

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR 7943**

6 DATE COMPLAINT FILED: 11/10/2021
7 DATE OF NOTIFICATIONS: 11/17/2021
8 LAST RESPONSE RECEIVED: 01/03/2022
9 DATE ACTIVATED: 05/02/2022
10 EXPIRATION OF SOL: 10/17/2026 (earliest)
11 10/23/2026 (latest)
12 ELECTION CYCLE: 2022

13
14
15 **COMPLAINANT:** Americans for Public Trust

16
17 **RESPONDENTS:** Common Good Virginia and Lillie Louise Lucas
18 in her official capacity as treasurer
19 Val Demings for U.S. Senate and Lauren Decot Lee
20 in her official capacity as treasurer
21 Val Demings
22

23 **RELEVANT STATUTES
24 AND REGULATIONS:**

25 52 U.S.C. § 30101(8)
26 52 U.S.C. § 30116(a), (f)
27 52 U.S.C. § 30125(e)(1)(A)
28 11 C.F.R. § 100.52
29 11 C.F.R. § 109.20
30 11 C.F.R. § 109.21
31 11 C.F.R. § 300.60
32 11 C.F.R. § 300.61

33 **INTERNAL REPORTS CHECKED:** Disclosure Reports

34
35 **FEDERAL AGENCIES CHECKED:** None
36

37 **I. INTRODUCTION**

38 The Complaint in this matter alleges that Val Demings, a former U.S. Representative and
39 2022 U.S. Senate candidate in Florida, approved of, and participated in, email solicitations by the
40 Virginia political committee Common Good Virginia and Lillie Louise Lucas in her official
41 capacity as treasurer ("CGVA") in support of Demings's candidacy. The Complaint argues that
42 by paying for these emails, CGVA made, and Val Demings for U.S. Senate and Lauren Decot

1 Lee in her official capacity as treasurer (the “Committee”) accepted, prohibited and excessive in-
2 kind contributions. The Complaint alleges that such in-kind contributions violate 52 U.S.C.
3 § 30125(e)(1)(A) and 11 C.F.R. § 300.61. CGVA, the Committee, and Demings deny violating
4 the Act.

5 The available record indicates that CGVA, as an entity acting as Demings’s agent or
6 otherwise on her behalf, violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by sending
7 at least one email solicitation in connection with an election for Federal office that was not
8 subject to the Act’s limitations and source prohibitions. But we recommend that the
9 Commission dismiss this apparent violation pursuant to the agency’s prosecutorial discretion in
10 accordance with the Commission’s disposition of a similar set of facts. We also recommend that
11 the Commission find no reason to believe that CGVA made, and the Committee and Demings
12 knowingly accepted, prohibited or excessive in-kind contributions, in violation of 52 U.S.C. §§
13 30116(a), (f), and 11 C.F.R. §§ 110.1(b)(1), 110.9, in the form of CGVA’s email
14 communications because the emails were not coordinated communications under Commission
15 regulations. However, we recommend that the Commission find reason to believe that CGVA
16 made, and Demings and the Committee knowingly accepted, prohibited or excessive in-kind
17 contributions in violation of 52 U.S.C. §§ 30116(a), (f), and 11 C.F.R. §§ 110.1(b)(1), 110.9
18 because CGVA, acting as Demings’s agent or otherwise on her behalf, appears to have used its
19 email list to solicit contributions to Demings’s campaign without charge. In addition, to the
20 extent that CGVA was not acting as Demings’s agent, because CGVA appears to have spent
21 more than \$250 on emails soliciting contributions to Demings — which do not meet the
22 Commission’s definition of a “coordinated communication” — without filing any independent

1 expenditure reports, it is possible that CGVA violated 52 U.S.C. § 30104(c). We recommend
2 that the Commission take no action at this time with respect to this potential violation.

3 **II. FACTUAL BACKGROUND**

4 Val Demings was the U.S. Representative for Florida's 10th Congressional District from
5 2017-2023.¹ She was also a Democratic candidate to represent the state of Florida in the U.S.
6 Senate in 2022.² Val Demings for U.S. Senate is her principal campaign committee.³

7 CGVA is a political committee registered with the Virginia State Board of Elections.⁴ It
8 appears to have been formed by former Virginia governor Terry McAuliffe.⁵ Its treasurer is
9 Lillie Louise Lucas.⁶ CGVA describes itself as “dedicated to helping Democratic campaigns and
10 organizations win critical races in Virginia and across the country.”⁷ It has accepted
11 contributions in excess of the Act's amount limitations and outside the Act's source
12 prohibitions.⁸

¹ Congress.gov, Representative Val Butler Demings, <https://www.congress.gov/member/val-demings/D000627>.

² Statement of Candidacy, Val Demings (Apr. 15, 2022), <https://docquery.fec.gov/pdf/814/202204159496943814/202204159496943814.pdf>.

³ Statement of Organization, Val Demings for U.S. Senate (Apr. 15, 2022), <https://docquery.fec.gov/pdf/239/202204159496938239/202204159496938239.pdf>.

⁴ Amended Statement of Organization, Common Good Virginia, <https://cfreports.elections.virginia.gov/Committee/Index/27409b3e-aa83-e911-acc7-984be103f032> (“Common Good Virginia Statement of Organization”) (select “Download Statement of Organization”).

⁵ Julia Manchester, *McAuliffe PAC raises \$2M for Democratic candidates*, THE HILL (June 6, 2022), <https://thehill.com/news/campaign/3513301-mcauliffe-pac-raises-2m-for-democratic-senate-candidates/>

⁶ *Id.* Lucas is also President pro tempore of the Senate of Virginia. <https://apps.senate.virginia.gov/Senator/memberpage.php?id=S19>.

⁷ <https://commongoodva.com/>.

⁸ See Reports for Common Good Virginia, Virginia State Board of Elections, <https://cfreports.elections.virginia.gov/Committee/Index/27409b3e-aa83-e911-acc7-984be103f032> (select “Large Contributions”).

1 In October 2021, CGVA sent at least three different emails using Demings's name and
 2 likeness.⁹ The emails include messages appearing to be directly from Val Demings and appeared
 3 to include official campaign photos and animated images.¹⁰ Each email header identifies it as
 4 coming "from" Val Demings.¹¹ However, the real sender appears to be McAuliffe because each
 5 email informs recipients that they could "stop receiving emails from Terry McAuliffe," and one
 6 email address in the header appears as "info@mccaulliffeoffice.org."¹² The emails are included in
 7 Attachment 1.

8 Each email links (via a "DONATE" button) to a tandem fundraising form on ActBlue's
 9 website.¹³ The tandem fundraising form states "Split a contribution between Val Demings and
 10 Common Good" followed by a further exhortation to "Rush a contribution right now to be split
 11 between Val Demings and Common Good."¹⁴ Contributors are told to "Choose an amount to
 12 split" and that their contribution "will be split evenly between Val Demings and Common Good

⁹ CGVA Resp. at 2; Compl. at Exs. A-C.

¹⁰ See Compl. at Exs. A-C; Terry McAuliffe.com, MILLED, (Oct. 23, 2021), <https://milled.com/terry-mcauliffe/it-very-well-could-go-permanently-red-udSgI81OdulteFwE> (including animated image "paid for by Val Demings for U.S. Senate"); Terry McAuliffe.com, MILLED, (Oct. 20, 2021), <https://milled.com/terry-mcauliffe/marco-rubio-is-attacking-me-right-now-iES2YMi2HoEHQVNO> (including animated image "paid for by Val Demings for U.S. Senate"); Terry McAuliffe.com, MILLED, (Oct. 17, 2021), https://milled.com/terry-mcauliffe/it-could-go-permanently-red-z6_OCnwTp8GpBQmQ.

¹¹ Compl. at Exs. A-C.

¹² *Id.* The emails state that they were "[s]ent via ActionNetwork.org." *Id.* Action Network, a D.C. corporation, provides progressive organizations with tools to mobilize support, such as sending mass emails. See https://actionnetwork.org/?utm_medium=referral&utm_source=idealist; D.C. Business Center Business Search, <https://business.dc.gov/lookup-business> (search in corporations for "Action Network"). According to its state disclosure report for the fourth quarter of 2021, CGVA paid tens of thousands of dollars to Action Network. Common Good Virginia (PAC-19-00762), Reporting Period: 10/01/2021 to 12/31/2021, <https://cfreports.elections.virginia.gov/Report/Index/275754> (disclosing \$20,027.26 paid to Action Network for "online services").

