



FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC AND FIRST CLASS MAIL

Justin Clark
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October 11, 2023

RE: MURs 7968, 7969

Dear Mr. Clark:

On March 23, 2022, March 24, 2022, and August 10, 2022, the Federal Election Commission notified your clients, Donald J. Trump, Save America and Bradley T. Crate in his official capacity as treasurer ("Save America"), Trump Save America Joint Fundraising Committee f/k/a Save America Joint Fundraising Committee and Bradley T. Crate in his official capacity as treasurer ("Save America JFC"), and Make America Great Again PAC and Bradley T. Crate in his official capacity as treasurer ("MAGA PAC"), of two Complaints indicating violations of the Federal Election Campaign Act of 1971, as amended. Copies of the Complaints were forwarded to your clients at those times.

The Commission considered the Complaints, but was equally divided on whether to find reason to believe or no reason to believe the allegations that (1) Donald J. Trump violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file a Statement of Candidacy and designate a principal campaign committee; (2) Save America and Save America JFC made excessive contributions in violation of 52 U.S.C. § 30116(a)(2)(A) and 11 C.F.R. § 110.2(b); and (3) Donald J. Trump knowingly accepted excessive contributions in violation of 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9. The Commission was also equally divided on whether to find no reason to believe that MAGA PAC violated 52 U.S.C. § 30116(a)(2)(A) and 11 C.F.R. § 110.2(b) by making excessive contributions to Donald J. Trump. Accordingly, the Commission voted to close the file in this matter on October 5, 2023. Attached is a Statement of Reasons from Vice Chairman Sean J. Cooksey and Commissioners Allen J. Dickerson and James E. "Trey" Trainor, III, explaining their decision in these matters. Additional Statements of Reasons may follow.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

If you have any questions, please contact Justine A. di Giovanni, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Mark Allen".

Mark Allen
Assistant General Counsel



FEDERAL ELECTION COMMISSION
 1050 FIRST STREET, N.E.
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)	
)	
Joseph R. Biden, Jr., <i>et al.</i>)	MURs 7931/8059
)	
Donald J. Trump, <i>et al.</i>)	MURs 7968/7969
)	

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

Introduction

The Federal Election Campaign Act of 1971 (“FECA” or the “Act”), as amended, governs the financial conduct of candidates for federal office. Once a person becomes a federal candidate, as defined by the Act and Commission regulations,¹ he or she must create a committee to handle the campaign’s money, appoint a treasurer to oversee that committee, abide by the Act’s source-and-amount limits on contributions, and comply with the Act’s disclosure requirements.²

President Joseph R. Biden, Jr. and former President Donald J. Trump are both candidates for election in 2024 and have both submitted the required statements of candidacy and organization. Both were also the subject of complaints alleging that they were, in fact, candidates much earlier than is reflected on those official filings. We disagreed and voted to find no reason to believe that either candidate violated the law.³

¹ 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3.

² 52 U.S.C. §§ 30101(2), 30102, 30104, 30125.

³ We voted to find no reason to believe as to all allegations against all Respondents. In doing so, we voted to dismiss the complaints. 52 U.S.C. § 30109(a)(1).

I. Legal standard

a. “Candidacy” under the Federal Election Campaign Act is determined solely by evaluating one’s contributions and expenditures.

The Act explains that a candidate is “an individual who seeks nomination for election, or election, to Federal office.”⁴ And it gives the standard for determining whether someone is, for legal purposes, a candidate within the meaning of the Act: “[A]n individual shall be deemed to seek nomination for election or election” if he or she, directly or through an authorized agent, either has “received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.”⁵ The Commission’s regulations make it equally clear that a person becomes a candidate only upon receiving \$5,000 in contributions or making \$5,000 in expenditures, either directly or through authorized representatives.⁶

Here we come to our first disagreement with the Office of General Counsel’s (“OGC”) legal recommendations. Rather than focusing on whether there is reason to believe that \$5,000 of contributions were raised or \$5,000 of expenditures made, OGC directs the bulk of its analysis toward determining whether President Biden or Mr. Trump had “decide[d] to run for office.”⁷ To determine whether either man had made this decision, OGC looked to “Commission regulations [that] set forth a non-exhaustive set of examples of activities that indicate that an individual has decided to become a candidate.”⁸ Those factors include, in relevant part, making public statements referring to the individual as a candidate, raising “funds in excess of what could reasonably be expected to be used for exploratory activities or undertak[ing] activity designed to amass campaign funds,” and “conducting activities...over a protracted period of time.”⁹

This approach suffers from two fatal problems.

⁴ 52 U.S.C. § 30101(2).

⁵ 52 U.S.C. § 30101(2)(A)–(B).

⁶ 11 C.F.R. § 100.3(a)(1)–(4).

⁷ First Gen’l Counsel’s Report at 21–37, MURs 7968/7960 (Donald J. Trump, *et al*), Oct. 13, 2022 (“Trump FGCR”); First Gen’l Counsel’s Report at 21–29, 43, MURs 7931/8059 (Biden for President, *et al.*), May 3, 2023 (“Biden FGCR”).

⁸ Trump FGCR at 22 (citing 11 C.F.R. § 100.72(b)) (cleaned up); *see also* Biden FGCR at 21 (same).

⁹ Trump FGCR at 22; Biden FGCR at 21–22.

