**FEDERAL ELECTION COMMISSION**
Washington, DC

**BEFORE THE FEDERAL ELECTION COMMISSION**

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| In the Matter of | ) | |
| | ) | |
| Fight for the American Dream PAC | ) | MUR 7781 |
| and Megan Troy in her official capacity as Treasurer | ) | |
| | ) | |

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

## I. INTRODUCTION

This Matter arose from a complaint alleging that Fight for the American Dream PAC and Megan Troy in her official capacity as treasurer (FFAD) made prohibited in-kind contributions to Mondaire for Congress (Committee) by republishing Committee campaign materials.[1] We joined Commissioner Cooksey in declining to find reason to believe (RTB) that FFAD violated the Federal Election Campaign Act of 1971, as amended (FECA or Act), by making an excessive in-kind contribution and failing to report an in-kind contribution.[2] We write separately to explain why we also voted to dismiss allegations against FFAD as an exercise of the Commission's prosecutorial discretion under *Heckler v. Chaney*.[3] The reasons explained here also support our votes declining to find RTB in this matter.

In our view, FECA's plain text precludes treating a public communication that republishes campaign materials as an in-kind contribution, absent coordination.[4] But a Commission regulation (11 C.F.R. § 109.23) implicitly reads coordination into every instance of republication, regardless of whether coordination has occurred. We believe that this 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. Because the record did not support finding coordination

[1] *See generally* Complaint, MUR 7781 (Fight for the American Dream PAC) (Aug. 17, 2020); First General Counsel's Report (FGCR) at 1-2, MUR 7781 (Dec. 18, 2020).
[2] Certification ¶ 3, MUR 7781 (Feb. 15, 2022) (reflecting that the Commission declined, by a vote of 3-3, to find RTB that FFAD violated 52 U.S.C. §§ 30116(a)(1)(A) and 30118(a) and 11 C.F.R. § 110.1(b)(1) by making an excessive in-kind contribution and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by failing to report an in-kind contribution). Commissioner Trainor joined Commissioner Cooksey in voting to find no RTB that FFAD violated the Act, *id.* ¶ 2, and joins Commissioner Cooksey's statement of reasons explaining that vote in full.
[3] *Id.* ¶ 1 (reflecting our vote to dismiss the allegations that FFAD violated 52 U.S.C. §§ 30116(a)(1)(A) and 30104(b) and 11 C.F.R. §§ 110.1(b)(1) and 104.3(b) pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985)).
[4] *See* Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022).

here, pursuing enforcement against FFAD would have subjected the Commission to significant litigation risk. Accordingly, we voted to dismiss the contribution-by-republication allegations against FFAD pursuant to the Commission's authority under *Heckler*.

## II. FACTUAL BACKGROUND

FFAD produced and distributed four thirty-second Facebook video ads supporting Mondaire Jones's candidacy in the 2020 Democratic primary election for New York's 17th Congressional District.[5] The ads incorporate b-roll video from the Committee's YouTube page and photos from the Committee's website.[6] The entirety of the visual content in one of the ads was Committee b-roll footage or photos, while such material comprised 14 to 16 seconds (or 47 to 53 percent) of the visual content in the other three ads.[7] "The Complaint does not allege that the Committee coordinated with FFAD regarding these advertisements, nor does the record include sufficient information to support a reasonable inference that such coordination occurred."[8] FFAD reported the ads as independent expenditures.[9]

The Commission's Office of General Counsel (OGC) recommended finding RTB that FFAD violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive in-kind contribution and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by failing to report such contribution.[10] To support this recommendation, OGC relied upon 11 C.F.R. § 109.23(a), which it cited for the proposition that republication of campaign materials is considered a contribution for purposes of the contribution limitations and reporting responsibilities of the person making the expenditure.[11] OGC "d[id] not make any recommendations regarding the Committee receiving an in-kind contribution from FFAD."[12]

## III. APPLICABLE LAW

FECA distinguishes between contributions (which are subject to amount and source limitations and are reportable by the candidate) and expenditures (which are not subject to amount or source limitations and are reportable by the spender). The Act provides that "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an *expenditure*…."[13] Such expenditure is considered a *contribution* to a candidate when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of" that candidate, their authorized committee, or their agent.[14] Thus, only if a person cooperates or consults with a candidate or committee on an expenditure (*i.e.*, only if