¹³ See Compl. at Exs. A-D. "Tandem fundraising" is an "ActBlue feature that allows campaigns, organizations, and activists to fundraise for multiple groups on a single contribution form. When a donor gives on a Tandem Fundraising form, they can easily split their contribution between all of the groups listed (or choose which ones they'd like to give to)." See Tandem Fundraising, ActBlue Support, <https://support.actblue.com/campaigns/contribution-form-features/tandem-fundraising/> (last visited May 23, 2022).

¹⁴ Compl. at Ex. D.

1 VA.”¹⁵ These statements are followed by dollar figures ranging from \$10 to \$2,500 and a blank
 2 fill-in amount, along with the option to make the amount a recurring monthly contribution.¹⁶ At
 3 the end of the form are “Contribution rules,” pursuant to which contributors agree they are a U.S.
 4 citizen or lawfully admitted permanent resident, are not making a contribution in the name of
 5 another, are at least 18 years old, and are not a federal contractor.¹⁷ The rules also include a
 6 specific Virginia rule that states: “This contribution is made from my own funds or the funds of
 7 an authorizing corporation or other entity, and the funds are not being provided by any other
 8 person or entity.”¹⁸ The last rule says:

9 Common Good Virginia is only asking for donations of up to \$2,900 per election
 10 from individuals and for donations of up to \$5,000 per election from federal
 11 political committees. Common Good Virginia is not asking for donations in excess
 12 of these amounts or for donations from corporations, labor organizations, foreign
 13 nationals, federal contractors, or national banks, and will not accept any such
 14 contributions.¹⁹

15 Milled, a search engine for email newsletters, shows that CGVA sent emails for over a
 16 year that solicited funds for Demings.²⁰ It also shows that CGVA sent emails soliciting funds for
 17

¹⁵ *Id.* In Advisory Opinion 2014-13, the Commission approved ActBlue’s request to permit users to configure contribution forms enabling contributors to split contributions between multiple committees. *See* Advisory Opinion 2014-13 (ActBlue). The Commission determined that, as proposed, ActBlue’s use of a “Split It” box would not trigger the joint fundraising requirements under 11 C.F.R. § 102.17. *Id.* at 5. In approving the request, the Commission noted that the Split It box “does not indicate that the recipient political committees have agreed to fundraise jointly” and that “the other recipient committees have *no involvement* in the creation, modification, or administration of the contribution form.” *Id.* (emphasis added). Here, because CGVA appears to have acted as Demings’s agent or otherwise acted on her behalf, the facts may be materially distinguishable from the situation approved by Commission in Advisory Opinion 2014-13 (ActBlue). *See* 52 U.S.C. § 30108(c).

¹⁶ Compl. at Ex. D.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The contribution form is also included in Attachment 1.

²⁰ *See, e.g.*, Terry McAuliffe.com, MILLED, (Apr. 20, 2022), <https://milled.com/terry-mcauliffe/re-following-up-Xfukkc74-plpJc55>; Terry McAuliffe.com, MILLED, (Mar. 28, 2022), <https://milled.com/terry-mcauliffe/worst-possible-moment-yXyLkfOfldRK-soY>; Terry McAuliffe.com, MILLED, (Jan. 31, 2022), <https://milled.com/terry-mcauliffe/photo-attached-thats-me-2maF3BnoO0i0fRmW>; <https://milled.com/terry-mcauliffe/last-chance->

1 other federal and state candidates.²¹ According to news reports, CGVA and McAuliffe raised
 2 millions of dollars for Democratic candidates in competitive 2022 races.²²

3 The Complaint alleges that Demings “approv[ed] and participat[ed]” in CGVA’s
 4 email solicitations, rendering their value an in-kind contribution to the Committee.²³ And
 5 because CGVA is a Virginia political committee capable of accepting funds not subject
 6 to the Act’s amount limitations and source prohibitions, the Complaint also contends that
 7 the in-kind contribution violated the Act’s soft money prohibition at 52 U.S.C.
 8 § 30125(e)(1)(A).

9 The Commission received two separate but practically identical responses, one
 10 from Demings and the Committee, and the other from CGVA. Respondents state that the
 11 cost of CGVA’s emails cannot be an in-kind contribution because the emails did not
 12 satisfy the content prong of the Commission’s definition of “coordinated
 13 communication.”²⁴ Next, they argue that even if CGVA’s email solicitations qualified as
 14 something of value given to the Committee, an in-kind contribution still did not result

[XBmJEertwzgiDbJ-](#); Terry McAuliffe.com, MILLED, (July 15, 2021), <https://milled.com/terry-mcauliffe/marco-rubio-is-already-attacking-me-ascvr-iqBg14txun>.

²¹ For example, CGVA sent emails with messages purportedly from Mark Kelly (AZ), Cheri Beasley (NC), John Fetterman (PA), Tim Ryan (OH), and Raphael Warnock (GA) soliciting funds for their campaigns. Terry McAuliffe.com, MILLED, (May 18, 2022), <https://milled.com/terry-mcauliffe/its-official-im-running-against-trumps-hand-picked-candidate-DfsGsrUKXMZhJK-a>; TerryMcAuliffe.com, MILLED, (May 18, 2022), [Terry McAuliffe: Im officially the Democratic nominee in Pennsylvania | Milled](#); TerryMcAuliffe.com, MILLED, (May 17, 2022), <https://milled.com/terry-mcauliffe/folks-i-really-need-you-if-were-going-to-hold-this-seat-2QL9i4MWrr0YagqX3>; TerryMcAuliffe.com, MILLED, (May 14, 2022), <https://milled.com/terry-mcauliffe/im-pissed-IJSJfPNphpd2FESM>; TerryMcAuliffe.com, MILLED, (Apr. 29, 2022); <https://milled.com/terry-mcauliffe/two-quick-things-9rbrDmI0P4ACtmsZ>.

²² See Julia Manchester, *McAuliffe PAC raises \$2M for Democratic candidates*, THE HILL (June 6, 2022), <https://thehill.com/news/campaign/3513301-mcauliffe-pac-raises-2m-for-democratic-senate-candidates/>; Lachlan Markay, *McAuliffe provides cash boost to 2022 Dems*, AXIOS (Mar. 28, 2022), <https://www.axios.com/2022/03/28/mcauliffe-provides-cash-boost-to-2022-dems>.

²³ Compl. at 1-2.

²⁴ Committee Resp. at 2-3; CGVA Resp. at 2-3.

1 because CGVA “received the benefit of using Representative Demings’s name and
2 likeness” to solicit for itself.²⁵ Finally, Respondents argue that even if the cost of
3 CGVA’s emails did qualify as an in-kind contribution to the Committee, no violation of
4 52 U.S.C. § 30125(e)(1)(A) occurred because CGVA had sufficient amounts within the
5 Act’s amount limitations and source prohibitions to cover the cost of the emails.²⁶

6 **III. LEGAL ANALYSIS**

7 **A. CGVA, as Demings’s Agent or as an Entity Otherwise Acting on Her Behalf,** 8 **Appears to Have Solicited Non-Federal Funds in Violation of 52 U.S.C.** 9 **§ 30125(e)(1)(A), but the Commission Should Exercise Its Prosecutorial** 10 **Discretion to Dismiss This Allegation**

11 The Act and Commission regulations prohibit candidates, individuals holding Federal
12 office, agents of a candidate or an individual holding Federal office, or an entity directly or
13 indirectly established, financed, maintained, or controlled by or acting on behalf of one or more
14 candidates or individuals holding Federal office from “solicit[ing], receiv[ing], direct[ing],
15 transfer[ing], or spend[ing] funds in connection with an election for Federal office, including
16 funds for any Federal election activity, unless the funds are subject to the limitations,
17 prohibitions, and reporting requirements of th[e] Act.”²⁷

18 Here, the record indicates that (1) CGVA was Demings’s agent or acted on her behalf;
19 (2) CGVA’s October 23, 2021 email was a solicitation; and (3) the solicitation was not limited to
20 funds complying with the Act’s amount limitations and source prohibitions.

²⁵ Committee Resp. at 3-4; CGVA Resp. at 3.

²⁶ Committee Resp. at 4; CGVA Resp. at 4.

²⁷ 52 U.S.C § 30125(e)(1); 11 C.F.R. §§ 300.60, 300.61.