First, OGC’s analysis of whether someone has “decided to become a candidate” is premised on 11 C.F.R. § 100.72¹⁰—the Commission’s testing-the-waters regulation. But that is not the operative regulation. Instead, the binding candidate definition is set forth at 11 C.F.R. § 100.3, which contains no such reference to a candidate’s personal decision to run. To the contrary, it clearly states that “an individual becomes a candidate for federal office” when he or she (1) receives contributions or makes expenditures of more than \$5,000, (2) gives consent to another person to do the same, or (3) fails to disavow third-party efforts to receive \$5,000 in contributions or make \$5,000 in expenditures on his or her behalf.¹¹ In other words, as one would expect of campaign finance law, the definition of candidacy turns on funds, not intent.

Reliance on 11 C.F.R. § 100.72 is misplaced in another way. By its plain terms, it applies only to “[f]unds received *solely* for the purpose of determining whether an individual should become a candidate.”¹² It is true that this regulatory safe harbor “does not apply to funds received for activities indicating that an individual has decided to become a candidate for a particular office,”¹³ and that the regulation lays out potential ways of determining whether “an individual has decided to become a candidate.”¹⁴ But that is not relevant to whether an individual is actually a candidate—a question resolved under 11 C.F.R. § 100.3.¹⁵ The analysis of the candidate’s personal “decision” affects only whether the narrow category of funds governed by the testing-the-waters regulation can qualify as a contribution. Here, the complaints made no allegation concerning testing-the-waters activity, and the exception—and thus 11 C.F.R. § 100.72 in its entirety—is “not at issue here.”¹⁶

¹⁰ There is a parallel provision governing expenditures at 11 C.F.R. § 100.131. That provision substitutes the phrase “payments for” in place of “funds received,” but is otherwise essentially identical to 11 C.F.R. § 100.72. The analysis accordingly applies equally to both provisions.

¹¹ 11 C.F.R. § 100.3(a)(1)–(4).

¹² 11 C.F.R. § 100.72(a) (emphasis added).

¹³ 11 C.F.R. § 100.72(b). Even here, the regulation speaks of “funds” used for particular “activities.” The candidate’s free-standing intentions are irrelevant except in so far as (1) funds are received solely for testing-the-waters activity, and (2) the recipient spends those funds on activities tending to show that he or she is, in fact, a candidate. For this reason, there is no tension between the testing-the-waters regulation and the actual definition of “candidate” turning on contributions and expenditures. Section 100.72 is merely a safe harbor for funds that would otherwise qualify as contributions for purposes of § 100.3(a).

¹⁴ 11 C.F.R. § 100.72(b).

¹⁵ This conclusion also follows from the Commission’s rule governing statements of candidacy. That regulation, 11 C.F.R. § 100.1(a), requires a candidate to designate a principal campaign committee “[w]ithin 15 days after becoming a candidate under 11 CFR 100.3.”

¹⁶ Trump FGCR at 46.

While we disagree with OGC’s analysis, we note that the confusion is not of OGC’s making and that it has been asked to advise the Commission against a contradictory and confused backdrop. The Commission has not always spoken clearly on this point, and prior decisions can be read to support OGC’s position.¹⁷ As these Matters show, the need for clarification in this area of the law has become pronounced. If the Commission has previously spoken with less clarity than is needed, that does not excuse it from faithfully applying the plain text of the law here.

Consequently, we are left with the text of the Act and 11 C.F.R. § 100.3. While an individual may voluntarily submit to the Commission’s jurisdiction by filing a statement of candidacy before crossing the \$5,000 threshold, the Commission is powerless to “deem” an individual a candidate until that person has either raised \$5,000 in contributions or made \$5,000 in expenditures.¹⁸

b. The definitions of “contributions” and “expenditures” are subject to the same limitations in the context of candidacy as elsewhere in the Act.

Federal law defines “contribution” to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹⁹ It similarly defines an “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or

¹⁷ See e.g. Factual & Legal Analysis at 10, MUR 6999 (David Larson), Nov. 2, 2016 (a candidate “may have decided to run for office four month earlier than [a fundraising] invitation” by “link[ing] to [a] report on his Twitter feed without correction” which quoted the respondent “as saying ‘it’s time to do it again’ and ‘we’ll win this time’”); Statement of Reasons of Vice Chairman Petersen and Comm’rs Hunter, McGahn, and Weintraub at 2, MUR 5934 (Fred Thompson), Mar. 10, 2009 (carefully parsing public statements made by former Senator Thompson to see if he had become a candidate under FECA); Advisory Op. 2015-09 at 5 (Senate Majority PAC) (“[A]n individual who has raised or spent more than \$5000 on ‘testing-the-waters’ activities would become a candidate when he or she makes a private determination that he or she will run for federal office.”); Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 6, MUR 7354 (McDaniel), Aug. 3, 2021 (“To qualify as a candidate under the Act, an individual or their agent must receive contributions or make expenditures exceeding \$5,000, or the individual must make the private decision to run for federal office and spend more than \$5,000 on testing-the-waters activity.”).

¹⁸ See, e.g., Statement of Reasons of Chairman Petersen and Comm’rs Hunter, McGahn, Walther, and Weintraub, MUR 5908 (Duncan Hunter), Aug. 23, 2010 (dismissing, as an exercise of prosecutorial discretion, allegations of late-filed statement of candidacy because, based upon date on which \$5,000 threshold was crossed, Rep. Hunter’s statement was at most three days late).

