



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 7760  
SMP and Rebecca Lambe in her official )  
capacity as treasurer )

**STATEMENT OF REASONS OF VICE CHAIRMAN SEAN J. COOKSEY AND  
COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. “TREY” TRAINOR, III**

In this matter, we declined to follow the Commission’s Office of the General Counsel’s (“OGC”) recommendation to find reason to believe that Respondents SMP and Rebecca Lambe in her official capacity as treasurer violated the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), and the Commission’s regulations by making and failing to report an excessive in-kind contribution to Hickenlooper for Colorado. Instead, we exercised our prosecutorial discretion to dismiss the republication allegations against SMP.<sup>1</sup> This statement explains why.

The Complaint alleges that SMP, an independent expenditure-only political committee, illegally republished campaign materials when it paid to produce and disseminate a 30-second television advertisement called “Honest Mistake,” which included six seconds of B-roll footage that previously appeared in an online video released by Hickenlooper for Colorado, the principal campaign committee of John Hickenlooper in Colorado’s 2020 U.S. Senate election.<sup>2</sup> In the First General Counsel’s Report, OGC accepted the Complaint’s theory that SMP’s distribution of “Honest Mistake” was an unlawful republication, reasoning that “republication is established by SMP’s incorporation of the Video Footage of Hickenlooper.”<sup>3</sup> On that basis OGC recommended the Commission find reason to believe SMP violated the Act and Commission regulations.<sup>4</sup>

<sup>1</sup> See Certification ¶ 3 (Nov. 29, 2022), MUR 7760 (Hickenlooper for Colorado, *et al.*); *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>2</sup> Complaint at 7–12 (July 9, 2020), MUR 7760 (Hickenlooper for Colorado, *et al.*).

<sup>3</sup> First General Counsel’s Report at 14–17 (Oct. 20, 2022), MUR 7760 (Hickenlooper for Colorado, *et al.*). The Complaint also alleges that SMP’s messaging in “Honest Mistake” repeated key talking points from a public website called “Get the Facts” that was set up by the Hickenlooper committee shortly before SMP’s ad began to air. Because OGC concluded that SMP violated the Act and regulations based on its use of the video footage alone, it did not determine whether SMP’s alleged use of the talking points as part of “Honest Mistake” also amounted to unlawful republication. *See id.* at 16–17.

<sup>4</sup> *Id.* at 17.

We have previously expressed our views on the problems presented by this agency's attempts to read its own republication regulations beyond the Act's limits.<sup>5</sup> OGC has continually "taken a maximalist view that an outside party's incorporation of any amount of campaign materials into its own communications is an illegal republication,"<sup>6</sup> even though the Commission's enforcement precedents have not articulated such a bright-line standard to delineate the scope of republication.<sup>7</sup> In addition, the Commission's primary republication regulation—11 C.F.R. § 109.23—deviates from the plain terms of FECA by failing to distinguish between coordinated republication—which the Act treats as a "contribution"<sup>8</sup>—and independent (that is, non-coordinated) republication—which the Act classifies as an "expenditure."<sup>9</sup> Because the regulation designates *any* republication of campaign materials "in whole or in part" as a contribution,<sup>10</sup> it is at odds with "a straightforward reading of the Act [which] precludes the conclusion that non-coordinated republication constitutes a contribution."<sup>11</sup> And by treating non-coordinated republication as an in-kind contribution subject to the statute's amount and source limitations, the regulation improperly proscribes independent political speech in contravention of Supreme Court precedent going back to *Buckley v. Valeo*.<sup>12</sup>

<sup>5</sup> See Interpretive Statement of Commissioner Sean J. Cooksey (Nov. 30, 2021), [https://www.fec.gov/resources/cms-content/documents/2021-11-30\\_Interpretive\\_Statement\\_of\\_Cmsr\\_Cooksey.pdf](https://www.fec.gov/resources/cms-content/documents/2021-11-30_Interpretive_Statement_of_Cmsr_Cooksey.pdf); Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022), [https://www.fec.gov/resources/cms-content/documents/Final\\_Dickerson\\_Interpretive\\_Statement\\_Republication.pdf](https://www.fec.gov/resources/cms-content/documents/Final_Dickerson_Interpretive_Statement_Republication.pdf); Statement of Reasons of Commissioners Cooksey and Trainor (Apr. 7, 2022), MURs 7646, 7666, 7675, 7681, 7715, 7717 and 7781 (1820 PAC, *et al.*); Statement of Reasons of Chairman Dickerson and Commissioners Cooksey and Trainor (Nov. 1, 2022), MUR 7670 (Hickenlooper for Colorado, *et al.*).

