



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 2022

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MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel for Enforcement

Claudio J. Pavia
Deputy Associate General Counsel for Enforcement

BY: Mark Allen *MA*
Assistant General Counsel

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Attorney

SUBJECT: MUR 7760 (Hickenlooper for Colorado, *et al.*)
Recommendation to Approve Revised Factual and Legal Analyses

17 On November 29, 2022, the Commission (1) dismissed as an exercise of prosecutorial
18 discretion the allegations that SMP and Rebecca Lambe in her official capacity as treasurer
19 violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive in-kind
20 contribution to Hickenlooper for Colorado and violated 52 U.S.C. § 30104(b) and 11 C.F.R.
21 § 104.3(b) by failing to report an in-kind contribution; (2) found no reason to believe that John
22 Hickenlooper and Hickenlooper for Colorado and Mark Turnage in his official capacity as
23 treasurer violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting an
24 excessive in-kind contribution; (3) found no reason to believe that Hickenlooper for Colorado
25 and Mark Turnage in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and
26 11 C.F.R. § 104.3(a) by failing to report an in-kind contribution; and (4) directed the Office of
27 General Counsel to revise the Factual and Legal Analyses to be consistent with these findings.¹

¹ Certification ¶¶ 3-4 (Dec. 1, 2022).

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Memorandum to the Commission

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1 The Office of General Counsel has revised the Factual and Legal Analyses, which are
2 attached, to be consistent with the Commission's findings.² The revisions to each Factual and
3 Legal Analysis are depicted on the attached redlines.³ We recommend the Commission approve
4 the attached revised Factual and Legal Analyses for SMP and for Hickenlooper for Colorado and
5 John Hickenlooper and close the file.

6 **RECOMMENDATIONS:**

- 7 1. Approve the attached revised Factual and Legal Analyses;
- 8 2. Approve the appropriate letters; and
- 9 3. Close the file.

10 Attachments:

- 11 1. Revised Factual and Legal Analysis for SMP
- 12
- 13 3. Revised Factual and Legal Analysis for Hickenlooper for Colorado and John Hickenlooper
- 14

² Attach. 1, Revised Factual and Legal Analysis for SMP; Attach. 3, Revised Factual and Legal Analysis for Hickenlooper for Colorado and John Hickenlooper.

³ Attach. 2, Redline Factual and Legal Analysis for SMP; Attach. 4, Redline Factual and Legal Analysis for Hickenlooper for Colorado and John Hickenlooper.

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: SMP and Rebecca Lambe in her official
capacity as treasurer

MUR 7760

I. INTRODUCTION

The Complaint alleges that SMP and Rebecca Lambe in her official capacity as treasurer (“SMP”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations when SMP republished Hickenlooper for Colorado (the “Hickenlooper Committee”)’s campaign materials in a coordinated communication. The allegations concern the Hickenlooper Committee’s operation of a website, *getthefacts.co* (“Get the Facts Website”), which, according to the Complaint, used “code language” to signal to outside groups that they should run advertisements using the messages and themes detailed on the website. The Complaint alleges that SMP republished talking points the Hickenlooper Committee placed on the Get the Facts Website using the title “Coloradans Need to Know,” as well as B-roll from an earlier Hickenlooper Committee advertisement, in a television advertisement entitled “Honest Mistake.”

SMP argues that no republication occurred because “Honest Mistake” only used brief clips of publicly available footage of John Hickenlooper, shared themes from the Get the Facts Website, and incorporated SMP’s own message. As discussed below, under the circumstances of this matter, the Commission exercises its prosecutorial discretion and dismisses the allegations that SMP 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 to the Hickenlooper Committee and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by failing to report an in-kind contribution.¹

¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

1 II. FACTUAL BACKGROUND

2 John Hickenlooper was a 2020 candidate for the U.S. Senate in Colorado.² Hickenlooper
3 for Colorado is his principal campaign committee.³ SMP is an independent expenditure-only
4 political committee registered with the Commission.⁴ Hickenlooper's opponent in the general
5 election was then-incumbent U.S. Senator Cory Gardner.⁵ During the 2020 election cycle, SMP
6 reported making \$229,911,901 in independent expenditures, including \$7,836,779 in opposition
7 to Gardner and \$2,700,142 in support of Hickenlooper.⁶

8 On August 22, 2019, Hickenlooper and the Hickenlooper Committee released a 90-
9 second advertisement, entitled "Not Done Fighting," announcing his U.S. Senate campaign.⁷
10 "Not Done Fighting" included six seconds of footage of Hickenlooper interacting with customers

² John W. Hickenlooper, Amended Statement of Candidacy (Oct. 15, 2020), <https://docquery.fec.gov/pdf/382/202010159294211382/202010159294211382.pdf>. Hickenlooper won the 2020 general election. COLO. SEC'Y OF STATE, 2020 ABSTRACT OF VOTES CAST 103-04 (2020), <https://www.sos.state.co.us/pubs/elections/Results/Abstract/2020/2020BiennialAbstractBooklet.pdf>.