¹⁹ 52 U.S.C. § 30101(8)(A).

anything of value, made by any person for the purpose of influencing any election for Federal office.”²⁰

Both terms, however, are subject to the limiting constructions imposed upon them nearly a half century ago in *Buckley v. Valeo*.²¹ Where the Supreme Court has provided such a “gloss,” it must “govern our application of the Act.”²²

The *Buckley* Court determined that the “critical phrase ‘for the purpose of...influencing’” presented issues of “ambiguity...that pose[d] constitutional problems.”²³ Noting that violations of FECA potentially incur criminal penalties, the Court described its concern that “fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights,” and expressed an obligation—which we share—to construe the statute, where possible, to “avoid the shoals of vagueness.”²⁴

The Court observed that the vagueness inquiry posed “fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution,” namely “[f]unds provided to a candidate,”²⁵ whether “made directly or indirectly.”²⁶ “So defined, ‘contributions’ have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.”²⁷

But expenditures posed a thornier problem. Unlike “contributions,” they were not bounded by a “general understanding.”²⁸ Merely seeking to “influence” an election result could “encompass[] both issue discussion and advocacy of a political result.”²⁹

²⁰ 52 U.S.C. § 30101(9)(A).

²¹ 424 U.S. 1 (1976) (*per curiam*).

²² Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 6, MURs 7645/7663/7705 (Trump), Aug. 31, 2022 (cleaned up).

²³ *Buckley*, 424 U.S. at 77.

²⁴ *Id.* at 77–78; see also *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972) (evaluating the vagueness issues posed by FECA by applying “fundamental principles of freedom of expression in our democratic form of government”).

²⁵ *Buckley*, 424 U.S. at 23, n.24.

²⁶ *Id.* at 78. In so doing, the Court explicitly recognized the FEC’s ability to regulate in-kind contributions, such as the gift of computers or office furniture, to a candidate committee.

²⁷ *Id.*

²⁸ *Id.* at 23, n.24.

²⁹ *Id.* at 79.

For individuals that have already qualified as candidates, or organizations the “major purpose of which is the nomination or election of a candidate,” this was less of a risk, because “[e]xpenditures of candidates and of ‘political committees’ so construed ...are, by definition, campaign related.”³⁰ But where “the maker of the expenditure” was “an individual other than a candidate,” the Court narrowed the term “expenditure” further, to “precisely [] that spending that is unambiguously related to the campaign of a particular federal candidate,” such as “communications that expressly advocate the election or defeat of a clearly identified candidate.”³¹

The Court was not called upon to address the definitions of “contribution” and “expenditure” in the context of the Act’s definition of “candidate.” Nor has OGC pointed to any case law, from the Supreme Court or otherwise, on that point. But the Court’s discussion is instructive, and the Commission has a duty to give it effect.³²

To begin, the Court’s discussion of “candidates” poses a risk of circularity. Because funds given to a candidate or to an organization controlled by a candidate constitute “contributions,” and because a candidate is defined in part by making “contributions,” there is a potential chicken-and-the-egg problem: Which came first, the candidacy or the contribution? Indeed, that appears to be the problem OGC attempted to solve by asserting that a person “must have made th[e] determination” to run for federal office before the money they raise and spend can qualify as a contribution or expenditure.³³

The trouble with OGC’s interpretation is that while it may be true as far as it goes—contributions and expenditures must be directed toward a candidacy—that does not mean the inverse is true. The fact that a person has decided to run for office does not mean that all funds they receive are “contributions” or that all funds they expend are “expenditures.” To take only the most obvious example, a candidate may receive and spend outside income for his or her personal use, subject to certain rules, none of which is considered a “contribution” or “expenditure” under the Act.³⁴ So the definitions of “contribution” and “expenditure” must turn on the nature of the funds themselves. The alternative is a hopelessly circular standard: a candidate is defined

³⁰ *Id.*

³¹ *Id.* at 79–80.

³² “Administrative agencies,” such as the Commission, “are creatures of statute...[which] possess only the authority that Congress has provided.” *Nat’l Fed’n of Indep. Business v. U.S. Dep’t of Labor*, 595 U.S. 109, 117 (2022); *cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting the “basic constitutional proposition[]...that ‘it is emphatically the province and duty of the judicial department to say what the law is’”) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (punctuation altered).

³³ Biden FGCR at 21, n.82; Trump FGCR at 21, n.80.

³⁴ *Cf.* 52 U.S.C. § 30114(b)(2).

by certain financial transactions, but those transactions are defined by the person's status as a candidate.

So “contributions” and “expenditures” must be judged objectively, based upon their own characteristics, and not by someone's intent to run for office. This leads us to the second interpretive difficulty. Not just any contribution or expenditure can lead to candidate status because a person may receive contributions or make expenditures completely unrelated to his or her candidacy. Every treasurer of every nonconnected political committee receives contributions and makes expenditures. No one asserts that they are therefore candidates.³⁵

Having determined that the “contributions” and “expenditures” discussed in the Act's definition of “candidate” must be judged based upon their own characteristics, the question becomes what those characteristics are. Here the Supreme Court has shown the way, in two senses.

Most broadly, it has explained that the Commission may not adopt a test based upon “intent-and-effect” to distinguish between expenditures advocating an electoral result and other political speech (which may not be constitutionally regulated by the Commission).³⁶ That rule flows directly from the *Buckley* Court's vagueness concerns and applies generally to the Commission's efforts to regulate in this constitutionally sensitive area.³⁷ As the Court has repeatedly explained, “[a]n intent-based standard ‘blankets with uncertainty whatever may be said,’ and ‘offers no security for free

³⁵ In one of these Matters, OGC contended that a person running a leadership PAC might meet the definition of “candidate” because such groups “receive[d] contributions and ma[de] expenditures on his behalf.” Trump FGCR at 38–39; *id.* at 38, n.166. But leadership PACs are separate organizations recognized by the statute, 52 U.S.C. § 30104(i)(8)(B), which are routinely run by former officeholders who are plainly not candidates. Some leadership PACs even continue operation after the officeholder-founder has died. It would be news to these leadership PAC founders to learn that contributions to a leadership PAC are evidence of candidacy.

