FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7724 & 7752
Johnny Teague for Congress Campaign Committee, *et al.*	)	

STATEMENT OF REASONS OF
VICE CHAIRMAN SEAN J. COOKSEY

The Complaints in this matter alleged, among other things, that the Church at the Cross (the "Church") made, and Johnny Teague for Congress Campaign Committee (the "Committee") knowingly accepted, an unlawful in-kind contribution in the form of a Church television advertisement. The ad featured Johnny Teague in his capacity as Pastor of the Church and aired in the Houston area within 30 days of Texas's 2020 primary election, in which Teague was a congressional candidate.

A majority of Commissioners voted to exercise prosecutorial discretion and dismiss this allegation, as recommended by the Office of the General Counsel ("OGC"). I would have instead found no reason to believe that the Respondents violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations because the Church's ad satisfied all elements of—and therefore should have qualified for—the commercial-transactions safe harbor under 11 C.F.R. § 109.21(i).[1] This statement explains my reasoning.

I. Factual Background

The Complaints in this matter were filed in April and June 2020, respectively, and alleged multiple violations of the Act and Commission regulations by the Church and Teague's campaign. As relevant here, the Complaints alleged that the Church made an unlawful in-kind contribution in the form of a coordinated communication when, shortly before Texas's 2020 primary election, it paid for a 30-second TV advertisement about the Church that prominently featured Teague. During the ad, Teague is clearly identified by a text banner as "Dr. Johnny Teague, Pastor," and he addresses the camera and states:

[1] *See* Certification (May 31, 2023), MURs 7724 & 7752 (Johnny Teague for Congress Campaign Committee, *et al.*).

> Have you ever asked a friend, "Do I have anything in my teeth?" Did you want them to tell you the truth, or tell you what made you feel good? A lot of people go to Church to make them feel good. God's Word does that but he also brings you the truth, what we need to clean up our lives and experience His blessing. I'm Dr. Johnny Teague and I invite you to join us at the Church at the Cross where we study every Sunday God's truth at 3835 South Dairy Ashford.[2]

The advertisement then concludes with a display of the Church's logo, address, phone number, and service times.[3] The advertisement aired on Fox 26 Houston from February 13 through March 2, 2020, within 30 days of the March 3rd, 2020 primary election. At the time, Teague was also a Republican candidate for Texas's 9th Congressional District, which includes part of Fox 26's television market.[4]

Despite the ad making no mention of Teague's congressional campaign, according to the Complaints, the Church's ad provided Teague "an unfair advantage" over his opponents in the primary race and violated federal campaign finance laws.[5]

II. Analysis

In its analysis of the Church's TV advertisement, OGC determined that the ad satisfied the three prongs of the Commission's coordinated-communication regulation and did not fall under any of the regulation's safe harbors.[6] Further, the First General Counsel's Report ("FGCR") observed that, while the coordinated-communication regulation includes a safe harbor for "business and commercial communications" that meet certain criteria, the Commission "did not adopt a similar safe harbor for tax exempt nonprofit organizations organized under 26 U.S.C. § 501(c)(3), such as the Church in this matter."[7]

Nonetheless, OGC recommended that the Commission exercise its prosecutorial discretion to dismiss the allegations, since the ad did not promote, attack, support, or oppose Teague or any other candidate, and it identified Teague only in his capacity as "Pastor" at the Church; its content, medium, and geographic distribution were comparable to other advertising previously paid for by

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2 The Church's advertisement is currently available on YouTube. https://www.youtube.com /watch?v=2Ckc8Wsip0o.

3 *See id.*

4 *See* First General Counsel's Report at 15 n.46 (Feb. 9, 2023), MURs 7724 & 7752 (Johnny Teague for Congress Campaign Committee, *et al.*) ("FGCR").

5 *See* Complaint at 1 (Apr. 2, 2020), MUR 7724 (Johnny Teague for Congress Campaign Committee, *et al.*); Complaint at 1 (June 22, 2020), MUR 7752 (Johnny Teague for Congress Campaign Committee, *et al.*).