³ Hickenlooper for Colo., Amended Statement of Organization at 2 (Dec. 3, 2020), <https://docquery.fec.gov/pdf/062/202012039341617062/202012039341617062.pdf>.

⁴ SMP, Amended Statement of Organization at 1-2 (Mar. 20, 2022), <https://docquery.fec.gov/pdf/450/202203209494096450/202203209494096450.pdf>. SMP was formerly known as Senate Majority PAC, and, originally, Commonsense Ten. *See* Commonsense Ten, Statement of Organization at 1 (June 11, 2010), <https://docquery.fec.gov/pdf/921/10030344921/10030344921.pdf>; Senate Majority PAC, Amended Statement of Organization at 1 (Mar. 8, 2013), <https://docquery.fec.gov/pdf/709/13940341709/13940341709.pdf> (indicating a name change); SMP, Amended Statement of Organization at 1 (Nov. 15, 2017), <https://docquery.fec.gov/pdf/356/201711169086695356/201711169086695356.pdf> (same); *see also* Compl. at 1 n.1 (July 9, 2020).

⁵ Cory Gardner, Amended Statement of Candidacy (Jan. 27, 2015), <https://docquery.fec.gov/pdf/070/15020035070/15020035070.pdf>.

⁶ *See SMP: Spending*, FEC.GOV, <https://www.fec.gov/data/committee/C00484642/?tab=spending&cycle=2020> (last visited Oct. 20, 2022).

⁷ Compl. at 4 n.9. "Not Done Fighting" is available on Hickenlooper's YouTube Channel. John Hickenlooper, *Not Done Fighting: John Hickenlooper Is Running for U.S. Senate*, YOUTUBE (Aug. 22, 2019) [hereinafter Not Done Fighting Video], <https://www.youtube.com/watch?v=-63689Ahyuk>.

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1 inside a restaurant and interacting with employees in a factory (the “Video Footage”).⁸ There is
2 no available information indicating that “Not Done Fighting” or the Video Footage ever
3 appeared on the Get the Facts Website.

4 On June 13, 2020, the Hickenlooper Committee posted talking points to the Get the Facts
5 Website, which it operated separate from its official campaign website, using the header
6 “Coloradans Need to Know the Facts About the Republican Attacks Against John
7 Hickenlooper.”⁹ The header was followed by a one-paragraph message, dated June 13, 2020:

8 Republicans have attacked John Hickenlooper for his trips to bring
9 business to Colorado, here is what voters need to know if they do
10 so again: 95 of their 97 allegations were dismissed and *the Denver*
11 *Post* called the other two “relatively minor,” an “honest mistake.”
12 He testified fully. They call him “an ethical public servant.” But
13 the Republicans are attacking Hickenlooper because they know
14 he’s the only one who can beat Cory Gardner, who stands with
15 Trump 100% of the time — not Colorado.¹⁰

16 The message was followed by the heading “Get the facts” and summaries of news reports and
17 Colorado’s Independent Ethics Commission documents primarily concerning ethics allegations
18 against Hickenlooper, as well as information about Gardner.¹¹ The Get the Facts Website

⁸ Not Done Fighting Video. The Video Footage appears at 0:45 to 0:51 in “Not Done Fighting.” The Video Footage was also the subject of a separate enforcement complaint filed by the same Complainant. Compl. at 4 n.9; First Gen. Counsel’s Rpt. (“First GCR”) at 3-4, MUR 7670 (Hickenlooper for Colorado, *et al.*). The Complaint in MUR 7670 alleged that the Hickenlooper Committee received a prohibited transfer of an asset — the Video Footage — when it incorporated footage originally created for Hickenlooper’s 2014 gubernatorial campaign in “Not Done Fighting.” Compl. at 4 n.9; First GCR at 4-5, MUR 7670 (Hickenlooper for Colorado, *et al.*); *see also* Certification (“Cert.”) ¶ 2 (Sept. 30, 2022), MUR 7670 (Hickenlooper for Colorado, *et al.*) (dismissing the allegations against the Hickenlooper Committee and Hickenlooper’s state campaign committee).