³⁶ *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 467 (2007) (“*WRTL I*”) (“[T]his Court in *Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates.”). The same necessarily is true for a contribution, which is simply money donated to a political committee to make expenditures. *Buckley*, 424 U.S. at 79 (noting that all activities of a political committee or candidate committee “are, by definition campaign related”); Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 3, MUR 7181 (Independent Women's Voice), May 10, 2021 (“After all, the Act has always defined political committees solely in monetary terms, as groups receiving ‘contributions’ and making ‘expenditures’”).

³⁷ *WRTL II*, 551 U.S. at 467; *see also* Statement of Reasons of Vice Chairman McGahn and Comm'rs Hunter and Peterson at 8, n.29, MUR 5878 (Ariz. State Dem. Cent. Comm., *et al.*), Sept. 19, 2013 (applying *WRTL II* in analyzing whether the spending of so-called Levin funds were permissible and noting that the Supreme Court had “reject[ed] an ‘intent-and-effect’ test for evaluating political speech”).

discussion.”³⁸ That concern was borne out by OGC’s emphasis on parsing various public statements for hints that a candidacy may be in the offing.³⁹

More concretely, having told the Commission the standard to avoid, the Supreme Court also provides the standard to apply. In evaluating the terms “contribution” and “expenditure” with an eye toward avoiding unconstitutional vagueness, the *Buckley* Court routinely explained that both terms must be directed toward funds that are “by definition” or “unambiguously campaign related.”⁴⁰ This approach eliminates both problems already identified. By requiring the “contributions” and “expenditures” referenced in the definition of “candidate” to themselves be directed specifically toward a particular candidate’s campaign, the Commission avoids the problem of circularity inherent in judging contributions and expenditures with reference to a person’s intent to run. And by limiting itself to contributions and expenditures unambiguously related to a *particular* campaign, the Commission avoids the line-drawing problems inherent in treating anyone who handles money for a political committee as a potential candidate.

Accordingly, for purposes of calculating whether an individual has crossed the \$5,000 threshold for candidacy, “contributions” and “expenditures” are those funds unambiguously raised or spent for the campaign for federal office of that particular individual.⁴¹

II. There was insufficient evidence to find reason to believe that President Biden violated the Federal Election Campaign Act.

The relevant question at this stage of the proceedings, then, is a straightforward one: Was there reason to believe that, prior to his announcement, President Biden, directly or through his agents, received \$5,000 in contributions to advance a 2024 candidacy or made \$5,000 in expenditures unambiguously related to his 2024 campaign? We concluded that there was not.

³⁸ *WRTL II*, 551 U.S. at 468 (quoting *Buckley*, 424 U.S. at 43).

³⁹ Biden FGCR at 24–29; Trump FGCR at 23–30.

⁴⁰ *Buckley*, 424 U.S. at 79–80 (“This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.”); *see also, e.g., N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 n.4 (10th Cir. 2010) (“[F]or a regulation of campaign related speech to be constitutional it must be unambiguously campaign related”); *Nat’l Comm. for Impeachment*, 469 F.2d at 1139–40 (“The Government says it is enough that the advertisement was published and sought money, since publication alone is said to have been an ‘obvious’ political activity that was intended to further the candidacies of the Congressmen” mentioned, but “the words of the Act seem to indicate that Congress[s] concern was primarily with groups organized or at least authorized by a particular candidate and whose principal focus is a specific campaign.”).

⁴¹ *Buckley*, 424 U.S. at 79–80.

a. OGC generally recommended against finding reason-to-believe the Biden Respondents violated the Act.

In 2020, Joseph R. Biden, Jr. successfully ran for President of the United States. As required by law, he formed a candidate committee (Biden for President) to promote that candidacy.⁴² During the 2020 election, Biden for President also entered into a joint fundraising arrangement with the Democratic National Committee and the federal committees of several state Democratic parties by means of a joint fundraising committee, the “Biden Victory Fund.”⁴³ Rather than winding down and terminating those entities after the 2020 election, President Biden chose to leave both his campaign committee and its participation in the joint fundraising arrangement intact.

“Between November 4, 2020 and March 31, 2023, [Biden for President] reported \$134,048,699.80 in total receipts,” including over \$100 million “in contributions during the 2020 Post-General reporting period.”⁴⁴ During that same time period, Biden for President made over a quarter-billion dollars in expenditures, “all designated as for the 2020 election.”⁴⁵

As for the Biden Victory Fund, “[s]ince the 2020 general election, [it] has reported receiving \$73,740,037.29 in total receipts, of which \$73,172,580.88 was reported as contributions,” but it “state[d] that all contributions” the Victory Fund received for Biden for President “were made to it on or before Election Day, and that no contributions received after Election Day have been transferred to” Biden for President.⁴⁶ During that same time period, the Victory Fund “also reported spending \$78,027,083.84.”⁴⁷

While most of OGC’s analysis was directed toward the legally irrelevant question whether the President had demonstrated the requisite mental state regarding his reelection,⁴⁸ OGC also reviewed a total universe of transactions well

⁴² Biden FGCR at 12.

⁴³ *Id.* at 14–16.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 13.

⁴⁶ *Id.* at 14–15.

⁴⁷ *Id.* at 15.