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[5] FGCR at 2.
[6] *Id.*
[7] *Id.* at 2-3.
[8] *Id.* at 2, n.1.
[9] *Id.* at 3.
[10] *Id.* at 9.
[11] *Id.* at 4 (citing 11 C.F.R. § 109.23(a)).
[12] *Id.* at 2, n.1 (citing 11 C.F.R. § 109.23(a)).
[13] 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added).
[14] *Id.* § 30116 (a)(7)(B)(i).

the expenditure is "coordinated") does that expenditure become an in-kind contribution under FECA.

FECA does not define coordination, but two Commission regulations attempt to address it (including in the republication context). First, 11 C.F.R. § 109.21 sets out a three-prong test for whether a public communication is a "coordinated communication"[15] 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).[16] A public communication must satisfy all three prongs to qualify as "coordinated" under this test.[17]

Second, 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."[18] The benefitting candidate "does not 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. . .."[19] But, as has been explained elsewhere,[20] the regulation ignores the Act's statement that republished campaign material is an expenditure, and not a contribution. Nor does § 109.23 require coordination in order for the person who republished the campaign materials to be considered to have made a contribution. We believe that this contradicts FECA's requirement that—in order to become a contribution to a candidate—an expenditure must be "made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of" that candidate, their authorized committee, or their agent.[21]

## IV. ANALYSIS

In determining whether to pursue enforcement, the Commission has prosecutorial discretion as described in *Heckler v. Chaney*.[22] 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, whether the particular enforcement action requested best fits the agency's overall policies[,]"[23] and other factors.

To the extent that 11 C.F.R. § 109.23 treats non-coordinated republication as an in-kind contribution, this regulation contradicts FECA's text and is therefore contrary to law.[24] We

[15] 11 C.F.R. § 109.21.
[16] *Id.* § 109.21(a).
[17] *Id.*
[18] *Id.* § 109.23(a).
[19] *Id.*
[20] *See, e.g.*, Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022).
[21] 52 U.S.C. § 30116 (a)(7)(B)(i).
[22] 470 U.S. at 832.
[23] *Id.*
[24] Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022).

are not alone in observing this legal infirmity.[25] Thus, in order to remain faithful to our enabling legislation, when the Commission enforces the republication provisions, it must establish actual coordination using the same standards applied to any other form of public communication. Failing such a finding, the independent republication of campaign material is just that: an independent expenditure.

Here, "[t]he Complaint does not allege that the Committee coordinated with FFAD regarding the[] advertisements, nor does the record include sufficient information to support a reasonable inference that such coordination occurred."[26] Absent the requisite coordination, FFAD's republication of Committee materials is an independent expenditure—just as FFAD reported.[27] Were the Commission to pursue enforcement on the theory that FFAD's non-coordinated republication of Committee materials was an in-kind contribution, it seems to us highly probable that a reviewing court would simply invalidate § 109.23 as directly contradictory to FECA. At the very least, a court would likely conclude that the regulation could not be lawfully applied in this Matter.

Accordingly, we voted to dismiss these allegations under *Heckler*.[28]

April 11, 2022
Date

Allen Dickerson
Chairman

April 11, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[25] *See generally* Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter and Goodman at 2, n.4, MURs 6603, 6777, 6801, 6870, and 6902 (Ben Chandler for Congress, *et al.*) (Dec. 17, 2015). *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).
[26] FGCR at 2, n.1.
[27] *See id.* at 3.
[28] We also question OGC's tendency to characterize silent "b-roll" footage, which is at issue in this matter, as campaign materials (a term that, in our view, is more properly understood as including a campaign's finished advocacy products). *See* Interpretive Statement of Chairman Allen J. Dickerson at 4 (Mar. 24, 2022). Because the requisite coordination is lacking, we need not reach this issue here. But the regulated community would be well-served were the Commission to standardize and clarify its understanding of what constitutes "campaign materials."