⁹ Compl. at 2-3; *see Coloradans Need to Know the Facts About the Republican Attacks Against John Hickenlooper*, GET THE FACTS (June 13, 2020) [hereinafter Get the Facts Website Archive], <https://www.getthefacts.co/> [<https://web.archive.org/web/20200618144429/https://www.getthefacts.co/>].

¹⁰ Get the Facts Website Archive; *see* Compl., Ex. A (copy of the Get the Facts Website as it appeared on July 1, 2020). The “Coloradans Need to Know” header remained on the Get the Facts Website as late as July 11, 2020, but included a different message dated July 2, 2020. *Coloradans Need to Know the Facts About the Republican Attacks Against John Hickenlooper*, GET THE FACTS (July 2, 2020), <https://www.getthefacts.co/> [<https://web.archive.org/web/20200711001353/https://www.getthefacts.co/>].

¹¹ Get the Facts Website Archive; Compl., Ex. A.

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1 consisted of a single page containing the above-referenced information, without additional tabs
2 or menus, and displayed a boxed disclaimer at the bottom stating that it was “Paid for by
3 Hickenlooper for Colorado” along with a link to the Hickenlooper Committee’s official website,
4 <https://hickenlooper.com/>.¹² The Get the Facts Website is no longer accessible as of the date of
5 the Commission’s findings in this matter.

6 On June 10, 2020, Melissa Miller, a Hickenlooper Committee staffer, tweeted: “Get the
7 facts about the dark money attack on @Hickenlooper,” and included a link to the Get the Facts
8 Website.¹³ On June 13, 2020, Lauren Passalacqua, Democratic Senatorial Campaign Committee
9 (“DSCC”) communication director, also tweeted a link to the Get the Facts Website with the

¹² Get the Facts Website Archive; Compl., Ex. A.

¹³ Melissa Miller (@Meliss1001), TWITTER (June 10, 2020, 8:15 PM), <https://twitter.com/Meliss1001/status/1270872176338460672>; Compl. at 3. It appears that Hickenlooper Committee campaign staff publicized the Get the Facts Website as early as June 1, 2020, but it is unclear whether the version available on that date included the “Coloradans Need to Know” language. *See, e.g.*, Melissa Miller (@Meliss1001), TWITTER (June 1, 2020, 11:05 AM), <https://twitter.com/Meliss1001/status/1267472396992172033>.

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- 1 caption: “GOP has attacked Hickenlooper for trips to bring business to Colorado. Here’s what
2 voters need to know.”¹⁴



- 3 On or around June 25, 2020, SMP started airing a television advertisement entitled
4 “Honest Mistake.”¹⁵ “Honest Mistake” is 30 seconds long, approximately six seconds of which
5 feature the Video Footage from the Hickenlooper Committee’s earlier “Not Done Fighting”
6 advertisement.¹⁶ On-screen text and audio defend Hickenlooper against alleged lies regarding
7 ethics complaints, stating that “95 of the 97 Republican charges were dismissed” and quoting
8 *The Denver Post* saying that Hickenlooper made an “honest mistake.”¹⁷ Between June 15

¹⁴ Lauren Passalacqua (@laurenpass), TWITTER (June 13, 2020, 2:39PM), <https://twitter.com/laurenpass/status/1271874926052589580>; Compl. at 3.

¹⁵ SMP Resp. at 2 (Sept. 1, 2020); see Senate Majority PAC, *Honest Mistake*, ADMO CREATIVE ALERT [hereinafter *Honest Mistake Video*], <https://host2.advertisinganalyticsllc.com/admo/viewer/2339525> (last visited Oct. 20, 2022); Compl. at 3-4 & n.4.

¹⁶ Compare *Honest Mistake Video* at 0:24-0:30, with *Not Done Fighting Video* at 0:45-0:51. See Compl. at 4-5 (including screenshots from “Not Done Fighting” and “Honest Mistake” side-by-side); see also SMP Resp. at 8 (“[‘Honest Mistake’] only contains short snippets of candidate [B]-roll footage . . . which were shown on screen for a total of [six] seconds.”).

¹⁷ See *Honest Mistake Video*.