⁴⁸ *Id.* at 5–11, 21–29. This included reviewing milquetoast statements of general support from the Secretary of Transportation, *id.* at 9, 25, and how the President of the United States reportedly reacted to a toast delivered by the French President during a state dinner. *Id.* at 11, 26.

north of three-quarters of a billion dollars and was unable to identify any funds expended to advance a 2024 Biden reelection.⁴⁹

Looking at the post-Election Day financial universe of the Biden for President committee and the Victory Fund, OGC required only three paragraphs to find that there was no reason to believe that Biden for President accepted \$5,000 in contributions, and similarly swift analysis concluded that the Victory Fund had not crossed the threshold as to either contributions or expenditures.⁵⁰ In making these determinations, OGC correctly credited the rebuttals proffered by the respondent committees.⁵¹ Unlike other administrative agencies,⁵² the Commission is not permitted to rely upon “mere ‘official curiosity’...as the basis for FEC investigations,” which the Act conditions upon a finding of reason to believe.⁵³

On the expenditure side, however, OGC believed it was “murky [] whether Biden passed the \$5,000 threshold triggering status as a candidate via funds spent by the Biden [for President] Committee in support of his 2024 candidacy prior to his formal campaign announcement.”⁵⁴ Out of nearly \$300 million in spending, OGC found three buckets suspicious: (1) “\$478,158.91 in disbursements to NGP Van Inc. for [a] ‘database subscription,’ and ‘processing fees,’” (2) “\$5,083,361.49 to Upland

⁴⁹ *Id.* at 21–43.

⁵⁰ *Id.* at 39–43.

⁵¹ *Id.* at 40 (“Although the Complaints raise questions as to the amount of contributions accepted by the Biden Committee and the Victory Fund after the 2020 general election, the Respondents credibly rebut the allegations that those post-election contributions were attributable to a 2024 Biden candidacy. The [Biden for President] Committee does not appear to have solicited or accepted contributions for Biden’s reelection campaign prior to Biden’s formal campaign announcement.”).

In making its determinations that the Victory Fund did not make any expenditures, OGC suggested that there was reason to believe that a \$100,000 payment by the Fund in 2021 to Vox Media, LLC was for services rendered in August of 2020, and should have been reported as a “debt or obligation to the vendor of greater than \$500 that was outstanding for over sixty days.” *Id.* at 48. We voted against OGC’s reason-to-believe recommendation on this allegation because the pursuit of further action against the Victory Fund for a payment already made and reported, albeit untimely, was not a good use of the agency’s scarce enforcement resources. *Heckler v. Chaney*, 470 U.S. 831,831–35 (1985).

⁵² As the U.S. Court of Appeals for the D.C. Circuit has observed, the FEC operates in a uniquely sensitive constitutional space as the only “federal administrative agenc[y]” which “has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes.” *Am. Fed’n of Labor-Congress of Indus. Orgs.*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm’n v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (“*Machinists*”).

⁵³ *Machinists*, 655 F.2d at 388 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), and contrasting the FEC’s “scope of investigative authority” against that of “the FTC, SEC, or the Administrator of the Department of Labor’s Wage and Hour Division”).

⁵⁴ Biden FGCR at 32.

Software Inc. for ‘software,’” and (3) “\$2,019,395.00 to Action Squared Inc. for ‘text message/email outreach’ and ‘text message outreach.’”⁵⁵

OGC ultimately determined there was nothing nefarious about the Biden for President’s post-Election Day disbursements to NGP Van Inc., noting that former President Barack Obama’s committee made similar disbursements to that same vendor following the 2012 Presidential election.⁵⁶ It also concluded that spending to Action Squared Inc. may have been for elections taking place in 2021 or 2022, but it was not “associated with Biden’s 2024 candidacy.”⁵⁷

OGC believed, however, that the Upland bucket of spending, totaling just over \$5 million, may have been expenditures for the 2024 race. OGC recommended that the FEC take no action, however, until it authorized an investigation into Biden for President’s alleged misreporting of the purpose of these disbursements, believing that a subsequent investigation “might shed light on the Complaints’ late-candidacy allegations.”⁵⁸

b. Contrary to OGC’s recommendation, we conclude there was no reason to believe that the Biden for President committee misreported the purpose of its spending to Upland Software.

OGC’s purpose-description recommendation concerns spending specifically addressed in the complaint, and the record before the Commission includes the committee’s refutation.⁵⁹ The committee explicitly stated those payments were “related to [the 2020 campaign’s] ownership of a SMS short code” and as such reflected “costs necessary to protect [its] intellectual property.”⁶⁰ This was supported by the sworn statement of Taryn Vogel, who “provide[d] compliance consulting services for” the committee.⁶¹ Ms. Vogel asserted that “[a]ll expenditures by [the committee] since Election Day 2020 have been for activity related to the 2020 election or expenses of winding down its 2020 activities.”⁶² Moreover, she swore that the

⁵⁵ *Id.* at 13–14.

⁵⁶ *Id.* at 33.

⁵⁷ *Id.* at 38–39.

⁵⁸ *Id.* at 38. OGC specifically concluded that it was “plausible” that the \$5 million in “disbursements” to Upland “were for the purpose of advancing Biden’s 2024 re[-]election campaign.” *Id.* at 37. OGC was correct not to recommend finding reason to believe on a merely “plausible” set of circumstances.

⁵⁹ This is not always the case. See *infra* at 16–18 (discussing Facebook ads produced by Save America).

⁶⁰ MUR 7931 Biden for President Resp. at 2, 5.

⁶¹ Vogel Aff. at 1, ¶ 1.