1 1. CGVA Appears to have been Demings's Agent or Acting on Her Behalf

2 For the purposes of the soft money prohibition, an “agent” of a federal candidate or
3 officeholder is “any person who has actual authority, either express or implied, to engage in any
4 of the following activities on behalf of” that candidate or officeholder: “solicit[ing], receiv[ing],
5 direct[ing], transfer[ing], or spend[ing] funds in connection with any election.”²⁸ In
6 promulgating this regulation in 2002, the Commission explained that the definition of “agent”
7 must cover “implied” authority because “[o]therwise, agents with actual authority would be able
8 to engage in activities that would not be imputed to their principals so long as the principal was
9 careful enough to confer authority through conduct or a mix of conduct and spoken words.”²⁹

10 In considering whether CGVA satisfies the definition of “agent,” the Commission “need
11 not analyze whether CGVA had the specific authority to raise nonfederal funds; a person who
12 has the authority to raise *federal* funds on behalf of a candidate or individual holding federal
13 office is an agent.”³⁰ As the Commission further explained in defining “agent” in this context in
14 a 2006 rulemaking, the “Commission’s current definitions of ‘agent’ are sufficiently broad to
15 capture actions by individuals where the candidate authorizes an individual to solicit Federal
16 funds on his or her behalf, but privately instructs the individual to avoid raising non-Federal
17 funds.”³¹ Indeed, “the candidate/principal may. . . be liable for any impermissible solicitations
18 by the agent, despite specific instructions not to do so.”³² Thus, if CGVA had actual authority,

²⁸ 11 C.F.R. § 300.2(b)(3).

²⁹ Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49082 (July 29, 2002). Thus, a principal may be held liable under an “implied actual authority theory” where “the principal’s own conduct reasonably causes the agent to believe that he or she had authority.” *Id.* at 49083.

³⁰ Factual & Legal Analysis (“F&LA”) at 4-5, MUR 7048 (Cruz for President).

³¹ Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4978 (Jan. 31, 2006).

³² *Id.*

1 express or implied, to raise funds on behalf of the Committee, it is irrelevant whether it was
2 given any instruction on the raising of, or the authority to raise, nonfederal funds.

3 In this matter, there is sufficient information to find at the initial stage of administrative
4 enforcement that Demings authorized the solicitations. The Commission's experience indicates
5 that federal candidates generally do not approve of third parties fundraising using their name and
6 likeness without authorization, as is demonstrated by examples of prior enforcement matters in
7 which candidates have demanded that such third party activities cease.³³ Here, in addition to the
8 Responses' admissions that CGVA acted on Demings's behalf, there is no evidence that
9 Demings disapproved of CGVA's fundraising.³⁴ Rather, the Responses state that CGVA
10 "*received equal consideration . . . in the form of the use of Representative Demings's name and*
11 *likeness to solicit contributions for CGVA.*"³⁵ This suggests an agreement under which CGVA
12 would fundraise for Demings using her name and likeness in exchange for the use of her name
13 and likeness to fundraise for itself.

14 Prior enforcement matters also support finding that Demings authorized CGVA's
15 communications. In MUR 6044, the Commission viewed the fact that a candidate did not speak
16 in a video as evidence cutting against candidate authorization.³⁶ But here, CGVA's October 23,

³³ See, e.g., F&LA at 12, MUR 7140 (Americans for Sensible Solutions PAC) (campaign "sent a cease-and-desist letter to the Committee for creating a series of unauthorized social media accounts and e-commerce websites unlawfully using Curbelo's name and likeness for commercial purposes and soliciting contributions"); F&LA at 6, MURs 7011 & 7092 (Socially Responsible Government) (cease-and-desist letter sent by campaign to organization using trademarks and logos of Bernie Sanders's campaign committee without authorization); F&LA at 6, MUR 6997 (Americans Socially United) (cease-and-desist letter sent by Bernie Sanders's campaign committee to unauthorized committee using "Bernie 2016" logo and having website appeared as an official campaign site); F&LA at 5, MUR 6893 (Winning the Senate PAC) (cease-and-desist letter sent by Rand Paul to SuperPAC after SuperPAC sent emails including Paul in the "from line").

³⁴ See CGVA Resp. at 3; Committee Resp. at 3-4.

³⁵ See CGVA Resp. at 3; Committee Resp. at 4.

³⁶ See Statement of Reasons, Comm'rs Walther, Petersen, Bauerly, Hunter and McGahn at 6, MUR 6044 (Musgrove for Senate); see also First Gen. Counsel's Rpt. at 19, MUR 6037 (Jeff Merkley for Oregon) (fact that

1 2021 email includes a GIF in which Demings can clearly be seen saying: “Please donate tonight
 2 before midnight.”³⁷ Moreover, the GIF itself appears to originate from Demings’ campaign,
 3 because it includes an embedded disclaimer stating that it was “paid for by Val Demings for U.S.
 4 Senate.”³⁸ In MUR 6037, this Office viewed the fact that an advertisement’s content resembled
 5 the candidate’s own press releases, and the short time period between when the press releases
 6 were issued and the advertisements aired, as evidence of candidate authorization.³⁹ Here, there
 7 are similarities between CGVA’s emails and Val Demings’s emails.⁴⁰

8 Even if CGVA was not acting as Demings’s agent, CGVA still appears to fall within the
 9 scope of 52 U.S.C. § 30125(e)(1)(A) because it acknowledges “acting on behalf of” of the

candidate was dominant person in the ad and directly addressed the viewer is evidence of candidate authorization or approval).

³⁷ See Terry McAuliffe.com, MILLED, (Oct. 23, 2021), <https://milled.com/terry-mcauliffe/it-very-well-could-go-permanently-red-udSgI81OdulteFwE> (including animated image “paid for by Val Demings for U.S. Senate”). The same GIFs also appear in Demings’ campaign emails. See Email from Val Demings <campaign@valdemings> (Oct. 23, 2021), <https://politicalemails.org/messages/499523>.

³⁸ See Terry McAuliffe.com, MILLED, (Oct. 23, 2021), <https://milled.com/terry-mcauliffe/it-very-well-could-go-permanently-red-udSgI81OdulteFwE> (including animated image “paid for by Val Demings for U.S. Senate”); Terry McAuliffe.com, MILLED, (Oct. 20, 2021), <https://milled.com/terry-mcauliffe/marco-rubio-is-attacking-me-right-now-iES2YMi2HoEHQVNO> (including animated image “paid for by Val Demings for U.S. Senate”); Terry McAuliffe.com, MILLED, (Oct. 17, 2021), https://milled.com/terry-mcauliffe/it-could-go-permanently-red-z6_OCnwTp8GpBQmQ (including animated image “paid for by Val Demings for U.S. Senate”). The same GIFs also appear in Demings’ campaign emails. See Email from Val Demings <campaign@valdemings> (Oct. 23, 2021), <https://politicalemails.org/messages/499523>.

³⁹ See First Gen. Counsel’s Rpt. at 19, MUR 6037 (Jeff Merkley for Oregon).

⁴⁰ Compare Email from Val Demings <campaign@valdemings> (Oct. 23, 2021), <https://politicalemails.org/messages/499523> (warning of Republican efforts to make Florida “PERMANENTLY Red”), with Compl. at Ex. A, C (warning of Republican effort to keep Florida “PERMANENTLY Red”).

1 Demings campaign.⁴¹ It therefore appears that CGVA acted as an agent of Demings or otherwise
 2 “act[ed] on behalf of” Demings within the meaning of 52 U.S.C. § 30125(e)(1)(A).

3 2. Each Email Attached to the Complaint Solicited Funds in Connection with a
 4 Federal Election

5 Commission regulations define “solicit” as “to ask, request, or recommend, explicitly or
 6 implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
 7 provide anything of value.”⁴² A solicitation is an oral or written communication that “contains a
 8 clear message asking, requesting, or recommending that another person make a contribution . . .
 9 or otherwise provide anything of value.”⁴³ In determining whether a communication contains a
 10 solicitation, the regulation requires that the communication is to be “construed as reasonably
 11 understood in the context in which it is made”⁴⁴ This test is objective and does not turn on
 12 the subjective interpretations of the speaker or the recipients.⁴⁵

⁴¹ See CGVA Resp. at 3; Committee Resp. at 4. The Act does not define the phrase “on behalf of” as used in 52 U.S.C. § 30125(e)(1)(A) and the Commission has not defined the phrase in 11 C.F.R. § 300.60(d). In such circumstances, the Commission has looked to the plain meaning of the words used. See, e.g., F&LA at 12, MURs 6869R & 6942R (Commission of Presidential Debates) (plain meaning of endorse or support in the context of debate sponsorship); *Level the Playing Field v. Federal Election Commission*, 381 F. Supp. 3d 78, 98-99 (D.D.C. 2019), *aff'd* 961 F.3d 462 (D.C. Cir. 2020) (upholding Commission’s interpretation of the ordinary meaning of “endorse,” “support,” and “oppose”). The plain meaning of the phrase “on behalf of” means as a “representative of” (*i.e.*, agent of), “in the interest of,” or “for the benefit of.” See, e.g., *United States v. Dion*, 37 F.4th 31, 38-39 (1st Cir. 2022) (citing *Madden v. Cowen & Co.*, 576 F.3d 957, 973 (9th Cir. 2009) and *United States v. Frazier* 53 F.3d 1105, 1112 (5th Cir. 1995)). Under a plain meaning analysis, CGVA acted, at the very least, for the benefit of Demings. To be sure, interpreting “on behalf of” to encompass purely independent spending “for the benefit of” or “in the interest of” federal candidates could raise constitutional concerns. See *Citizens United v. FEC*, 558 U.S. 310 (2010). But here, the facts do not indicate that CGVA was acting independently. See *supra* pp. 8-11.

