

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7934

DATE COMPLAINT FILED: 10/20/2021
DATE OF NOTIFICATIONS: 10/27/2021
LAST RESPONSE RECEIVED: 12/17/2021
DATE ACTIVATED: 03/24/2022
EXPIRATION OF SOL: 04/02/2018 –
07/03/2018
ELECTION CYCLE: 2018

COMPLAINANT:

Carol A. Reynolds

RESPONDENTS:

Xochitl Torres Small
Xochitl for New Mexico and Joshua Orozco in his
official capacity as treasurer
Karen S. Mendenhall

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)
52 U.S.C. § 30114
11 C.F.R. § 104.3(b)
11 C.F.R. § 113.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that 2018 U.S. House candidate Xochitl Torres Small, her principal campaign committee Xochitl for New Mexico and Joshua Orozco in his official capacity as treasurer (the “Committee”), and her campaign counsel Karen S. Mendenhall violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by misusing campaign funds to pay legal fees in connection with a lawsuit brought by campaign supporter William Thomas Morrow challenging the nominating petition of Angel D. Peña—Torres Small’s would-be electoral opponent in the 2018 Democratic Primary Election. This allegation also

1 raises the issue of whether the Committee properly reported its payments to fund Morrow's
 2 lawsuit.

3 For the reasons set forth below, the Committee's funding of Morrow's lawsuit
 4 challenging Peña's nominating petition appears to be a legitimate campaign expense that would
 5 not have existed but for Torres Small's candidacy. Accordingly, we recommend that the
 6 Commission find no reason to believe that the Committee, Xochitl Torres Small, or Karen S.
 7 Mendenhall violated 52 U.S.C. § 30114 and 11 C.F.R. § 113.2 by converting campaign funds to
 8 personal use. We also recommend that the Commission find no reason to believe that the
 9 Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by reporting the purpose of
 10 its payments to The Mendenhall Firm, P.C. as "legal services."

11 **II. FACTUAL BACKGROUND**

12 The 2018 New Mexico Democratic Party primary election for U.S. Representative for
 13 New Mexico's 2nd Congressional district involved two candidates: Xochitl Torres Small and L.
 14 Madeline Hildebrandt.¹ Another individual, Angel D. Peña, declared his candidacy but was
 15 disqualified by the New Mexico Secretary of State "because a number of his submitted petition
 16 pages failed to meet the requirements set forth in [the] state statute."² Consequently, Peña "did
 17 not meet the minimum number of signatures required for qualification."³ There were three

¹ New Mexico Secretary of State, Official Results 2018 Primary, <https://electionresults.sos.state.nm.us/resultsSW.aspx?type=FED&map=CTY&eid=112>; Xochitl Torres Small, Statement of Candidacy at 1, (Nov. 26, 2018), <https://docquery.fec.gov/pdf/812/201811269133808812/201811269133808812.pdf>.

² Committee Resp. at 3 (Dec. 17, 2021), Ex. A (Press Release, SOS Toulouse Oliver Qualifies Major Party Candidates for Pre-Primary Convention Designation (Feb. 12, 2018), https://www.sos.state.nm.us/wp-content/uploads/2019/10/20180212_SOS_Qualifies_Major_Party_Candidates.pdf).

³ *Id.*

reported reasons why Peña's petition failed to contain the required minimum number of signatures:

[O]ne page was disqualified because it "contained a listed address for Peña that didn't match the one on his voter registration . . . two petition pages were disqualified because the header contained extra text . . . [and] Eight petition pages were invalidated because they contained headers in which the "ñ" in Peña's name and Doña Ana County appeared as "Ö" because of print formatting errors. Campaign personnel wrote on the petition headers, such as by scratching out the "Ö's" and writing "ñ."⁴

On February 16, 2018, Peña challenged his disqualification by filing a lawsuit against the New Mexico Secretary of State, Toulouse Oliver.⁵