⁶² *Id.* at ¶ 6.

committee “made disbursements to Upland Software Inc. in June 2021 to maintain ownership of [the committee’s] short code phone number, used for communications with” Biden for President.⁶³

“At the [reason-to-believe] stage,’ when speculation that is ‘not premised on whistleblower testimony or any other sworn statement from someone with direct, personal knowledge’ is ‘pitched against a contradictory sworn statement from someone with personal knowledge of the matter at hand, we must credit the sworn statement.”⁶⁴ Here, the Commission has a sworn statement from the individual at the Biden for President committee responsible for “reviewing receipts and disbursements to ensure they are accurately and appropriately recorded, and ensuring receipts are permissible and in compliance with regulations.”⁶⁵

Nevertheless, OGC speculated, on the basis of its “online review of short code vendors,” that such a product would more likely have been a “subscription service provided at a set rate, rather than charges varying by amount and time.”⁶⁶ OGC conceded, however, that Ms. Vogel’s “declaration’s statement may accurately describe” reality and that “it is...possible that maintenance of the SMS short code...was necessary as a communications tool to further appropriate wind-down activities” from the 2020 election.⁶⁷

Just as “something outweighs nothing every time,”⁶⁸ a sworn statement based upon personal knowledge outweighs mere allegations or speculation based upon internet searches. We accordingly voted against OGC’s reason-to-believe recommendation concerning misreported purpose descriptions. We also rejected OGC’s effort to bootstrap the very thin argument for reason to believe on these purpose descriptions into authorization for an investigation into the candidacy allegations against President Biden. As OGC correctly found, and as already discussed, there was no evidence supporting reason to believe on those allegations and thus no legal basis to undertake an investigation supplementing OGC’s existing analysis.

⁶³ *Id.* at ¶ 8.

⁶⁴ Statement of Reasons of Chairman Dickerson and Comm’r Trainor at 3, MUR 7535 (Leah for Senate), Mar. 28, 2022.

⁶⁵ Vogel Aff. at 1, ¶ 1.

⁶⁶ Biden FGCR at 35.

⁶⁷ *Id.* at 36.

⁶⁸ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) (ellipses omitted) (quoting *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)).

Accordingly, we found no reason to believe that the Biden Respondents had violated the Act.

III. There was insufficient evidence to find reason to believe that former President Trump violated the Federal Election Campaign Act.

The legal standard applicable to Mr. Trump was precisely the same as that applicable to President Biden. Was there reason to believe that, prior to his announcement, Mr. Trump, directly or through his agents, received \$5,000 in contributions to advance a 2024 candidacy or made \$5,000 in expenditures unambiguously related to his 2024 campaign? We again concluded that there was not.

As in the Biden Matters, OGC expended significant time and resources evaluating whether Mr. Trump had formed a private determination to run for reelection in 2024.⁶⁹ As discussed above, this was unnecessary, as the answer is irrelevant. The question was whether OGC could show reason to believe that there were \$5,000 in contributions or expenditures, unambiguously related to Trump's 2024 candidacy, that were received or made in advance of Mr. Trump's submission of a statement of candidacy with the FEC on November 15, 2022.⁷⁰

Like President Biden, Mr. Trump chose not to terminate his 2020 campaign committee after the 2020 election. Rather, he “converted [it] to an unauthorized, multicandidate committee and renamed” it the Make America Great Again (“MAGA”) PAC.⁷¹ While he was an officeholder, Mr. Trump also established a leadership PAC, Save America. Save America and MAGA PAC have entered into a joint fundraising relationship through the Save America Joint Fundraising Committee (“JFC”).⁷²

Much of OGC's legal analysis is directed toward showing that MAGA PAC or the Save America committees either “amass[ed] funds” or “conduct[ed] activities...over a protracted period of time” within the meaning of the Commission's

⁶⁹ Trump FGCR at 4–9, 21–30.

⁷⁰ FEC Form 2, Donald J. Trump, Nov. 15, 2022. OGC's FGCR in this Matter circulated before Mr. Trump filed his candidacy, but a Supplement acknowledging that event was circulated to the Commission on August 22, 2023. Supplement to First Gen'l Counsel's Report at 3, MURs 7968/7960 (Donald J. Trump, *et al*), Dec. 5, 2022 (“Trump SFGCR”) (“The \$5,000 threshold was met in these Matters months before Trump filed his November 2022 Statement of Candidacy”) (capitalization altered for clarity).

⁷¹ Trump FGCR at 10. Upon announcing his candidacy, Mr. Trump designated a different entity as his 2024 campaign committee. FEC Form 2, Donald J. Trump, Nov. 15, 2022.

⁷² Trump FGCR at 10–12.

testing-the-waters rules.⁷³ But, as explained above, these categories are not relevant here. The question before the Commission was not whether Trump had fallen out of the testing-the-waters rules, because he had never fallen into them—a point on which OGC agrees, not least because Trump categorically denied that he was taking advantage of the testing-the-waters safe harbor.⁷⁴

In any event, time has not borne out OGC’s amassing-funds theory. OGC posited that because “Trump has raised more than \$100 million through the Save America Committees,” and that Save America had far more cash-on-hand than most other leadership PACs, “the available information [] indicate[d] that Trump [was] amassing funds for his 2024 candidacy.”⁷⁵ Subsequent to the October 2022 circulation of the First General Counsel’s Report in these Matters, however, Save America spent much of those funds, including over \$21 million on legal fees unrelated to the 2024 election.⁷⁶ Save America most recently reported just over \$3.65 million cash-on-hand.⁷⁷

OGC’s second testing-the-waters argument was grounded on Trump’s regular appearances at rallies sponsored by Save America, under the theory that Trump was conducting testing-the-waters activity over an impermissibly “protracted period of time.”⁷⁸ Once again, Trump was never testing the waters, and the Save America rallies were never “solely” for the purpose of determining the viability of a 2024 presidential candidacy.⁷⁹ Nor were these rallies themselves expenditures or in-kind contributions to an alleged 2024 campaign. As the responses noted, the former president “is a leading political figure with a history of engaging in political activism and frequently engages in activities, such as public speaking, for reasons other than

⁷³ *Id.* at 31–37.