⁴² 11 C.F.R. § 300.2(m).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13926, 13927 (Mar. 20, 2006). Commission regulations provide a non-exhaustive list of specific types of communications that constitute solicitations:

- (i) A communication that provides a method of making a contribution or donation, . . .
- (ii) A communication that provides instructions on how or where to send contributions or donations, . . . [and]
- (iii) A communication that identifies a Web address where the Web page displayed is specifically dedicated to facilitating the making of a contribution or donation, or automatically redirects the

1 Here, each CGVA email requests contributions be made to Val Demings's campaign.
2 Each CGVA email appears to include GIFs from Demings's campaign, and she can clearly be
3 seen (but not heard) saying "Please donate tonight before midnight."⁴⁶ The October 17, 2021
4 email expresses alarm at the possibility of missing a \$50,000 fundraising goal deadline, followed
5 by an expression of thanks for recipients' support, and a "DONATE" link to ActBlue's tandem
6 contribution form.⁴⁷ The October 20, 2021 email informs recipients that the number of donors to
7 the campaign is below expectations.⁴⁸ A "DONATE" link to ActBlue's tandem contribution
8 form is also included. Finally, the October 23, 2021 email expresses alarm regarding an
9 impending \$50,000 fundraising goal deadline, asks recipients to split a donation between CGVA
10 and Demings's campaign, asks recipients to "contribute whatever amount you can," includes
11 buttons for various contribution amounts, thanks recipients for their support, and ends with a
12 "DONATE" link to ActBlue's tandem contribution form.⁴⁹

Internet user to such a page, or exclusively displays a link to such a page. 11 C.F.R.
§ 300.2(m)(1)(i)-(iii).

⁴⁶ See Terry McAuliffe.com, MILLED, (Oct. 23, 2021), <https://milled.com/terry-mcauliffe/it-very-well-could-go-permanently-red-udSgI81OdulteFwE> (including animated image "paid for by Val Demings for U.S. Senate"); Terry McAuliffe.com, MILLED, (Oct. 20, 2021), <https://milled.com/terry-mcauliffe/marco-rubio-is-attacking-me-right-now-iES2YMi2HoEHQVNO> (including animated image "paid for by Val Demings for U.S. Senate"); Terry McAuliffe.com, MILLED, (Oct. 17, 2021), https://milled.com/terry-mcauliffe/it-could-go-permanently-red-z6_OCnwTp8GpBQmQ (including animated image "paid for by Val Demings for U.S. Senate"). The same GIFs also appear in Demings' campaign emails. See Email from Val Demings <campaign@valdemings> (Oct. 23, 2021), <https://politicalemails.org/messages/499523>.

⁴⁷ Compl. at Ex. A.

⁴⁸ *Id.* at Ex. B.

⁴⁹ *Id.* at Ex. C.

1 3. CGVA's October 23, 2021 Email Solicitation Was Not Limited to Federal
2 Funds

3 At the relevant time, the Act limited contributions by any person to \$2,900 per candidate,
4 per election.⁵⁰ CGVA's October 23, 2021 email requests that recipients contribute "whatever
5 amount you can" accompanied with a request to donate an "other" amount.⁵¹

6 Commission precedent indicates that such language does not limit contributions to
7 federally permissible amounts. In MUR 7347, the Commission determined that federal
8 candidate Conor Lamb violated 52 U.S.C. § 30125(e)(1)(A) when he consented to an email
9 solicitation by End Citizens United which used his name and likeness. In that case, the email's
10 message appeared to be directly from Lamb and linked to an ActBlue tandem contribution form
11 requesting donors give "whatever you can afford directly to Conor Lamb's campaign" and a fill-
12 in blank amount with no information referencing the applicable federal contribution limit.⁵² The
13 Commission also stated that the email solicitation itself, in which Lamb requested that recipients
14 "donate every dollar you can," did not limit contributions to federally permissible amounts.⁵³

15 Similarly, in MUR 6841, the Commission determined that an email solicitation violated
16 52 U.S.C. § 30125(e)(1)(B) when Harry Reid asked recipients to contribute "\$5 or more" and
17 "\$5, or whatever you can" to the campaign of Lucy Flores, a candidate for Nevada lieutenant
18 governor and linked to her contribution page.⁵⁴ In MUR 7682, the Commission found reason to
19 believe that U.S. Senate candidate Amy McGrath's campaign committee and campaign manager

⁵⁰ 52 U.S.C. § 30116(a)(1)(A), (C); 11 C.F.R. § 110.1(b); *see also* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021).

⁵¹ Compl. at Ex. C.

⁵² F&LA at 5, MUR 7347 (Conor Lamb).

⁵³ *Id.* at 4 n.15.

⁵⁴ F&LA at 1-3, MUR 6841 (Friends of Harry Reid, *et al.*).

1 violated 52 U.S.C. § 30125(e)(1)(A) when her campaign manager stated “We very strongly
 2 encourage donors to give to Eric’s Group [a SuperPAC].”⁵⁵ The Commission stated that the
 3 request constituted an impermissible solicitation of soft money because it was not limited to
 4 federally permissible funds.⁵⁶

5 In each of these cases there was an absence of language informing recipients that the
 6 solicitation was limited to funds that comply with the Act’s amount limitations and source
 7 prohibitions. The fact that it may not have been possible for contributors to give excessive or
 8 prohibited funds through ActBlue — given the contribution form’s rules and the possibility that
 9 ActBlue’s software prevents such contributions⁵⁷ — is immaterial to whether a solicitation of
 10 non-federal funds occurred.⁵⁸

11 4. The Commission Should Dismiss the Apparent Soft Money Violation

12 We recommend that the Commission dismiss the 52 U.S.C. § 30125(e)(1)(A) violation
 13 pursuant to *Heckler v. Chaney*.⁵⁹ In MUR 7347, a recent matter involving similar facts, this
 14 Office recommended, and the Commission approved, dismissing the alleged 52 U.S.C.

⁵⁵ F&LA at 7, MUR 7682 (Honor Bound PAC, *et al.*).

⁵⁶ *See id.*

⁵⁷ *See* Response of ActBlue, MUR 7347 (Conor Lamb, *et al.*) (describing how “[t]he software that powers the ActBlue website and contribution forms has been built specifically to comply with regulations, including preventing excessive contributions from being processed”).

⁵⁸ *See* F&LA at 5, MUR 7437 (Conor Lamb) (determining candidate solicited excessive funds, even though “it appears that it was not possible for a contributor to contribute an amount beyond the limits”) *Cf.* F&LA at 7-8, MURs 7165 & 7196 (Great America PAC) (interpreting foreign national ban to foreclose “any solicitation of foreign money into the electoral process, even if such a solicitation could not have succeeded because of a circumstance unknown to the person soliciting the contribution or donation”). In MURs 7165 & 7196 the Commission found reason to believe on a knowing and willful basis against, and conciliated with, the political committee Great America PAC for violating the Act’s foreign national ban and the Commission’s implementing regulation when its agent solicited contributions from undercover reporters posing as representatives of a fictitious foreign national. *See* F&LA at 10-15, MURs 7165 & 7196 (Great America PAC); Certification at ¶1 (Mar. 1, 2021), MURs 7165 & 7196 (Great America PAC). However, the Conciliation Agreement did not include an admission of a knowing and willful violation. Conciliation Agreement at V.2, MUR MURs 7165 & 7196 (Great America PAC).

⁵⁹ 470 U.S. 821 (1985).