Three days later, William Thomas Morrow (a Torres Small supporter) filed a separate lawsuit against both Peña and Oliver challenging Peña's nominating petition on other grounds.⁶ Morrow was represented by Torres Small's campaign's counsel, Karen S. Mendenhall, and the Committee paid the legal fees for the lawsuit.⁷ The Committee paid the Mendenhall Firm, P.C. \$18,037.02 during the reporting cycle and reported the purpose in each instance as "legal services."⁸

⁴ Diana Alba Soular and Jason Gibbs, *Angel Peña files Lawsuit Challenging Disqualification From New Mexico Congressional Race*, LAS CRUCES SUN NEWS (Feb. 23, 2018), <https://www.lcsun-news.com/story/news/local/2018/02/23/angel-pena-challenges-disqualification-new-mexico-congressional-race/365261002/> (emphasis in original). The eight disqualified pages were reportedly "not disqualified because of the 'ñ' itself, but rather because the headers were altered, which is expressly prohibited in state law." *Id.*

⁵ *In re Angel Peña*, D-101-CV-201800527 (Feb. 16, 2018), <https://caselookup.nmcourts.gov/caselookup/app>.

⁶ See Committee Resp. at 2-3; Soular and Gibbs, *supra* note 4.

⁷ See Committee Resp. at 3-5, Exs. C-E. The lawsuit was subsequently dismissed after the parties agreed that Peña lacked the minimum number of valid signatures to qualify as a candidate. See *id.* at 3, Ex. B.

⁸ See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00666149&recipient_name=mendenhall&two_year_transaction_period=2018 (last visited June 24, 2022) (reflecting disbursements by Xochitl for New Mexico to the Mendenhall Firm, P.C.). The Complaint claims the total amount paid for the lawsuit was \$18,000. Compl. at 2 (Oct. 20, 2021). But the news article on which the Complaint relies for that claim merely restates the Committee's total reported payments to the Mendenhall Firm, which, according to the Committee, includes additional expenses, such as costs associated with its own ballot access efforts as well as costs to analyze Peña's nominating petition. See Resp. at 4; Will Ford, *Party*

The Complaint alleges that Torres Small “misuse[d] campaign funds” by engaging in “questionable,” “reprehensible,” and “unethical” campaign tactics.⁹ Although the Complaint does not cite a specific provision of the Act, it focuses on the payment of Morrow’s legal fees for the purpose of disqualifying Peña’s nominating petition.¹⁰ The Complaint claims Torres Small concealed her funding of Morrow’s lawsuit because voters would disapprove of her efforts to disqualify Peña over the omission of a tilde in his name.¹¹

The Committee filed a response denying that it violated the Act.¹² First, the Committee argues that the complained-of payments were to “prevent an opponent from appearing on the primary ballot,” and were therefore related to Torres Small’s candidacy, and would not have existed but for her candidacy.¹³ To support this assertion, the Response points to Commission advisory opinions where payments for the purpose of gaining and challenging ballot access were deemed campaign related, as well as an enforcement matter where efforts to deny ballot access to an opposing candidate were viewed by the Commission as “qualified campaign expenses” under the Presidential Election Campaign Fund Act.¹⁴ In an effort to show that the expenses for Morrow’s lawsuit were legitimate campaign expenses and not personal expenses, the Response

favors: Should parties pick candidates before voters do?, HIGH COUNTRY NEWS (DEC. 9, 2019), <https://www.hcn.org/issues/51.21-22/politics-party-favors-should-parties-pick-candidates-before-voters-do>.

⁹ Compl. at 1-2.

¹⁰ *Id.* at 1 (“These efforts involved using campaign finance funds to fund a lawsuit by a private citizen who was surreptitiously recruited to file said suit on behalf of the campaign in order to foster the perception of grassroots voter concern over the validity of Pena’s [*sic*] petition forms.”).

¹¹ *Id.* at 2.

¹² Committee Resp. at 1, 3. The Commission has not received a response from Torres Small or Karen Mendenhall.