⁷⁴ *Id.* at 31.

⁷⁵ *Id.*

⁷⁶ *See* Save Am. Mid-Year 2023 Report.

⁷⁷ *Id.*

⁷⁸ Trump FGCR at 37 (citation omitted); *id.* at 36–37 (“Trump has made public statements indicating that he has determined to run for president over a period spanning more than 15 months. Further, between June 2021, just days before he publicly stated that he had made this decision, and October 2022, Trump has been the keynote speaker at no fewer than 24 rallies...”). As we noted above, putting aside that OGC’s theory incorrectly expands the scope of the testing-the-waters regulations, this particular test is hopelessly vague and would “dissolve in practical application.” *Buckley*, 424 U.S. at 42.

⁷⁹ OGC notes that at these events Mr. Trump would occasionally muse on running for president in 2024. But those words are not incantations that transmogrified Save America’s rallies, which often were explicitly held for the purpose of promoting candidates that Save America supported in the 2022 midterms, into activities conducted “solely” to determinate a candidacy, 11 C.F.R. § 100.131, or which were “by definition” or “unambiguously [2024] campaign related.” *Buckley*, 424 U.S. at 79–80.

a potential political campaign.”⁸⁰ We decline OGC’s invitation to find a violation of the Commission’s candidacy rules purely on the basis of a respondent’s public speaking.⁸¹

OGC’s remaining arguments were properly directed to the statute’s \$5,000 trigger, rather than the Commission’s testing-the-waters regulations. Neither, however, is availing.

First, OGC noted that the Save America committees had raised over \$100 million, which is a lot of money.⁸² But just as with the (much larger) amount raised by the Biden Respondents, the question is not how much money was raised in the abstract, but rather whether the funds were raised and spent *for Mr. Trump’s 2024 campaign*.

Specifically, OGC posited that because Trump maintained a leadership PAC, Save America “receive[d] contributions and ma[de] expenditures on his behalf” in the context of a candidacy,⁸³ and therefore the “more than \$100 million” those entities raised easily clears the \$5,000 contribution threshold.⁸⁴ This analysis misses a step. Contributions raised for a leadership PAC, which was established by Trump when he was an officeholder, are not contributions for a future candidacy. They are contributions raised for a leadership PAC. OGC fails to explain how funds raised for Save America were, in fact, unambiguously connected to Trump’s 2024 campaign. The Commission cannot assume that link without undertaking a sea change in the law whereby funds raised for a leadership PAC are simply transmogrified into contributions to the candidate. There is no basis for doing this in the law, and it would have severely disruptive consequences for leadership PACs generally. It would also make no sense; leadership PACs principally work toward the election of candidates other than their sponsors, and many are maintained by former officeholders who do not run for reelection—and are, in some cases, deceased.⁸⁵

⁸⁰ MUR 7968 Trump Resp. at 2.

⁸¹ U.S. Const. amend. I.

⁸² Trump FGCR at 39–40 (“The Responses argue that Trump has ‘not accepted contributions or made expenditures in excess of \$5,000 for the purpose of supporting an alleged candidacy.’ However, the Save America Committees have done so on his behalf, and have raised more than \$100 million in the process.”).

⁸³ *Id.* at 38–39 & n.166.

⁸⁴ *Id.* at 40 (“These contributions and expenditures...far exceed the \$5,000 threshold triggering candidacy under the Act.”).

⁸⁵ *See supra* at n.35.

The closest OGC comes to linking Save America to unambiguous 2024 election activity is a single Facebook advertisement run by Save America in the spring of 2022. OGC notes that spending on that ad “surpassed \$5,000 in total cost between May 5 and May 11, 2022.”⁸⁶

The advertisement in question shows a picture of Mr. Trump with the overlaid text: “Would you vote for Trump a third time?”⁸⁷ Above the image of Mr. Trump, there is text that says the following:

LIVE POLL[:] Would you vote for President Trump a 3rd Time? President Trump was the greatest President of all time—there is no arguing with that. Team Trump is collecting responses from our best Patriots all around the Country, like YOU. You have 1 minute to submit your answer to our question below. Tell us now: would you vote for President Trump A 3rd Time?⁸⁸

The Facebook ad offers only one option (“Yes”), and “[c]licking on these ads redirects to a page with ‘yes’ or ‘no’ response options, and that requires the user to sign up for text messages ‘from President Trump’ sent by Save America JFC. Submitting the poll response then leads to a WinRed contribution page for Save America JFC.”⁸⁹

There are two problems with relying on this ad. First, there is no question that it post-dates the complaint against Mr. Trump. The Commission may initiate enforcement proceedings either based upon a complaint or “or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities.”⁹⁰ This advertisement cannot meet the first qualification, because it post-dates the complaint and consequently cannot fall within its allegations. Even if we were inclined to expand the scope of complaints to include whatever later information OGC might find in reviewing a matter, we would be mindful of the significant problems of fairness involved in acting on allegations about which the respondent could not possibly be on notice.⁹¹ Nor do we believe that OGC review of

⁸⁶ Trump SFGCR at 5, n.17. This ad was not appended to the complaints against Mr. Trump and was discovered by OGC’s review of the Meta Ad Library prior to any finding of reason to believe. As a result, the Trump Respondents did not have the opportunity, as the Biden Respondents did, to directly address any allegations about this particular communication.