1 § 30125(e)(1)(A) and 52 U.S.C. § 30116(f) violations because (1) there was no affirmative
2 solicitation of excessive amounts and (2) it appeared that it was not possible for a contributor to
3 contribute beyond federally permissible limits.⁶⁰ Here, like in MUR 7347, there was no
4 affirmative solicitation of excessive amounts. Instead, the phrase “contributing whatever amount
5 you can” was immediately followed by several suggested amounts that were well within the
6 Act’s amount limitations and a suggested “other” amount.⁶¹ In addition, unlike the contribution
7 form at issue in MUR 7347, the ActBlue tandem contribution form to which CGVA’s October
8 23, 2021 email linked did not include a request to “contribute whatever you can afford” or
9 similar language. And unlike the form in MUR 7347, the forms at issue here appear to limit
10 contributions to federally permissible amounts from federally permissible sources. Finally, it
11 does not appear likely that excessive contributions *could* have been made to Demings’s
12 campaign through ActBlue.⁶² For these reasons, we recommend that the Commission exercise
13 its prosecutorial discretion and dismiss the violation of 52 U.S.C. § 30125(e)(1)(A) in connection
14 with CGVA’s October 23, 2021 email.

15 **B. The Commission Should Find No Reason to Believe that CGVA’s Emails**
16 **Constituted In-kind Contributions Because They are Not Coordinated**
17 **Communications**

18 The Complaint alleges that CGVA made impermissible in-kind contributions to the
19 Committee by sending emails soliciting contributions on behalf of Demings.⁶³ The term

⁶⁰ See F&LA at 5, MUR 7347 (Conor Lamb); First Gen. Counsel’s Rpt. at 10, MUR 7347 (Conor Lamb, *et al.*).

⁶¹ Compl. at Ex. C.

⁶² See ActBlue Support, <https://support.actblue.com/donors/contributions/are-there-limits-or-minimums-for-how-much-i-can-contribute/> (“We’ve built ActBlue so that each contribution form is preset to accommodate each jurisdiction’s contribution limits”).

⁶³ See Compl. at 2.

1 “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of
2 value made by any person for the purpose of influencing any election to Federal office.”⁶⁴ The
3 phrase “anything of value” includes “all in-kind contributions.”⁶⁵ In-kind contributions include
4 the “provision of any goods or services without charge or at a charge that is less than the usual
5 and normal charge for such goods or services.”⁶⁶ In-kind contributions also include “coordinated
6 expenditures,” that is, expenditures “made by any person in cooperation, consultation or in
7 concert, with, or at the request or suggestion of, a candidate, his [or her] authorized committees,
8 or their agents.”⁶⁷

9 Commission regulations set forth a three-prong test for when a communication is
10 “coordinated” with a candidate, an authorized committee, a political party committee, or agent
11 thereof, and treated as an in-kind contribution: (1) the communication is paid for, partly or
12 entirely, by a person other than the candidate, authorized committee, political party committee,
13 or agent thereof; (2) the communication satisfies at least one of the “content standards” at 11
14 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the “conduct standards” at
15 11 C.F.R. § 109.21(d).⁶⁸ All three prongs must be satisfied for a communication to be

⁶⁴ 52 U.S.C. § 30101(8)(A).

⁶⁵ 11 C.F.R. § 100.52(d)(1).

⁶⁶ *Id.* (listing examples of goods or services, such as securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists).

⁶⁷ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20.

⁶⁸ The six types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

1 considered coordinated under the regulations. Agreement or formal collaboration is not required
2 for a communication to be a coordinated communication.⁶⁹

3 Here, CGVA's emails do not satisfy the content prong of the Commission's coordinated
4 communication regulation.⁷⁰ For a communication to satisfy the content prong, it must, among
5 other things, be either an "electioneering communication" or a "public communication."⁷¹ Email
6 is specifically exempted from the definition of electioneering communication and the term
7 "public communication" excludes communications over the Internet, except for communications
8 placed for a fee on another person's website, digital device, application, or advertising
9 platform.⁷² Thus, CGVA's emails are neither electioneering communications nor public
10 communications.⁷³ Because CGA's emails soliciting contributions to Demings do not satisfy the
11 content prong, they cannot be coordinated communications under 11 C.F.R. § 109.21.⁷⁴ In turn,
12 because CGVA's email solicitations are not coordinated communications, their costs are not
13 treated as in-kind contributions.

14 Accordingly, we recommend that the Commission find no reason to believe that CGVA

⁶⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002) ("The [Commission's] regulations shall not require agreement or formal collaboration to establish coordination."); 11 C.F.R. § 109.21(e) ("Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication . . . is not required for a communication to be a coordinated communication.").

⁷⁰ If CGVA was acting as Demings' agent, its payment for the emails would not satisfy the regulation's payment prong. *See* 11 C.F.R. § 109.20 (coordination regulations' reference to candidate, candidate's authorized committee, or a political party committee "includes an agent thereof"); *id.* at § 109.21(a)(1) (requiring communication be paid for by a person *other than* the candidate, candidate's authorized committee, or political party committee).

⁷¹ *See* 11 C.F.R. § 109.21(c). The term "electioneering communication" excludes communications over the Internet. *Id.* § 100.29(c)(1).

⁷² *Id.* §§ 100.26, 100.29(c); *see also* Internet Communication Disclaimers and Definition of "Public Communication, 87 Fed. Reg. 77467, 77471 (Dec. 19, 2022) (amending definition of "public communication").

⁷³ *Id.*

⁷⁴ *See* F&LA at 12-13, MUR 7788 (Pallotta for Congress, *et al.*) (electronic mail fails content prong of 11 C.F.R. § 109.21).

1 made, and the Committee and Demings knowingly accepted, prohibited or excessive in-kind
 2 contributions, in violation of 52 U.S.C. §§ 30116(a), (f), and 11 C.F.R. §§ 110.1(b)(1), 110.9, in
 3 connection with CGVA's email communications.

4 **C. CGVA's Email List is Something of Value and the Commission Should Find**
 5 **Reason to Believe that CGVA's Use of its List to Solicit Contributions on**
 6 **Behalf of Val Demings is an Unreported Excessive Contribution**

7 "Membership lists" and "mailing lists" are examples of goods that are in-kind
 8 contributions (*i.e.*, something of value) when provided to a candidate or political committee
 9 without charge or at less than their usual and normal charge.⁷⁵ The difference between the usual
 10 and normal charge for goods or services at the time of the contribution and the amount actually
 11 charged is treated as an in-kind contribution.⁷⁶

12 In determining whether there is an in-kind contribution, the Commission has considered
 13 whether the provision of an item would "relieve" the campaign of an expense it "would
 14 otherwise incur" to obtain a similar benefit.⁷⁷ The possibility that the *use* of a mailing list may
 15 constitute an in-kind contribution has arisen in the enforcement context, most frequently
 16 involving corporate facilitation.⁷⁸ The Commission has determined that prohibited corporate

⁷⁵ 11 C.F.R. § 100.52(d)(1); *see also* Advisory Opinion 1979-18 (FEC's Former Employees Committee) (political committee would make an in-kind contribution to a candidate if it provided its contributor list to the candidate at less than the usual and normal charge); F&LA at 7, MUR 5181 (Spirit of America PAC) (reason to believe the provision of a mailing list to a candidate in exchange for something of lesser value is a contribution); First Gen. Counsel's Rpt. at 5 MUR 5682 (Bachman for Congress, *et al.*) (recommending no reason to believe because no information that Committee did not pay normal and usual charge for mailing list).

⁷⁶ 11 C.F.R. § 100.52(d)(1). The "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services means "the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered." *Id.* The Commission has opined that entities may establish the "usual and normal charge" of goods or services by reference to their "fair market price." *See* Advisory Op. 2010-30 at 3 (Citizens United).

⁷⁷ *See* F&LA at 8 n.33, MURs 7838, 7849, 7852, and 7856 (Expensify, Inc., *et al.*) (citing Advisory Opinion 2017-06 (Stein and Gottlieb) at 5).

⁷⁸ *See, e.g.*, MUR 7856 (Expensify, Inc.); MUR 6127 (Obama Victory Fund, *et al.*); MUR 3023 (Yates for Congress Committee).