6 FGCR at 13–16.

7 *Id*. at 16.

the Church; and the total cost of the ad was likely low.[8] A majority of the Commission ultimately voted to dismiss the allegations per OGC's recommendation.[9]

OGC's conclusion that the Church's advertisement was not covered by the commercial-transactions safe harbor in 11 C.F.R. § 109.21(i) was wrong. Notwithstanding the Church's status as a 501(c)(3) nonprofit, the ad at issue satisfies all criteria for that safe harbor. The commercial-transactions safe harbor states, in full, that:

> A public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if:
>
> 1. The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and
>
> 2. The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.[10]

After asserting that this safe harbor was not meant to include communications by § 501(c)(3) organizations like the Church, OGC proceeded to evaluate the Church's ad using largely the same criteria. First, OGC observed that "the Church's ad does not [promote, attack, support, or oppose] Teague or any other candidate; indeed, the ad identified Teague only in his capacity as operator of the Church and the ad makes no mention of the election."[11] Second, "the ad was consistent with other public communications made by the Church prior to [Teague's] candidacy," in terms of its medium (a 30-second TV ad), content (the ad showed Teague addressing the camera and discussing the Church, with a text banner at the bottom of the ad that identified him as "Dr. Johnny Teague, Pastor," then listed the Church's contact information and worship-service times), and geographic distribution (the ad aired on Fox 26 Houston).[12] Lastly, the FGCR points out that Teague's "appearance in the ad as spokesperson for the Church was not unusual," considering that "Teague has been employed by the Church since 2005 and serves as its Senior Pastor."[13] In other words, Teague appeared in the ad only in his capacity as an "owner or operator" of the Church, a business that existed prior to his congressional candidacy. OGC's categorial denial that the commercial-transactions safe harbor will ever apply to communications by § 501(c)(3) entities is therefore belied by its own analysis of the advertisement at issue, which relies on the factors specified in that safe harbor.

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8 *Id.* at 16–17.

9 *See* Certification (May 31, 2023), MURs 7724 & 7752 (Johnny Teague for Congress Campaign Committee, *et al.*).

10 11 C.F.R. § 109.21(i).

11 FGCR at 16.

12 *Id.* at 16–17.

13 *Id.* at 17.

The regulatory history of the commercial-transactions safe harbor likewise undercuts OGC's claim that the safe harbor is inapplicable to otherwise qualified "business and commercial communications" solely because the source of such communications is a § 501(c)(3) nonprofit organization. The Commission adopted the safe harbor for certain business and commercial transactions now at 11 C.F.R. § 109.21(i) as part of its 2010 rulemaking to revise the coordinated-communications regulations. In the Explanation and Justification ("E&J") that accompanied the rulemaking, the Commission described the commercial-transactions safe harbor as "intended to encompass the types of commercial and business communications that were the subject of several recent enforcement actions."[14] Those matters concerned "advertisements paid for by businesses owned by Federal candidates that had been operating prior to the respective candidacies," and that "included the name, image, and voice of the candidate associated with the business"—and thus technically qualified at the time as coordinated communications subject to 11 C.F.R. § 109.21—but which "served an apparent business purpose and lacked any explicit electoral content." [15]

"To avoid capturing such advertising in the future in the coordinated communications rules," the Commission introduced the commercial-transactions safe harbor in its revisions to 11 C.F.R. § 109.21 as a protection for "*bona fide* business communications" that "serve non-electoral business and commercial purposes."[16] However, the Commission did not expressly restrict the availability of this safe harbor to communications paid for by for-profit entities either in the text of the regulation or in the E&J, and the regulation does not define the scope of "business" organizations whose communications may be eligible for the safe harbor.[17] An organization being a business or "commercial" is not synonymous with having the purpose of earning a profit. Indeed, one need look no further than Goodwill Industries or the Girl Scouts for examples of nonprofit organizations that plainly also operate as businesses. In the same way, the Church's ad featuring Teague soliciting attendance and membership at the Church is a commercial communication entitled to the safe harbor, like any other business's ad.