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1 and 29, 2020, SMP reported making \$2,697,141.57 in independent expenditures in support of
2 Hickenlooper, including four disbursements totaling \$48,945.64 for “Media Production,” and six
3 disbursements totaling \$2,648,195.93 for “Media Buy[s],” or “Digital Ad Buy.”¹⁸ The available
4 information is not clear regarding which disbursements or portions thereof correspond to
5 “Honest Mistake.”¹⁹

6 The Complaint alleges that SMP republished the Hickenlooper Committee’s campaign
7 materials in “Honest Mistake.”²⁰ Specifically, the Complaint alleges that SMP republished the
8 Video Footage from “Not Done Fighting” and the talking points from the Get the Facts Website
9 in “Honest Mistake.”²¹ SMP asserts that “Honest Mistake” contained SMP’s own words,

¹⁸ *FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?committee_id=C00484642&data_type=processed&q_spender=C00484642&is_notice=false&most_recent=true&candidate_id=S0CO00575&candidate_id=S4CO00395&min_date=06%2F01%2F2020&max_date=07%2F01%2F2020 (last visited Oct. 20, 2022) (reflecting 10 independent expenditure disbursements by SMP in support of Hickenlooper or in opposition to Gardner in June 2020); SMP, 2020 July Monthly Report at 3504-06, 3511-14, 3517 (July 20, 2020), <https://docquery.fec.gov/pdf/213/202007209260163213/202007209260163213.pdf#navpanes=0>.

¹⁹ The Complaint alleges that “Honest Mistake” started airing on June 25, 2020, but SMP’s Response states only that SMP ran the advertisement in June 2020. Compl. at 3; SMP Resp. at 2. Federal Communications Commission filings do not contain sufficient information to identify the advertisement connected to each filing in order to ascertain the exact air dates or the exact amount spent for “Honest Mistake.” See *About Public Inspection Files*, FED. COMM’NS COMM’N, <https://publicfiles.fcc.gov/about> (last visited Oct. 20, 2022). The available information indicates that “Honest Mistake” started airing shortly before the Colorado primary election held on June 30, 2020, but it appears that SMP may have aired more than one advertisement during that timeframe. See Reid Wilson & Gabby Birenbaum, *Democrats Spend Big to Bolster Struggling Hickenlooper*, HILL (June 23, 2020, 8:07 PM), <https://thehill.com/homenews/campaign/504217-democrats-spend-big-to-bolster-struggling-hickenlooper> (reporting that SMP planned to spend \$2.2 million “defending Hickenlooper in the two weeks before Colorado voters cast their ballots”); Greg Giroux (@greggiroux), TWITTER (June 25, 2020, 9:28 AM), <https://twitter.com/greggiroux/status/1276145224079814657> (discussing newly released advertisements, including “Honest Mistake,” for the Colorado Senate race). SMP ran a different advertisement beginning on or about June 17, 2020, with similar content to “Honest Mistake,” but that advertisement did not include the Video Footage. Greg Giroux (@greggiroux), TWITTER (June 17, 2020, 7:17 PM), <https://twitter.com/greggiroux/status/1273394409833463814>.

²⁰ Compl. at 7-8.

²¹ *Id.* at 4-8 & n.9. The Complaint calculates that, “[w]hen the messaging and video are examined together,” 25 seconds out of the 30 seconds of runtime in “Honest Mistake” republished the Hickenlooper Committee’s campaign materials. *Id.* at 4-6. In support of this analysis, the Complaint includes a side-by-side comparison of “Honest Mistake” and “Not Done Fighting,” displaying three frames of the republished Video Footage. *Id.* at 5. Additionally, the Complaint includes a side-by-side comparison of the narration and text from both advertisements to demonstrate their similarities, asserting that “60% of the messaging narration” was taken from the Get the Facts Website. *Id.* at 4.

1 content, and message and that brief incorporation of short snippets and clips of B-roll footage
2 and use of similar themes are insufficient to establish republication under Commission
3 precedent.²² SMP acknowledges that “Honest Mistake” contains six seconds of B-roll video
4 footage featuring Hickenlooper but does not state from where it obtained that footage.²³

5 **III. LEGAL ANALYSIS**

6 **A. Relevant Law**

7 The Act prohibits any person from making, and any candidate or committee from
8 knowingly accepting, an excessive contribution.²⁴ Independent expenditure-only political
9 committees are prohibited from making contributions to candidates and their authorized
10 committees.²⁵ Committee treasurers are required to disclose the identification of each political
11 committee that makes a contribution to the reporting committee during the reporting period,

²² SMP Resp. at 5-8. Additionally, SMP contends that the Complaint’s side-by-side comparison of the narration and text from both advertisements further demonstrates that “Honest Mistake” expresses SMP’s own views because the two advertisements contain different phrasing and content. *Id.* at 6-7.

²³ *See id.* at 2.