1 facilitation may result if a corporation uses its list of customers, who are not within the restricted
2 class, to solicit contributions or distribute invitations to fundraisers without advance payment for
3 the fair market value of the list.⁷⁹ If solicitations occur following consultation with the candidate
4 the candidate may be deemed to have knowingly accepted a prohibited in-kind contribution.⁸⁰

5 Most recently, in MUR 7856 (Expensify, Inc.) the Commission addressed the issue of
6 whether the use of a company's customer list by its CEO to send an email supporting Joe Biden
7 resulted in an in-kind contribution to the Biden campaign. The Commission found no reason to
8 believe because there were "no facts suggesting any such interaction [*i.e.*, interactions meeting
9 the conduct standards at 11 C.F.R. § 109.21] between Respondents and the Biden campaign."⁸¹

10 But the issue of whether the use of a list can constitute an in-kind contribution is not
11 limited to cases involving corporations. For example, MUR 6270 involved allegations that the
12 Committee to Re-Elect Ron Paul's use of *its* email list to send five emails soliciting contributions
13 to Rand Paul for U.S. Senate was an excessive in-kind contribution.⁸² The Commission found
14 no reason to believe, noting that both committees reported the use as an in-kind contribution.⁸³

⁷⁹ See 11 C.F.R. § 114.2(f)(2)(i)(C).

⁸⁰ See F&LA at 6, MUR 6127 (Obama Victory Fund, *et al.*) (dismissing where record did not include information that any committee was involved with the emails at issue). In that matter, unlike here, both the DNC and Obama Victory Fund ("OVF") respondents argued that they did not knowingly accept an in-kind contribution because they did not request or have any prior knowledge that the fundraising emails would be sent. See OVF Response at 3, MUR 6127 (Obama Victory Fund, *et al.*). The record also indicated that OVF reimbursed the sender for his use of the email list. See *id.* at 3. In another matter, three commissioners disagreed with OGC's reason to believe recommendation where a corporation used its email list to solicit contributions to a federal candidate because, unlike the record here, "the solicitation was not part of any general, coordinated fundraising effort." Statement of Reasons, Comm'rs Hunter, McGahn & Petersen at 3-5, MUR 6211 (Armenian National Committee of America, *et al.*).

⁸¹ F&LA at 8, MURs 7838, 7849, 7852, and 7856 (Expensify, Inc., *et al.*).

⁸² See Complaint at 3, MUR 6270 (Committee to Re-Elect Ron Paul, *et al.*).

⁸³ See F&LA at 4, MUR 6270 (Committee to Re-Elect Ron Paul, *et al.*). The use of the Committee to Re-Elect Ron Paul's email list was valued at \$550 each for the October 1, 2009 and December 12, 2009 rentals, with an outstanding debt of \$4,600 owed for additional rentals. See *id.*

1 Here, the Committee paid thousands of dollars for “list rental,” “list acquisition,” “list
2 purchase,” and “fundraising database” but did not report making any disbursements to CGVA or
3 Action Network (the firm used to send the emails attached to the Complaint).⁸⁴ Because CGVA,
4 acting as Demings’s agent or otherwise on her behalf, reportedly used an email list compiled by
5 Terry McAuliffe’s 2021 gubernatorial campaign to solicit contributions to Demings, and because
6 there is no evidence that the Committee paid CGVA or Action Network for its use, it appears
7 that CGVA relieved the Demings campaign of an expense it would otherwise incur to obtain a
8 similar benefit.⁸⁵ Therefore, it appears CGVA made, and Demings and the Committee
9 knowingly accepted, an in-kind contribution.

10 Contributions from organizations that are not political committees under the Act must
11 comply with the prohibitions and limitations of the Act.⁸⁶ Here, it appears that the fair market
12 value of CGVA’s apparent in-kind contribution was well in excess of the applicable limitations.
13 The email list used was reportedly amassed by the McAuliffe campaign during his race for
14 Virginia governor when it received more than \$86 million in contributions during and
15 immediately following that election.⁸⁷ The reported list of contributors making direct individual
16 contributions over \$100 to Terry for Virginia (McAuliffe’s 2021 campaign committee) between

⁸⁴ *FEC Disbursements: Filtered Results*, FEC.GOV,
https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00590489 (last visited Aug. 24,
2022 (disclosing disbursements by Val Demings for U.S. Senate).

⁸⁵ Lachlan Markay, *McAuliffe provides cash boost to 2022 Dems*, AXIOS (Mar. 28, 2022),
<https://www.axios.com/2022/03/28/mcauliffe-provides-cash-boost-to-2022-dems> (“A source familiar with the
McAuliffe fundraising operation told Axios it’s using the email list amassed during last year’s campaign.”).
Milled.com shows emails from both Terry for Virginia and Common Good Virginia until November 2021, and then
only emails from Common Good Virginia which suggests Axios’ report is accurate. *See* Terry McAuliffe.com,
MILLED, (Oct. 23, 2021), <https://milled.com/terry-mcauliffe/>.

⁸⁶ *See* 11 C.F.R. § 102.5(b).

⁸⁷ *Supra* note 84; Reports for Terry for Virginia (CC-20-00332), Virginia State Board of Elections,
<https://cfreports.elections.virginia.gov/Committee/Index/b2702e01-58a0-4427-9df8-a0b0799a4a6c>.

1 October 1, 2021 and October 21, 2021 alone runs over 2,900 pages.⁸⁸ It therefore is clear that
 2 the value of CGVA's email list is significant.⁸⁹ Finally, CGVA's list appears to have been used
 3 repeatedly to solicit contributions on Demings' behalf for over a year. The more the list was
 4 used without charge, the greater the benefit provided to Demings.⁹⁰

5 The Responses contend that CGVA received equal consideration for its solicitation on
 6 behalf of the Demings campaign: the use of Demings's name and likeness to solicit for itself.⁹¹
 7 But the Responses do not provide any information regarding the value of Demings's name and
 8 likeness or explain how it can be considered equal in value. This is significant because in similar
 9 circumstances the Commission has investigated whether such an exchange was of equal value.⁹²
 10 Given the likely significant value of McAuliffe's email list, the repeated use of the list to solicit

⁸⁸ See Reports for Terry for Virginia (CC-20-00332) (Reporting Period 10/1/2021 to 10/21/2021), Schedule A: Direct Contributions Over \$100, Virginia State Board of Elections, <https://cfreports.elections.virginia.gov/Report/ScheduleA/262144>.

⁸⁹ See Advisory Opinion 2022-12 at 5 (Ready for Ron) (“As ‘the product of time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars’ to compile, a political committee’s list of persons sympathetic to its cause is among ‘its most valuable assets.’”) (quoting *FEC v. Int’l Funding Inst.*, 969 F.2d 1110, 1116 (D.C. Cir. 1992) (en banc) (internal citations omitted)); see also Notice of Proposed Rulemaking, Mailings Lists of Political Committees, 68 Fed. Reg. 52,531, 51,531 (Sept. 4, 2003) (“One of the principal assets of many political committees is their mailing list.”).

⁹⁰ See Certification at ¶1-2, MUR 5396 (Bauer for President 2000, Inc., *et al.*) (approving conciliation agreements in matter involving unequal exchange of donor lists where OGC’s recommended penalty took into consideration length of time each list was used); Gen. Counsel’s Rpt. #2 at 5, MUR 5396 (Bauer for President 2000, Inc., *et al.*) (“we recognize that, in some instances, the difference in length of time [each list was used] could impact valuation”); Gen Counsel’s Rpt. # 4 at 14, MUR 5181 (Spirit of America) (“If an exchange of one-time use of a list in exchange for a signature was potentially a contribution in [MURs 4382/4401], the size of the contribution would be much larger in this matter, where Mr. Ashcroft received rights to unlimited use of the PAC’s mailing lists . . .”).

⁹¹ Committee Resp. at 3-4; CGVA Resp. at 3. It appears that this argument is directed at addressing the value of the email communications themselves and not the value of any email list. Nevertheless, our analysis addresses the possibility that the Responses intended their argument to encompass the value of the email list.

⁹² See Gen. Counsel’s Brief at 26, MUR 5181 (Spirit of America PAC, *et al.*) (reasoning that the “[Candidate] received far more from the PAC in the form of the mailing lists than he gave to the PAC in the form of the use of his name and likeness” and drawing contrast with MUR 4382/4401, in which candidate signed letters for organization and in exchange received one-time use of the list of persons who responded to those letters).

1 for Demings, and the lack of evidence with respect to the value of Demings's name and likeness,
2 the record at this stage fails to demonstrate that the exchange was of equal value.

3 For these reasons we recommend that the Commission find reason to believe that CGVA
4 violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive
5 contribution. We also recommend that the Commission find reason to believe that Demings and
6 the Committee violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting an
7 excessive contribution. Finally, we recommend that the Commission find reason to believe that
8 the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.13(a) by failing to report an
9 in-kind contribution.