¹³ *Id.* at 5.

¹⁴ *See id.* at 4 (citing Advisory Opinion 2018-09 at 3 (Clements for Congress); Advisory Opinion 1980-57 at 3 (Bexar County Democratic Party); Advisory Opinion 1982-35 (Hopfman)), at 5 (citing First Gen. Counsel’s Rpt. at 6-7, MUR 5509 (Kerry-Edwards 2004, Inc.) (dispositive Commission opinion)); *see also* Certification ¶ 1, MUR 5509 (Kerry-Edwards 2004, Inc.) (Mar. 4, 2005).

1 states that campaign volunteers reviewed Peña's nominating petition for errors, and that counsel
 2 "advised the Campaign concerning how to mount a legal challenge to the sufficiency of Mr.
 3 Peña's nominating petition, and then worked with a supporter of the Campaign to bring such a
 4 challenge."¹⁵

5 Second, the Committee argues that it reported its payments to The Mendenhall Firm for
 6 its legal fees in connection with Morrow's lawsuit and appropriately described the purpose as
 7 "Legal Services."¹⁶ It argues that this description is adequate according to the Commission's
 8 published sample list of purpose descriptions and that based on its own search of the
 9 Commission's disbursement database, it is "exceedingly rare that any additional detail" is
 10 provided on the "nature of the legal expenses."¹⁷

11 **III. LEGAL ANALYSIS**

12 The Complaint in this matter raises the following issues: (1) whether a principal
 13 campaign committee's funding of another person's lawsuit challenging the sufficiency of a
 14 competing candidate's nominating petition converts campaign funds to personal use; and (2)
 15 whether reporting the purpose of payments to the law firm representing the plaintiff as "legal
 16 services" is a sufficient description of purpose under the Act and Commission regulations.

17 **A. The Commission Should Find No Reason to Believe that the Committee's** 18 **Payments to Fund Morrow's Legal Challenge to Peña's Nominating Petition** 19 **Resulted in the Conversion of Campaign Funds to Personal Use**

20 The Act affords candidates and their campaign committees wide discretion in the
 21 disposition of their campaign funds and provides that contributions accepted by a candidate may

¹⁵ *Id.* at 5.

¹⁶ *See id.* at 6, Exs. C-E (attaching pages from Committee's reports showing payments to the Mendenhall Firm).

¹⁷ *Id.* at 6.

1 be used by the candidate “for otherwise authorized expenditures in connection with the campaign
 2 for Federal office of the candidate” and “for ordinary and necessary expenses incurred in
 3 connection with duties of the individual as a holder of Federal office.”¹⁸ The Act provides,
 4 however, that campaign funds may not be converted to the personal use of the candidate or any
 5 other person.¹⁹ The Act states that “a contribution or a donation shall be considered to be
 6 converted to personal use if the contribution or amount is used to fulfill any commitment,
 7 obligation or expense of a person that would exist irrespective of the candidate’s election
 8 campaign or individual’s duties as a holder of Federal office.”²⁰ This means that expenses “that
 9 would be incurred even if the candidate was not a candidate” are considered personal rather than
 10 campaign related.²¹ The Act and Commission regulations provide a non-exhaustive list of uses
 11 of campaign funds that are *per se* personal use.²² For all other disbursements, including
 12 payments for legal expenses, the Commission determines on a case-by-case basis whether a
 13 given campaign fund disbursement is personal use by applying the “irrespective test,” that is,
 14 whether the payment fulfills a commitment, obligation, or expense that would exist irrespective
 15 of the candidate’s campaign or duties as a federal officeholder.²³ The Commission has stated

¹⁸ 52 U.S.C. § 30114(a)(1)-(2); *see* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7866-67 (Feb. 9, 1995) (“Personal Use E&J”) (explaining that the personal use prohibition is “not so broad as to limit legitimate campaign related or officeholder related activity,” and that “candidates have wide discretion over the use of campaign funds”).

