.

[81] Compl. at 2, MUR 7681; First Gen. Counsel's Rpt. at 11–12, MUR 7681.

[82] Compl. at 10, MUR 7681.

[83] 17 U.S.C. § 201(a). Although the statutory or common law of many states permits claims for misappropriation of one's name or likeness for commercial purposes, the Copyright Act (which Congress passed as an exercise of an enumerated power granted to it by Art. 1, § 8, cl. 8 of the United States Constitution) contains an express preemption clause, which provides that it preempts conflicting state law to the extent that a state law grants rights equivalent to those granted by the Copyright Act. *Id.* at § 301. However, because the Copyright Act does not define "equivalent rights," there is significant ambiguity and complexity with respect to when the Copyright Act preempts state right of publicity claims. *Compare Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017) (Copyright Act preempted plaintiffs' state publicity rights claims when their likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use) *and*

that he did not create them—and therefore that neither he nor his campaign own the images and are simply using them under an express or implied license. And because complicated determinations involving a party's intellectual property rights are well outside the Commission's jurisdiction and expertise, we believe it is improper for us to casually opine on such matters in the context of applying our regulations on republication.

* * *

For the foregoing reasons, we voted to dismiss the allegations that VoteVets, VoteVets PAC, and Majority Forward impermissibly republished campaign materials and failed to report in-kind contributions pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, and to find no reason to believe that Gary Peters, Cal Cunningham, Mary Jennings Hegar, or their authorized committees or agents knowingly accepted and failed to report in-kind contributions.

April 12, 2022
Date

Allen J. Dickerson
Chairman

April 12, 2022
Date

James E. "Trey" Trainor, III
Commissioner

Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986) (Copyright Act pre-empted plaintiff baseball players' right of publicity with respect to videotaping and broadcast of baseball games) *with Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (Copyright Act did not pre-empt right of publicity claim based on the use of plaintiffs' images and names in a product catalog) *and Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000) (Copyright Act did not pre-empt right of publicity claim by plaintiff musicians based on the use of their names and likenesses on CDs and cassettes containing their copyrighted songs, and on catalogues and posters promoting the CDs and cassettes).