10 **D. If the Commission Concludes that CGVA Was Not Acting as Demings's Agent,**
11 **It Should Find Reason to Believe that CGVA Failed to Report Independent**
12 **Expenditures**

13 For the reasons set forth above, the available information indicates that CGVA was acting
14 as Demings's agent.⁹³ In the event that the Commission determines that the available
15 information insufficiently establishes such agency, then the Commission should also consider
16 whether CGVA failed to report independent expenditures.

17 Every person that is not a political committee that makes independent expenditures that
18 aggregate more than \$250 during a calendar year with respect to a given election must file a
19 quarterly report using Form 5.⁹⁴ All persons, including political committees, that make or
20 contract to make independent expenditures, aggregating \$10,000 or more at any time during a
21 calendar year — up to and including the 20th day before an election — must disclose the activity

⁹³ See *supra* pp. 8-11.

⁹⁴ 52 U.S.C. § 30104(c)(1); 11 C.F.R. § 109.10.

1 within 48 hours.⁹⁵ Any independent expenditures aggregating \$1,000 or more and made after the
 2 20th day but more than 24 hours before the day of an election must be reported, and the report
 3 must be received within 24 hours after the expenditure is made.⁹⁶

4 An “independent expenditure” means “an expenditure by a person for a communication
 5 expressly advocating the election or defeat of a clearly identified candidate that is not made in
 6 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a
 7 candidate’s authorized committee, or their agents, or a political party committee or its agents.”⁹⁷
 8 “Clearly identified” includes, among other things, a candidate’s name and photograph.⁹⁸ A
 9 communication is “made in cooperation, consultation, or concert with, or at the request or
 10 suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political
 11 party committee or its agents’ if it is a coordinated communication under 11 C.F.R. § 109.21 or a
 12 party coordinated communication under 11 C.F.R. § 109.37.”⁹⁹

13 The Commission has stated that “exhortations to contribute time or money to a candidate
 14 . . . fall within the revised definition of express advocacy.”¹⁰⁰ Accordingly, payments for such
 15 communications are independent expenditures, provided they do not meet the Commission’s
 16 definition of a coordinated communication or a party coordinated communication.¹⁰¹ Here,

⁹⁵ 11 C.F.R. § 104.4(b).

⁹⁶ *Id.* at § 104.4(c); 104.5(g).

⁹⁷ *Id.* at § 100.16.

⁹⁸ *Id.* at § 100.17

⁹⁹ *Id.* at § 100.16.

¹⁰⁰ *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35294 (July 6, 1995); *see also* *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (“[A]s the *Buckley* Court recognized . . . express advocacy also includes verbs that that exhort one to campaign for, or contribute to, a clearly identified candidate.”).

¹⁰¹ *See* 11 C.F.R. § 100.16 (referencing 11 C.F.R. §§ 109.21, 109.37). While CGVA’s emails are exempt from the definition of “public communication,” and thus the provisions of the Act incorporating that term would not

1 CGVA emails cannot be coordinated communications because they do not satisfy the content
2 prong of 11 C.F.R. § 109.21,¹⁰² and although CGVA acknowledges that it sent the
3 communications on behalf of Demings, it is possible that, contrary to the available information,
4 CGVA was not acting as her agent.¹⁰³

5 CGVA has not filed any independent expenditure reports with the Commission despite
6 sending numerous emails soliciting contributions for federal candidates.¹⁰⁴ While the
7 Commission has recognized that “there is virtually no cost associated with sending e-mail
8 communications, even thousands of emails to thousands of recipients,” that does not appear to be
9 the case here.¹⁰⁵ According to its disclosure reports filed with Virginia State Board of Elections,
10 CGVA paid tens of thousands of dollars to email marketing firms in 2021 and 2022, such as
11 Action Network (the firm used to send the emails attached to the Complaint).¹⁰⁶ Therefore,
12 assuming CGVA was acting “for the benefit of” Demings but not as her agent,¹⁰⁷ it appears
13 CGVA violated 52 U.S.C. § 30104(c) by making in excess of \$250 in independent expenditures
14 without filing independent expenditure reports with the Commission.¹⁰⁸ Because it appears that

apply, *see* Internet Communications, 71 Fed. Reg. 18589, 18591-92, 18596- 97 (Apr. 12, 2006), the Act and Commission regulations do not limit the definitions of “expenditure” or “independent expenditure” to “public communications.” *See* 52 U.S.C. §§ 30101(9)(A), 30101(17); 11 C.F.R. §§ 100.16, 100.111; *see also* F&LA at 1 n. 1, MUR 6173 (Population Research Institute, Inc.).

¹⁰² *Supra* pp.15-18.

¹⁰³ *See supra* pp. 8-11.

¹⁰⁴ *See supra* at pp. 4-6.

¹⁰⁵ Internet Communications, 71 Fed. Reg. at 18596.

¹⁰⁶ *See* Common Good Virginia (PAC-19-00762), Reporting Period: 01/01/2022 to 03/31/2022, <https://cfreports.elections.virginia.gov/Report/Index/281881> (disclosing \$41,708.50 paid to NGP VAN for “database services”); Common Good Virginia (PAC-19-00762), Reporting Period: 10/01/2021 to 12/31/2021, <https://cfreports.elections.virginia.gov/Report/Index/275754> (disclosing \$20,027.26 paid to Action Network for “online services” in December 2021).

¹⁰⁷ *See supra* note 41 (discussing plain meaning of “on behalf of”).

¹⁰⁸ *See* F&LA at 5, MUR 6795 (CREW) (dismissing because of cost of mass email did *not* appear to trigger \$250 independent expenditure reporting threshold).

1 CGVA was acting as Demings's agent, we recommend that the Commission take no action at
2 this time with respect to this allegation.¹⁰⁹

3 **IV. PROPOSED INVESTIGATION**

4 We propose an investigation that would focus on confirming or disproving the elements
5 of an excessive contribution under 52 U.S.C. §§ 30116(a)(1)(A), 30116(f), namely, that the
6 amount of the in-kind contribution exceeded applicable contribution limits and that the recipient
7 candidate/committee knowingly accepted the in-kind contribution. In this particular context
8 involving the use of email lists, that effort would consist of (1) confirming that CGVA used the
9 email list compiled by McAuliffe's 2021 gubernatorial campaign in making the solicitations;
10 (2) clarifying Demings's role in the solicitations CGVA made on her behalf; (3) determining the
11 usual and normal market price for the use of the email list; and (4) determining whether CGVA
12 received fair market value from the Demings campaign in exchange for its use of the email list
13 on her behalf. The proposed investigation would also determine the exact cost of CGVA's email
14 solicitations in support of federal candidates and may reveal information about whether CGVA
15 was acting as Demings's agent.

16 Although we plan to first seek the information through voluntary means, we request that
17 the Commission authorize the use of compulsory process, including the issuance of appropriate
18 interrogatories, document subpoenas, and deposition subpoenas, as necessary.

19 **V. RECOMMENDATIONS**

20 1. Dismiss, pursuant to the Commission's prosecutorial discretion, the allegation
21 that Common Good Virginia and Lillie Louise Lucas in her official capacity as
22 treasurer, Val Demings for U.S. Senate and Lauren Decot Lee in her official

¹⁰⁹ We recommend that the Commission put CGVA on notice that the proposed investigation will address this issue by including the discussion of independent expenditures in its factual and legal analysis for CGVA. Should the proposed investigation uncover evidence that CGVA violated 52 U.S.C. § 30104(c), we will make the appropriate recommendations.