¹⁹ 52 U.S.C. § 30114(b); *see* 11 C.F.R. § 113.2.

²⁰ 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

²¹ Personal Use E&J at 7863.

²² 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i).

²³ 11 C.F.R. § 113.1(g)(1)(ii).

1 that “[i]f the candidate can reasonably show that the expenses at issue resulted from campaign or
 2 officeholder activities, the Commission will not consider the use to be personal use.”²⁴

3 The Commission has explained that “campaign funds may be used to pay for legal
 4 expenses incurred in proceedings that directly relate to the candidate’s campaign activities or
 5 officeholder duties.”²⁵ However, legal expenses “will not be treated as . . . campaign or
 6 officeholder related merely because the underlying legal proceedings have some impact on the
 7 campaign or the officeholder’s status.”²⁶ To illustrate the difference between campaign or
 8 officeholder related legal expenses and personal legal expenses, the Commission highlighted
 9 “legal expenses associated with a divorce or charges of driving under the influence of alcohol” as
 10 examples of personal expenses.²⁷ A number of advisory opinions and enforcement matters
 11 further delineate the distinction between campaign or officeholder related legal expenses and
 12 personal legal expenses.²⁸

²⁴ See Personal Use E&J at 7867.

²⁵ Advisory Opinion 2018-03 at 3 (Committee to Elect Michael Gilmore) (quoting Advisory Opinion 2013-11 at 3 (Citizens for Joe Miller) (concluding that use of campaign funds for legal expenses incurred in lawsuit by media outlets seeking to obtain information relevant to candidacy would not constitute impermissible personal use)).

²⁶ Personal Use E&J at 7868.

²⁷ *Id.*

²⁸ See, e.g., Advisory Opinion 2005-11 (Cunningham) (payment of legal fees stemming from a grand jury investigation into the candidate’s fundraising activity and conduct in office not personal use); Advisory Opinion 2003-17 (Treffinger) (payment of legal expenses to defend against counts in an indictment alleging filing of false reports with the Commission not personal use); Advisory Opinion 2000-40 (McDermott) (use of campaign funds for legal fees to defend a House member in a civil suit alleging illegal conduct related to his role in the House Ethics Committee not personal use); Advisory Opinion 1996-24 (Cooley) (use of campaign funds to pay legal fees and expenses to investigate, research, and communicate with State and Federal agencies in connection with responding to press allegations of the unlawful receipt of Veterans benefits would be personal use); see also Factual and Legal Analysis (“F&LA”) at 7-8, MUR 7390 (Make America Great Again PAC, *et al.*) (campaign committee payments for legal expenses in connection with Department of Justice investigation into Russian interference with the 2016 election not personal use); F&LA at 8-11, MUR 6128 (Craig for U.S. Senate) (Senator’s use of campaign funds to pay legal expenses to overturn conviction for disorderly conduct is personal use). The Commission’s determination in MUR 6128 was subsequently upheld by the D.C. Circuit. *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 839 (D.C. Cir. 2016) (“[The] allegations did not concern the Senator’s campaign activities or official duties, the legal fees he expended trying to withdraw his plea constituted ‘personal use.’”).

1 The Commission has also determined that campaign funds may be used to pay the legal
 2 expenses of persons *other* than the candidate when they are for activities directly related to the
 3 candidate's campaign or officeholder duties. For example, in Advisory Opinion 2009-20
 4 (Visclosky), the Commission determined that Congressman Peter Visclosky's principal
 5 campaign committee could use campaign funds to pay for his legal expenses, and the legal
 6 expenses of his current and former staffers, related to a Federal investigation into whether a
 7 lobbying firm made improper political contributions to Visclosky and other members of
 8 Congress.²⁹ Advisory Opinion 2011-07 (Chuck Fleischmann for Congress) concerned a request
 9 by Congressman Chuck Fleischmann's principal campaign committee to pay a former
 10 consultant's legal expenses to defend himself in a civil lawsuit alleging tortious interference with
 11 a contractual relationship and defamation.³⁰ The Commission concluded that "to the extent that
 12 the legal proceedings derive from allegations directly relating to campaign activity," campaign
 13 funds could be used to pay the consultant's legal fees.³¹