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

²⁵ Advisory Opinion 2017-10 at 2 (Citizens Against Plutocracy) (“An independent expenditure-only political committee ‘may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.’” (quoting Advisory Opinion 2016-21 at 3-4 (Great America PAC))); Factual & Legal Analysis (“F&LA”) at 6, MUR 7813 (Iowa Democratic Party, *et al.*) (“Independent expenditure-only political committees . . . are prohibited from making contributions to candidates and their authorized committees.”); F&LA at 4, MUR 7168 (Catherine Cortez Masto, *et al.*) (“Super PACs are prohibited from making contributions to candidates and their authorized committees.”); F&LA at 8, MUR 7124 (Katie McGinty for Senate, *et al.*) (“[Independent expenditure-only political committees] and nonprofit corporations are prohibited from making contributions to candidates and their authorized committees.”); *see also* Advisory Opinion 2010-11 at 2-3 (Commonsense Ten) (stating that independent expenditure-only committees may receive unlimited funds and funds from corporations and labor organizations).

1 along with the date and amount of any such contribution.²⁶ If a committee makes a contribution,
2 it shall disclose the name and address of the recipient and the contribution amount.²⁷

3 Under the Act, “the financing by any person of the dissemination, distribution, or
4 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
5 campaign materials prepared by the candidate, his campaign committees, or their authorized
6 agents shall be considered to be an expenditure.”²⁸ The Commission has previously concluded
7 that “campaign materials” include any material belonging to or emanating from a campaign,
8 including video footage.²⁹ Commission regulations further provide that the republication of
9 campaign materials “shall be considered a contribution for the purposes of [the Act’s]
10 contribution limitations and reporting responsibilities of the person making the expenditure.”³⁰
11 Under Commission regulations, however, the candidate who prepared the materials is not
12 considered to have received an in-kind contribution and is not required to report an expenditure
13 unless the dissemination, distribution, or republication of campaign materials is a coordinated
14 communication or a party coordinated communication.³¹

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

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

²⁸ 52 U.S.C. § 30116(a)(7)(B)(iii); *see* 11 C.F.R. § 109.23(a). Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate. 52 U.S.C. § 30116(a)(7)(B)(i).

²⁹ *See, e.g.*, F&LA at 6-7, MUR 6535 (Restore Our Future, Inc.) (determining that video footage from an advertisement produced and distributed by Mitt Romney’s 2008 presidential campaign committee was “campaign materials” for the purpose of republication); *see also* F&LA at 4-6, MUR 6783 (Indian Ams. for Freedom, NFPC, *et al.*) (finding reason to believe based on republication of identical text from a campaign committee advertisement); First GCR at 8, MUR 5743 (Betty Sutton for Congress, *et al.*) (concluding multicandidate political committee made an in-kind contribution by republishing pictures from a candidate committee’s website in its own mailers); Amended Cert. ¶ 2 (Dec. 5, 2006), MUR 5743 (Betty Sutton for Congress, *et al.*) (exercising prosecutorial discretion and dismissing republication allegation and sending an admonishment letter).

³⁰ 11 C.F.R. § 109.23(a).

³¹ *Id.*; *see also id.* § 109.21 (coordinated communications); *id.* § 109.37 (party coordinated communications).

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1 **B. The Commission Exercises Its Prosecutorial Discretion and Dismisses the**
2 **Allegations SMP Made and Failed to Report an Excessive In-Kind**
3 **Contribution to the Hickenlooper Committee by Republishing Campaign**
4 **Materials**

5 The available information indicates that SMP incorporated six seconds of the Video
6 Footage that previously appeared in the Hickenlooper Committee’s “Not Done Fighting”
7 advertisement into “Honest Mistake.”³² This campaign material constituted approximately one-
8 fifth of the visual content in “Honest Mistake.” Under these circumstances, taking into account
9 the extent of the alleged republication as well as the Commission resources that would be needed
10 to further pursue the allegations, in light of other Commission priorities, the Commission
11 exercises its prosecutorial discretion and dismisses the allegations that SMP violated
12 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive in-kind
13 contribution to the Hickenlooper Committee and violated 52 U.S.C. § 30104(b) and 11 C.F.R.
14 § 104.3(b) by failing to report an in-kind contribution.³³

³² Compare Honest Mistake Video at 0:24-0:30, with Not Done Fighting Video at 0:45-0:51. See Compl. at 4-5 (including screenshots from “Not Done Fighting” and “Honest Mistake” side-by-side); *supra* note 16.

³³ See *Heckler v. Chaney*, 470 U.S. 821 (1985).