1 capacity as treasurer, and Val Demings violated 52 U.S.C. § 30125(e)(1)(A) and
2 11 C.F.R. § 300.61;

- 3
- 4 2. Find no reason to believe that Common Good Virginia and Lillie Louise Lucas in
5 her official capacity as treasurer made, and that Val Demings and Val Demings
6 for U.S. Senate and Lauren Decot Lee in her official capacity as treasurer
7 knowingly accepted, prohibited or excessive in-kind contributions, in violation of
8 52 U.S.C. §§ 30116(a), (f), and 11 C.F.R. §§ 110.1(b)(1), 110.9, in the form of
9 email communications;
- 10
- 11 3. Find reason to believe that Common Good Virginia and Lillie Louise Lucas in her
12 official capacity as treasurer, violated 52 U.S.C. § 30116(a)(1) and 11 C.F.R. §
13 110.1(b)(1) by making an excessive contribution by using its email list on behalf
14 of Val Demings;
- 15
- 16 4. Find reason to believe that Val Demings violated 52 U.S.C. § 30116(f) and 11
17 C.F.R. § 110.9 by knowingly accepting an excessive contribution in the form of
18 the value of Common Good Virginia's use of an email list on Demings' behalf at
19 no charge or less than the usual and normal charge;
- 20
- 21 5. Find reason to believe that Val Demings for U.S. Senate and Lauren Decot Lee in
22 her official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30116(f) and
23 11 C.F.R. § 110.9 by knowingly accepting and failing to report an excessive
24 contribution in the form of the value of Common Good Virginia's use of an email
25 list on Demings' behalf at no charge or less than the usual and normal charge;
- 26
- 27 6. Take no action at this time with respect to the possibility that Common Good
28 Virginia violated 52 U.S.C. § 30104(c)(1), (2), (g) and 11 C.F.R. § 109.10 by
29 failing to report independent expenditures;
- 30
- 31 7. Authorize the use of compulsory process;
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- 33 8. Approve the attached Factual and Legal Analyses; and
- 34
- 35 9. Approve the appropriate letters.
- 36
- 37

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Lisa J. Stevenson
Acting General Counsel

March 8, 2023
Date

Charles Kitcher
Charles Kitcher
Associate General Counsel for Enforcement

Peter G. Blumberg
Peter G. Blumberg
Assistant General Counsel

Christopher S. Curran
Christopher S. Curran
Attorney

Attachments

1. CGVA's Emails and ActBlue Contribution Form

EXHIBIT A

----- Forwarded message -----

From: Val Demings < >
Date: Sun, Oct 17, 2021 at 1:06 PM
Subject: it could go permanently RED
To:

[REDACTED]

Hi, friend. I'm sorry for popping into your inbox like this – but I'm leaning on my strongest supporters because **Republicans are trying to PERMANENTLY keep Florida red and flip the Senate.**

[REDACTED]

I'm fighting to defeat Marco Rubio and defend our Democratic majority in the Senate – but I just found out that the Republican National Committee is investing at least \$10 MILLION in on-the-ground organizers to keep Florida RED for decades. I can't bear the thought.

I'll give it to you straight, friend: GOP leaders are saying that registering 60,000 more Republican voters could

hand Florida to the GOP *permanently*. I'm not giving up on Florida – but with Republicans pouring money into this race, I need to make critical investments right now. And I cannot afford to make those investments if I miss my critical \$50,000 grassroots fundraising goal tonight.



I can't thank you enough for your support.

Congresswoman Val Demings

[DONATE »](#)

Paid for by Common Good Virginia

Sent via [redacted], To update your email address, change your name or address, or to stop receiving emails from Terry McAuliffe, please [redacted]

||

EXHIBIT B

----- Forwarded message -----
From: Val Demings < >
Date: Wed, Oct 20, 2021 at 10:38 AM
Subject: Marco Rubio is attacking me right now
To:



Marco Rubio is attacking me, team.



First in a primetime interview with Fox News host Sean Hannity *and now* on Twitter, Rubio is taking pages out of his idol Donald Trump's playbook: Divisive rhetoric. Misrepresentations about me. Far-right talking points. He even

said he'd "absolutely" welcome the twice-impeached former president on the campaign trail.

This is what we're up against, team, and it's only the beginning. The worst part is that with Senate control on the line, the full force of the GOP establishment and their dark money allies will pour millions into Florida to prop up Marco Rubio, and Trump will be fanning the flames every step of the way.

That's why we've got to build a grassroots movement that can fight back, here and now, and all the way to the finish line. But we're still falling short of the number of donors we'd hoped to have at this point.

Thanks for stepping up and having my back from the very beginning, team. I have so much faith in this team. Together, we can deliver better leadership for Floridians and defend our majority in the Senate.

Val Demings

[DONATE »](#)

Paid for by Common Good Virginia

Sent via . To update your email address, change your name or address, or to stop receiving emails from Terry McAuliffe, please:

EXHIBIT C

From: Val Demings <info@mcauliffeoffice.org>
Date: October 23, 2021 at 10:32:01 AM EDT
To:
Subject: it very well could go permanently RED
Reply-To: info@mcauliffeoffice.org

Image removed by sender.

Hi, friend. I'm sorry for popping into your inbox like this – but I'm leaning on my strongest supporters because **Republicans are trying to PERMANENTLY keep Florida red and flip the Senate.**



I'm fighting to defeat Marco Rubio and defend our Democratic majority in the Senate – but I just found out that the Republican National Committee is investing at least \$10 MILLION in on-the-ground organizers to keep Florida RED for decades. I can't bear the thought.

I'll give it to you straight, friend: GOP leaders are saying that registering 60,000 more Republican voters could hand Florida to the GOP *permanently*. I'm not giving up on Florida – but with Republicans pouring money into this race, I need to make critical investments right now. And I cannot afford to make those investments if I miss my critical \$50,000 grassroots fundraising goal tonight.

So I have to ask you humbly and directly because outlets like CNN say my race could decide Senate control: will you split a donation of \$25 or more between Common Good VA and my campaign to help me win in Florida and defeat Marco Rubio? I'm still short of my \$50,000

midnight goal, so contributing whatever amount
you can will really help my campaign right now.

Donate \$25

Donate \$50

Donate \$100

Donate other

I can't thank you enough for your support.

Congresswoman Val Demings

DONATE »

Paid for by Common Good Virginia

Sent via [ActionNetwork.com](#). To update your email address, change your name or address, or
to stop receiving emails from Terry McAuliffe, please [click here](#).

EXHIBIT D

10/28/21, 3:12 PM

Split a contribution between Val Demings and Common Good — Donate via ActBlue



Split a contribution between Val Demings and Common Good

Val Demings is running against Marco Rubio for the U.S. Senate seat in Florida. Rush a contribution right now to be split between Val Demings and Common Good.

Common Good Virginia is committed to supporting progressive candidates in the Commonwealth and around the country in 2021 and beyond. Your support is critical to stopping Trumpism and ensuring progressives win up and down the ballot.

Choose an amount to split:

2 RECIPIENTS

| | |
|--|--------------------------|
| <p> Your contribution will be split evenly between Val Demings and Common Good VA.</p> | <p>Customize amounts</p> |
|--|--------------------------|

\$10

\$25

\$50

\$100

\$250

\$1,000

\$2,500

\$

https://secure.actblue.com/donate/cgva_2021_VD?refcode=20211023_VD_F_B17&amount=25&link_id=2&refcodeEmailReferrer=email_1332867&can_id=e09dd9... 1/3

10/28/21, 3:12 PM

Split a contribution between Val Demings and Common Good — Donate via ActBlue

Make it monthly!**Yes, count me in!****No, donate once****Checkout****👉 Have an ActBlue Express account? [Sign in to give faster.](#)****paypal****Continue with credit or debit****Contribution rules**

1. I am a U.S. citizen or lawfully admitted permanent resident (i.e., green card holder).
2. This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution.
3. I am at least eighteen years old.
4. I am not a federal contractor.
5. I am making this contribution with my own personal credit card and not with a corporate or business credit card or a card issued to another person.
6. Virginia: This contribution is made from my own funds or the funds of an authorizing corporation or other entity, and the funds are not being provided by any other person or entity.

By providing your mobile phone number you consent to receive recurring updates from Val Demings for U.S. Senate, including by automated text message. Txt HELP for help, STOP to end. Msg & Data rates may apply. Privacy Policy & Terms of Service.
Only individuals who are American citizens or permanent resident aliens that reside in the United States may contribute. Only corporations who are incorporated in the United States, who utilize U.S. proceeds for the contribution, and for which the decision to contribute was made by an American citizen or permanent resident alien may contribute.

By making a contribution you certify that you have read these notices and that this contribution complies with the law.

Contributions to Common Good Virginia are not tax deductible.

Paid for by Common Good Virginia.

https://secure.actblue.com/donate/cgva_2021_VD?refcode=20211023_VD_F_B17&amount=25&link_id=2&refcodeEmailReferrer=email_1332867&can_id=e09dd9... 2/3

10/28/21, 3:12 PM

Split a contribution between Val Demings and Common Good — Donate via ActBlue

7. Common Good Virginia is only asking for donations of up to \$2,900 per election from individuals and for donations of up to \$5,000 per election from federal political committees.

Common Good Virginia is not asking for donations in excess of these amounts or for donations from corporations, labor organizations, foreign nationals, federal contractors, or national banks, and will not accept any such contributions here.

8. Contributions or gifts to Common Good Virginia and Val Demings for U.S. Senate are not tax deductible. Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in an election cycle.

By proceeding with this transaction, you agree to ActBlue's terms & conditions.

https://secure.actblue.com/donate/cgva_2021_VD?refcode=20211023_VD_F_B17&amount=25&link_id=2&refcodeEmailReferrer=email_1332867&can_id=e09dd9... 3/3