14 Here, the Complaint alleges that the Committee misused campaign funds by paying the
 15 Mendenhall Firm for the legal fees associated with a campaign supporter's legal challenge of
 16 Peña's nominating petition. The Response submitted by the Committee denies the allegations
 17 and argues that expenses to prevent a would-be competitor from gaining ballot access would not
 18 exist irrespective of Torres' election campaign. As explained below, because the Committee's

²⁹ Advisory Opinion 2009-20 (Visclosky).

³⁰ Advisory Opinion 2011-07 at 1-2 (Fleischmann for Congress).

³¹ *Id.* at 4; *see also* F&LA at 8, MUR 7390 (Make America Great Again PAC, *et al.*) (no reason to believe that Donald Trump's principal campaign committee converted funds to personal use when it paid the legal expenses for his son — who supported the campaign but did not have an official role — in connection with congressional and DOJ investigations into Russian interference in the 2016 election); *cf.* Advisory Opinion 1998-01 at 3, 6 n.4 (Hilliard) (The Commission cautioned that campaign committee payments to a law firm for legal expenses in connection with representing persons other than the candidate for activities *not* directly related to the candidate's campaign or officeholder duties is prohibited);

1 spending of campaign funds for the purpose of removing an electoral opponent from a ballot
 2 constitutes a legitimate campaign-related expense that would not exist irrespective of Torres
 3 Small's candidacy, there is no reason to believe that Torres Small, the Committee, or
 4 Mendenhall converted campaign funds to personal use.

5 First, spending for the purpose of removing an electoral opponent from the ballot
 6 constitutes a legitimate campaign-related expense. Indeed, in an analogous context, the
 7 Commission has previously found that expenses aimed at preventing an electoral opponent from
 8 being on the ballot are campaign related. In Advisory Opinion 1980-57 (Bexar County
 9 Democratic Party), the Commission approved the Bexar County Democratic Party's proposed
 10 solicitation of funds on behalf of a Congressional candidate to defray the costs of legal
 11 proceedings challenging the nominating petition of the candidate's electoral opponent.³² The
 12 Commission stated that "[a] candidate's attempt to force an election opponent off the ballot so
 13 that the electorate does not have an opportunity to vote for that opponent is as much an effort to
 14 influence an election as is a campaign advertisement derogating that opponent."³³

15 Second, the fact that a Torres Small supporter, not the Committee itself, was the plaintiff
 16 in the lawsuit challenging Peña's nominating petition, does not alter the campaign-related
 17 purpose for which the Committee's funds were paid. As noted above, candidates and their
 18 committees are afforded wide discretion in how to spend their funds. Here, the decision to fund
 19 a third-party's lawsuit to remove Peña from the ballot has the same effect as if the Committee

³² Advisory Opinion 1980-57 (Bexar County Democratic Party).

³³ *Id.* at 3. The Commission has also concluded that expenses associated with efforts to *attain* ballot access are campaign related. *See, e.g.,* Advisory Opinion 1995-45 (Hagelin for President); Advisory Opinion 1984-11 (Independents for Dennis Serrette). In the enforcement context, this Office has also stated that "[t]he attempt to deprive the electorate's opportunity to vote for a given candidate constitutes activity made for the purpose of influencing an election." First Gen. Counsel's Rpt. at 20-25, MUR 6021 (The Ballot Project, *et al.*) (The Commission dismissed the allegations pursuant to *Heckler v. Chaney*).