⁸⁷ Trump FGCR at 14.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 52 U.S.C. § 30109(a)(2).

⁹¹ See *Fed. Communications Comm’n v. Fox Television Studios, Inc.*, 567 U.S. 239, 253–54 (2012) (“Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected

information post-dating a complaint, undertaken solely because of that complaint, qualifies as information obtained in the “normal course” of the Commission’s “supervisory responsibilities.”⁹²

More fundamentally, however, it is the complainant’s and Commission’s burden to demonstrate that there is reason to believe that this advertisement was an expenditure.⁹³ Because it is a communicative advertisement, as opposed to money spent, for example, securing a candidate’s ballot access, and because the legal question is whether it was money spent by Save America on Mr. Trump’s behalf to support his 2024 candidacy, the evidence must show it “expressly advocate[s] the election or defeat of a clearly identified candidate.”⁹⁴

A communication is express advocacy when it either (a) uses terminology “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)” or when (b) “[t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and...[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate[s] or encourages some other kind of action.”⁹⁵

This communication, taken in context and as a whole, does not call for the reader to vote for Mr. Trump. Instead, we believe the best reading of the advertisement is as a list-building solicitation. The ad is designed to draw the attention of Trump supporters and obtain their contact information and financial support for Save America. At minimum, the advertisement cannot be express advocacy “when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.”⁹⁶ Others may view the advertisement differently, but the standard is whether the communication “can have no other reasonable meaning” or is “suggestive of only one meaning”—and there are multiple ways to understand this communication.⁹⁷

but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” (citation omitted).

⁹² 52 U.S.C. § 30109(a)(2).

⁹³ *Buckley*, 424 U.S. at 79–80.

⁹⁴ *Id.*

⁹⁵ 11 C.F.R. § 100.22.

⁹⁶ *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987); accord 11 C.F.R. § 100.22(b)(2).

⁹⁷ 11 C.F.R. § 100.22(a) and (b)(1).

Leadership PACs are allowed to fundraise using the likeness and public notoriety of a principal without turning those sponsors into federal candidates.⁹⁸

Accordingly, we determined that there was insufficient evidence that former President Trump had become a federal candidate prior to November 15, 2022, and because OGC’s remaining recommendations all hinged on a reason-to-believe finding on that question, we voted against OGC’s enforcement recommendations in these Matters.

Conclusion

We end where we began. The greatest original error of FECA was not First Amendment overbreadth. It was vagueness. The Commission—time and time again—has run afoul of the basic obligation to regulate with precision and ensure that its rules place ordinary people on notice of their legal obligations.⁹⁹ “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney...before discussing the most salient political issues of our day.”¹⁰⁰

Here, the beginning and the bulk of OGC’s analysis was directed toward evaluating the statements—that is, the speech—of President Biden and former President Trump to determine whether they had decided to run for president. The First General Counsel Reports in both cases even evaluate the speech of others, such as the Secretary of Transportation or even “unnamed Democrats,” toward that end.¹⁰¹ The Supreme Court long ago explained the problem with such an approach:

No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied

⁹⁸ *Contra* Trump SFGCR at 8 (“In short, Save America’s spending on Facebook advertisements asking whether individuals would “vote for Trump” were either expenditures or in-kind contributions because they were made by an entity under Trump’s control to promote a candidacy Trump had already decided many months earlier to pursue.”).

⁹⁹ *Buckley*, 424 U.S. at 43; *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010) (“Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated.”).

¹⁰⁰ *Citizens United*, 558 U.S. at 324.

¹⁰¹ Biden FGCR at 24.

understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.¹⁰²

And the Court warned the Commission that such a rule “blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.”¹⁰³

We see that borne out here. The record before the Commission is replete with examples of both the sitting President and Mr. Trump, a major figure in the opposition party, contorting their messages to fit to what they have been told is the Commission’s rule. The fine difference between the President saying he “will” run versus “plans to run;”¹⁰⁴ the snap decision to raise a glass, or not, when the French President toasts a 2024 campaign;¹⁰⁵ or even the choice not to answer a question because, in the speaker’s view, “the campaign finance laws are extremely complicated and unbelievably stupid,”¹⁰⁶ cannot form the basis for legal liability.

Thankfully, that is not the Commission’s rule. Ambitious undergraduates and potential major-party nominees alike may take comfort in the fact that FECA and Commission regulations govern spending, not speech. A person becomes a candidate only upon receiving \$5,000 in contributions, or making \$5,000 in expenditures, to advance that individual’s candidacy, regardless of how often he or she expresses interest in seeking office.

Here, there was no reason to believe that either President Biden or former President Trump met that test prior to the formal initiation of their 2024 campaigns. Accordingly, we voted to find no reason to believe that any of the Respondents violated the law.

¹⁰² *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

¹⁰³ *Id.*

¹⁰⁴ Biden FGCR at 27.

¹⁰⁵ *Id.* at 26.

¹⁰⁶ Trump FGCR at 5.



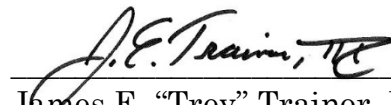
Sean J. Cooksey
Vice Chairman

October 6, 2023
Date



Allen Dickerson
Commissioner

October 6, 2023
Date



James E. "Trey" Trainor, III
Commissioner

October 6, 2023
Date