In rejecting the safe harbor's application,[18] OGC hangs its analysis on the fact that the Commission declined, as part of the 2010 coordinated-communications rulemaking, to adopt a separate safe harbor for "certain communications paid for by certain tax-exempt nonprofit organizations and in which Federal candidates and officeholders appear."[19] OGC claims that the rejection of that separate safe harbor is evidence that communications like the Church's do not fall under the commercial-transaction safe harbor that the Commission did adopt. But as the 2010 E&J makes clear, the two safe harbors were not mutually exclusive, and the proposed safe harbor would have exempted an entirely different sort of nonprofit communications, "like the one that was the subject of" MUR 6020 (Alliance for Climate Protection, *et al.*), which at the time was "the only

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14 Coordinated Communications, 75 Fed. Reg. 55,947, 55, 959 (Sept. 15, 2010) ("Coordinated Communications E&J").

15 *Id*.

16 *Id*.

17 *See id*.; 11 C.F.R. § 109.21(i).

18 *See* FGCR at 15–16.

19 Coordinated Communications E&J at 55,960.

Commission enforcement action in which a 501(c)(3) organization paid for a public communication that satisfied all three prongs of the coordinated communications rule."[20]

In MUR 6020, the Alliance for Climate Protection, a § 501(c)(3) organization focused on environmental policy, had "selected" and reached agreements with then U.S. House Speaker Nancy Pelosi and former Speaker Newt Gingrich to appear in a national advertising campaign, "because it believed the two would fit into the Alliance's humorous ad campaign featuring 'unlikely pairs' allied for a common purpose and would further [ ] its goal of focusing public attention on a policy issue."[21] Importantly, neither Pelosi nor Gingrich was ever an "owner or operator" of the Alliance for Climate Protection or otherwise affiliated with the organization outside of their participation in the advertising campaign, and their appearance in the ads was only for the purpose of bringing public attention to a policy issue—climate change— championed by the sponsoring nonprofit.[22] In the E&J, the Commission further justified its decision not to adopt the proposed safe harbor for certain nonprofit communications by highlighting the existence of strict IRS rules governing 501(c)(3) entities' political activities that would likely mean "few of those 501(c)(3) organizations would therefore benefit from the proposed safe harbor."[23]

This important factual context to the 2010 rulemaking substantiates that the Church's advertisement differs in critical ways from the type of advertising that the Commission had in mind when considering a safe harbor for nonprofit communications in the 2010 rulemaking. At the same time, the Church's television ad facially satisfies all of the criteria set forth in 11 C.F.R. § 109.21(i), which even OGC implicitly recognized in the FGCR: (1) the advertisement clearly identifies Teague only in his capacity as an owner or operator (*i.e.*, "Dr. Johnny Teague, Pastor") of a business that existed prior to his candidacy; (2) the medium, timing, content, and geographic distribution of the ad are consistent with other public communications that the Church had made prior to the start of Teague's candidacy; and (3) the ad does not promote, attack, support, or oppose Teague or any another candidate.[24] And though the Church may not be a business in the for-profit sense, the Commission's regulations do not define the meaning of "business" for purposes of the commercial-transactions safe harbor, and the Church's television ad, by promoting the Church and its services to the wider public, indisputably "serve[d] non-electoral business and commercial purposes," just like the "*bona fide* business communications" that prompted the Commission to create the safe harbor.[25]

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20 *Id*.

21 Statement of Reasons of Chairman Steven T. Walther, Vice Chairman Matthew S. Petersen, and Commissioners Cynthia L. Bauerly, Caroline C. Hunter, and Donald F. McGahn, II at 5 (May 11, 2009), MUR 6020 (Alliance for Climate Protection, *et al.*).

22 *See* First General Counsel's Report at 3–8 (Mar. 26, 2009), P-MUR 472/ MUR 6020 (Alliance for Justice).

23 Coordinated Communications E&J at 55,960.

24 *See* FGCR at 16–17.

25 *See* Coordinated Communications E&J at 55,959.

For the foregoing reasons, I voted to find no reason to believe that the Church violated 52 U.S.C. § 30118 and 11 C.F.R. § 114.2 in connection with its television ad, on the basis that the ad satisfied the elements of the commercial-transactions safe harbor under 11 C.F.R. § 109.21(i).

Sean J. Cooksey
Vice Chairman

July 12, 2023
Date