1 had brought the lawsuit — removing an electoral opponent from the ballot. Thus, whether the
 2 lawsuit was brought by a third-party or by the Committee, the payment is directly related to the
 3 campaign. In a prior matter, the Commission approved, in an analogous context, a campaign's
 4 effort to fund third-parties' attempt to remove an opponent from the ballot. In MUR 5509
 5 (Kerry-Edwards 2004, Inc.) the Commission found no reason to believe that alleged payments by
 6 Kerry-Edwards 2004, Inc. to fund *others' efforts* to scrutinize and challenge the ballot petitions
 7 of independent candidate Ralph Nader violated the Presidential Election Campaign Fund Act by
 8 not being a "qualified campaign expenses."³⁴ Here, Peña was Torres Small's electoral opponent
 9 and the Committee paid for a legal challenge to prevent him from appearing on the ballot,
 10 thereby depriving the electorate's opportunity to vote for him. The election-influencing purpose
 11 of the Committee's payments did not change because the plaintiff was someone other than the
 12 candidate or official member of the campaign.³⁵

13 In sum, it does not appear that the Committee's payments to the Mendenhall Firm to
 14 prevent Peña from appearing on the ballot would have been incurred absent Torres Small's
 15 candidacy and therefore do not appear to have been "used to fulfill any commitment, obligation,

³⁴ First Gen. Counsel's Rpt. at 2, 6, MUR 5509 (Kerry-Edwards 2004, Inc., *et al.*) (involving ballot challenges by Democratic party activists or state Democratic Party officials) (dispositive Commission opinion) (citing AO 1980-57 (Bexar County Democratic Party), Advisory Opinion 1995-45 (Hagelin for President), and Advisory Opinion 1984-11 (Independents for Dennis Serrette); Certification ¶ 1, MUR 5509 (Kerry-Edwards 2004, Inc., *et al.*). For general election candidates (which John Kerry and John Edwards were), an expenditure is a "qualified campaign expense" if it is incurred to further a candidate's campaign for election to the office of President or Vice President. *See* 52 U.S.C. § 9002(11); 11 C.F.R. § 9002.11.

³⁵ Moreover, the Committee's payments to the Mendenhall Firm do not appear to implicate the concerns which motivated the Commission to promulgate the personal use regulations. *See* Personal Use E&Jat 7868; Notice of Proposed Rulemaking, *Expenditures; Personal Use of Campaign Funds*, 58 Fed. Reg. 45463, 45465 (Aug. 30, 1993) (indicating Commission's interest in situations where campaign funds are "used to finance an activity that benefits participants in their private capacity" such as certain payments for entertainment, meals, and travel, as well as payments for legal expenses "unrelated to any election campaign"); Hearing Transcript, NPRM Public Hearing on Proposed Personal Use Regulations at 2-3 (Jan. 12, 1994) ("Use of campaign funds for private gain betrays [public] trust.") (statement of Chairman Potter).

or expense of a person that would exist irrespective” of Torres Small’s election campaign.³⁶ Accordingly, the Commission should find no reason to believe that the Committee, Xochitl Torres Small, or Karen S. Mendenhall violated 52 U.S.C. § 30114 and 11 C.F.R. § 113.2 by converting campaign funds to personal use.

B. The Commission Should Find No Reason to Believe that the Committee Misreported its Payments to Fund Morrow’s Legal Challenge to Peña’s Nominating Petition

Political committees must itemize and report the name and address of each person to whom they make expenditures or other disbursements that aggregate more than \$200 per calendar year (for unauthorized committees) or per election cycle (for authorized committees).³⁷ Committees must also report the date, amount, and purpose of each expenditure or disbursement.³⁸ “The ‘purpose of disbursement’ entry, when considered along with the identity of the disbursement recipient, must be sufficiently specific to make the purpose of the disbursement clear.”³⁹ While a detailed description is not required, the reported purpose, “when considered along with the identity of the disbursement recipient, must be sufficiently specific to make the purpose of the disbursement clear” so as to allow “a person not associated with the committee [to] easily discern why the disbursement was made when reading the name of the recipient and the purpose.”⁴⁰ Examples of sufficient statements of purpose include, but are not

³⁶ 52 U.S.C. § 30114(b)(2).