<sup>6</sup> Interpretive Statement of Commissioner Sean J. Cooksey at 2 (Nov. 30, 2021), [https://www.fec.gov/resources/cms-content/documents/2021-11-30\\_Interpretive\\_Statement\\_of\\_Cmsr\\_Cooksey.pdf](https://www.fec.gov/resources/cms-content/documents/2021-11-30_Interpretive_Statement_of_Cmsr_Cooksey.pdf).

<sup>7</sup> Compare First General Counsel's Report at 8 (June 3, 2013), MUR 6667 (House Majority PAC, *et al.*) (arguing that the regulation's language about republication "in whole or in part" covers any use of campaign materials), with MUR 6357 (American Crossroads, *et al.*) (involving republication allegations where a committee used 10–15 seconds of b-roll footage in a 30-second TV ad, and where the Commission did not proceed with enforcement).

<sup>8</sup> 52 U.S.C. § 30116(a)(7)(B)(i) ("[E]xpenditures 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").

<sup>9</sup> 52 U.S.C. § 30116(a)(7)(B)(iii) ("[T]he 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").

<sup>10</sup> See 11 C.F.R. § 109.23(a) ("The 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.").

<sup>11</sup> Interpretive Statement of Chairman Allen J. Dickerson at 3 (Mar. 24, 2022), [https://www.fec.gov/resources/cms-content/documents/Final\\_Dickerson\\_Interpretive\\_Statement\\_Republication.pdf](https://www.fec.gov/resources/cms-content/documents/Final_Dickerson_Interpretive_Statement_Republication.pdf).

<sup>12</sup> 424 U.S. 1, 39–59 (1976) (per curiam) (holding that expenditure limits—including limits on independent expenditures by individuals, expenditures from candidates' own personal resources, and total campaign expenditures—are unconstitutional). See also, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating on First Amendment grounds Massachusetts law prohibiting corporate expenditures regarding state ballot initiatives and referenda); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that federal statutory

Furthermore, we take issue with OGC’s simplistic analysis of republication because it gives no consideration to other relevant factors such as whether the campaign material was of *de minimis* value, incidental to the advertising’s overall message, or already part of the public domain. As past Commissioners have explained in matters with similar fact patterns, these factors bear on whether a communication can be said to constitute republication.<sup>13</sup> SMP’s brief inclusion of B-roll from the Hickenlooper committee’s video, which had been widely available online for nearly a year before the first televised airing of “Honest Mistake,” does not negate the ad’s status as an independent expenditure, and the record in this matter otherwise contains no evidence to support that any coordination occurred between SMP and Hickenlooper for Colorado.<sup>14</sup>

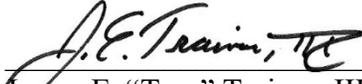
For these reasons, we dismissed the allegations that SMP illegally republished the Hickenlooper committee’s campaign materials in violation of the Act and Commission regulations.

  
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 Sean J. Cooksey  
 Vice Chairman

February 27, 2023  
 Date

  
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 Allen J. Dickerson  
 Commissioner

February 27, 2023  
 Date

  
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 James E. “Trey” Trainor, III  
 Commissioner

February 27, 2023  
 Date

prohibition on corporate entities making independent expenditures with their general treasury funds was unconstitutional).

<sup>13</sup> See, e.g., Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen at 3–6 (Feb. 22, 2012), MUR 6357 (*American Crossroads, et al.*) (concluding that an independent expenditure-only political committee’s use of “snippets” of campaign footage taken from YouTube did not constitute republication); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn at 1 (Dec. 3, 2009), MUR 5996 (*Tim Bee for Congress, et al.*) (“[W]e do not believe the republication of photographs from a candidate’s publicly available website, particularly ‘head shot’ photos, constitutes republication of campaign materials”); Statement of Reasons of Commissioners von Spakovsky and Weintraub at 4 (Jan. 23, 2007), MUR 5743 (*Betty Sutton for Congress, et al.*) (observing that “[t]o treat an incidental republication of a photograph, which is part of an otherwise permissible independent expenditures, as an ‘in-kind contribution’ makes no intuitive sense.”).

<sup>14</sup> See First General Counsel’s Report at 20 (Oct. 20, 2022), MUR 7760 (*Hickenlooper for Colorado, et al.*) (concluding that “the available information is insufficient to support a reasonable inference that the conduct prong of the coordinated communication test is satisfied.”).