³⁷ 52 U.S.C. § 30104(b)(5)(A), 6(A); 11 C.F.R. §§ 104.3(b)(4)(i), 104.9(a).

³⁸ 11 C.F.R. §§ 104.3(b)(4)(i), 104.9(a).

³⁹ Statement of Policy: “Purpose of Disbursement” Entries for Filings with the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007) (“Purpose Statement of Policy”) (citing 11 C.F.R. §§ 104.3(b)(3)(i)(B), (4)(i)(A)).

⁴⁰ Purpose Statement of Policy, 72 Fed. Reg. at 887-888 (citing 11 C.F.R. §§ 104.3(b)(3)(i)(B), (b)(4)(i)(A)); *see* LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1979 at 202 (including H.R. Rep. No. 96-422 at 18 (1979)) (“[T]he purpose requirement will be satisfied by a short statement or description, no more than one or two words in most cases, of why the money was spent. The particulars, *i.e.*, the details of the disbursement are not required by the statute.”) (quoting House Report accompanying H.R. 5010 Federal Election Campaign Act Amendments of 1979).

1 limited to, dinner expenses, media, salary, polling, travel, party fees, phone banks, travel
 2 expenses, travel expense reimbursement, and catering costs.⁴¹ In addition to the non-exhaustive
 3 list of examples included in the regulation, the Commission provided guidance in a Statement of
 4 Policy that, among other descriptions, “Consulting-Legal” is generally a sufficient description of
 5 purpose when read in context with the name of the payee.⁴² Additional guidance set forth on the
 6 Commission’s website lists “Legal/ Legal Fees/ Legal Services” as an example of an adequate
 7 purpose description.⁴³

8 Here, the Committee reported \$18,037.02 paid to the Mendenhall Firm for “legal
 9 services.”⁴⁴ The Response argues that this purpose description “accurately reflects the
 10 disbursement and is consistent with the Commission’s sample descriptions.”⁴⁵ As explained
 11 below, the description “legal services” is sufficiently specific to describe the Committee’s
 12 payments to the Mendenhall Firm.

13 First, the Mendenhall Firm’s legal fees were in connection with Karen Mendenhall’s
 14 representation of an individual in a lawsuit, a quintessential legal service. Second, the fact that a
 15 campaign supporter, and not the Committee, was the plaintiff in the lawsuit challenging Peña’s
 16 nominating petition does not change the purpose for which the law firm was paid. The nature of
 17 Ms. Mendenhall’s services, legal representation, would be no different if the Committee had
 18 been the plaintiff. Third, the Mendenhall Firm appears to have been the ultimate recipient of the
 19 Committee’s payment, distinguishing it from other matters where the reported recipient is merely

⁴¹ 11 C.F.R. § 104.3(b)(3)(i)(B); *id.* § 104.3(b)(4)(i)(A); *see also* Purpose Statement of Policy at 888.

⁴² Purpose Statement of Policy at 888.

⁴³ *Purposes of Disbursement*, FEC.GOV, <https://www.fec.gov/help-candidates-and-committees/purposes-disbursements/> (last updated Aug. 21, 2018).

⁴⁴ *See supra* at 3.

⁴⁵ Resp. at 6.

1 a conduit.⁴⁶ Finally, the Commission specifically includes “Legal Services” as an example of an
 2 adequate purpose description.

3 Further, when confronted with situations in which a committee paid for legal services
 4 provided to someone else, the Commission has not indicated that a more specific description of
 5 purpose is necessary. For example, MUR 7390 involved payments by the Republican National
 6 Committee (“RNC”) to various attorneys and law firms “for representation of [Donald] Trump
 7 and [Donald] Trump Jr.” in connection with DOJ’s investigation into Russian interference with
 8 the 2016 election. The RNC listed “Legal and Compliance Services” as the purpose and “Legal
 9 Proceedings Account” on the memo line. Although MUR 7390 focused on whether the RNC’s
 10 payment of legal fees from a segregated account that it established for “election recounts and
 11 contests and other legal proceedings” was permissible, the Commission never questioned the
 12 purpose description.⁴⁷

13 A committee reporting payments using the Commission-approved “legal services”
 14 purpose description may still violate the Act and Commission regulations if the description of
 15 purpose is misleading. In MURs 7291 and 7449 (Hillary for America), the Commission
 16 concluded that Hillary for America failed to properly disclose the purpose of reported
 17 disbursements to Perkins Coie LLP for a subvendor’s opposition research.⁴⁸ There, the

⁴⁶ See, e.g., *United States v. Benton*, 890 F.3d 697 (8th Cir. 2018) (affirming convictions of three Ron Paul 2012 campaign officials for causing false expenditure reports by concealing payments to an individual using a conduit); Conciliation Agreement at 3-4, MUR 4872 (Jenkins) (the committee knowingly and willfully violated 2 U.S.C. § 434(b)(5)(A) (now 52 U.S.C. § 30104(b)(5)(A)) by concealing payments to a vendor that the candidate “did not want his campaign to be associated with” by routing payments through another company that had “no involvement whatsoever with the services provided”).

⁴⁷ See F&LA at 8, MUR 7390 (Republican National Committee).

⁴⁸ F&LA at 4-5, MURs 7291 and 7449 (Hillary for America); see F&LA Analysis at 11-14, MUR 7923 (Friends of David Schweikert, *et al.*) (finding reason to believe committee’s inclusion of Commission-approved purpose description of “strategic consulting” was inadequate because disbursements were actually for advertising, website design, lodging, and food and beverage); First Gen. Counsel’s Rpt. at 36-41, MURs 7575, 7580, 7592, &

Commission determined that a person reading the Clinton campaign's disclosure reports would not have discerned from the name of the recipient and purpose that the payments were for something *other* than legal services (*i.e.*, opposition research).⁴⁹ But unlike the situation in MURs 7291 and 7449, the record does not indicate that the Committee paid the Mendenhall Firm for opposition research or other non-legal services, nor does the record indicate that the Mendenhall Firm served as simply an intermediary. Just the opposite appears to be true.

For these reasons, we recommend that the Commission find no reason to believe that the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by reporting the purpose of its payments to The Mendenhall Firm, P.C. as "legal services."

IV. RECOMMENDATIONS

1. Find no reason to believe Xochitl Torres Small, Xochitl for New Mexico, and Karen S. Mendenhall violated 52 U.S.C. § 30114 and 11 C.F.R. § 113.2 by converting campaign funds to personal use;
2. Find no reason to believe Xochitl for New Mexico violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by reporting the purpose of its payments to The Mendenhall Firm, P.C. as "legal services";
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and
5. Close the file.

7626 (Brand New Congress, *et al.*) (recommending Commission find reason to believe reported purpose description of "strategic consulting" was where payments were actually for travel, salary, website design, compliance, and other services).

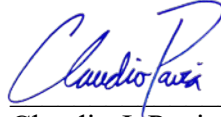
⁴⁹ Factual and Legal Analysis at 7-9, MURs 7291 and 7449 (Hillary for America); General Counsel's Brief at 7-10, MURs 7291 and 7449 (Hillary for America).

1 Lisa J. Stevenson
2 Acting General Counsel
3

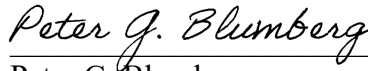
4 Charles Kitcher
5 Associate General Counsel for Enforcement
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9 6/24/2022

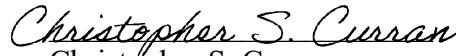
10 Date



11 Claudio J. Pavia
12 Deputy Associate General Counsel for Enforcement
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14 Peter G. Blumberg
15 Assistant General Counsel
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18 Christopher S. Curran
19 Attorney
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