



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

April 29, 2024

VIA EMAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Brent Owen
Haynes and Boone LLP
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Denver, CO 80202
brent.owen@haynesboone.com

RE: MUR 8017
(Unknown Respondent, *et al.*)

Dear Mr. Owen:

This is in reference to the complaint you filed with the Federal Election Commission (the "Commission") on behalf of Joe O'Dea for Senate, concerning alleged violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). Based on that complaint, on March 26, 2024, the Commission determined to dismiss this matter and voted to close the file, effective April 29, 2024.

Documents related to the case will be placed on the public record today. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter's transmittal are enclosed.

The Act allows a complainant to seek judicial review of the Commission's dismissal of this action within 60 days of the dismissal, which became effective today. *See* 52 U.S.C. § 30109(a)(8).

If you have any questions, please contact Christopher Curran, the attorney assigned to this matter, at (202) 694-1362.

Sincerely,

Lisa J. Stevenson
Acting General Counsel

A handwritten signature in black ink, appearing to read "Aaron Rabinowitz".

BY: Aaron Rabinowitz
Assistant General Counsel

Enclosures



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Unknown Respondents	)	MURs 8017 and 8023
	)	

STATEMENT OF REASONS OF COMMISSIONERS ALLEN J. DICKERSON, DARA LINDENBAUM AND JAMES E. “TREY” TRAINOR, III

The Complaints in these matters allege that Unknown Respondents violated 52 U.S.C. §§ 30104, 30120 by sending mailers containing express advocacy without disclaimers and by failing to report the activity to the Commission.¹ Such alleged violations require the Commission to analyze, *inter alia*, whether the mailers contain express advocacy.² The mailers attached to the MUR 8017 Complaint were difficult to analyze because the mailers appeared to be missing pages and it was not clear which pages constituted the fronts and backs of each mailer.³ Given the demands of a busy enforcement docket, our scarce enforcement resources are better devoted to Complaints that clearly present the facts and violations. We therefore voted to dismiss these matters pursuant to the Commission’s prosecutorial discretion.⁴

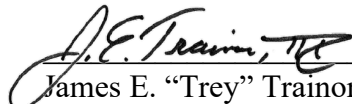
4/22/24
Date


Allen J. Dickerson
Commissioner

4/22/24
Date


Dara Lindenbaum
Commissioner

4/22/24
Date


James E. “Trey” Trainor, III
Commissioner

¹ MUR 8017 Compl. (June 16, 2022); MUR 8023 Compl. (July 8, 2022).

² See 11 C.F.R. § 100.22(b).

³ See MUR 8017 Compl., Exs. 1-5.

⁴ See *Heckler v. Chaney*, 470 U.S. 821 (1985); Certification ¶ 2 (Mar. 29, 2024).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Unknown Respondent(s), *et al.*

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MURs 8017 & 8023

**STATEMENT OF REASONS OF
CHAIRMAN SEAN J. COOKSEY**

In this matter, the Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that unknown respondents failed to include disclaimer statements or file reports in connection with anonymous mailers sent out before Colorado’s 2022 Republican primary for U.S. Senate, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations. OGC further asked the Commission to authorize an investigation of the mailers. Rather than following OGC’s recommendations, I voted to dismiss the case as an exercise of prosecutorial discretion.¹ The following statement explains my reasons for doing so.

I. Factual Background

The Complaints in this matter alleged that a “John Doe Organization” violated the Act and Commission regulations by failing to place disclaimers on six “electioneering communications” mailers referring to candidates in Colorado’s 2022 Republican primary election for U.S. Senate, and by failing to file reports of expenditures made in connection with the mailers, which the Complaint claims were received by “400,000-500,000 voters” in the weeks before the June 28, 2022 primary.² Generally, the mailers were critical of Joe O’Dea, a candidate in the 2022 Republican Senate primary, and they contrasted O’Dea’s positions on various issues with those of his opponent in the race, Ron Hanks.³ Several of the mailers also falsely represented that the Colorado Republican Party had endorsed Hanks.⁴

¹ Certification (Mar. 26, 2024), MURs 8017 & 8023 (Unknown Respondent(s), *et al.*). *See also Heckler v. Cheney*, 470 U.S. 821 (1985).

² *See* Complaint at 3–4 (June 16, 2022), MUR 8017.

³ *See* First General Counsel’s Report at 3–4 (June 16, 2023), MURs 8017 & 8023 (Unknown Respondent(s), *et al.*) (“FGCR”).

⁴ *Id.*

None of the mailers included a disclaimer statement that complied with 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a), though each had the following postmark: “PAID Denver, CO PERMIT NO. 2571.”⁵ The U.S. Postal Service bulk-mail permit number on the mailers belongs to Christian Printers, a commercial printing company based in Des Moines, Iowa.⁶ In its Response, Christian Printers attested that it was only hired to print the mailers, and as a commercial vendor, it was not responsible for ensuring disclaimers were included on them. Christian Printers did not otherwise disclose in its Response who paid for the mailers.⁷ Likewise, OGC’s review of the Commission’s records found no political committees that had reported payments to Christian Printers in the month preceding the 2022 Republican senate primary in Colorado, nor did records show any independent expenditures that were paid to Christian Printers—or independent expenditures for mailers against Joe O’Dea more generally—throughout the 2022 election cycle.⁸

While the Complaints did not present any substantive evidence as to who actually paid for the six mailers, the MUR 8017 Complaint claimed “[o]n information and belief” that “progressive and other democratic-aligned groups, including ProgressNow Colorado,” were behind a “coordinated effort to use false electioneering communications to discredit Joe O’Dea” and “to ensure that a less-electable Republican is nominated for the general election,” including by distributing the anonymous mailers at issue.⁹ However, in a sworn declaration submitted to the Commission, the executive director of ProgressNow Colorado denied that her organization was responsible for or involved with any of the mailers, and the available record offers no other information regarding potential sources for the mailers.¹⁰

In its First General Counsel’s Report, OGC recommended that the Commission find reason to believe that unknown respondents violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11, because the mailers “appear to be public communications that expressly advocate the election or defeat of a Federal Candidate.”¹¹ Similarly, OGC recommended finding reason to believe that unknown respondents failed to report expenditures for the mailers, in violation of 52 U.S.C. § 30104, on the basis that the costs of “each mailer likely exceeded \$250” and thus should have been reported to the Commission either as independent expenditures or as communications paid for by a political committee.¹²

Given the lack of information in the record about the mailers’ source, cost, and dates of distribution, OGC proposed an investigation “to prove or disprove the elements of a violation of

⁵ *Id.* at 4.

⁶ *See* Complaint at 1 (July 8, 2022), MUR 8023 (Unknown Respondent(s), *et al.*).

⁷ Christian Printers Response (Sept. 23, 2022), MURs 8017 & 8023 (Unknown Respondent(s), *et al.*).

⁸ *See* FGCR at 16–17.

⁹ Complaint at 3 (June 16, 2022), MUR 8017. The primary source for these allegations appears to be several news stories describing outside Democratic groups’ plans to influence Colorado’s 2022 Republican senate primary. *See id.*

¹⁰ ProgressNow Colorado Response (May 2, 2023), Declaration of Sara Loflin, MURs 8017 & 8023 (Unknown Respondent(s), *et al.*).

¹¹ FGCR at 14.

¹² *Id.* at 16.

52 U.S.C. §§ 30104(b), (c), and (g) by identifying whether the purchaser is an existing political committee, whether the purchase of the mailers met the Act’s independent expenditure reporting threshold (if not a political committee), and when the purchase(s) should have been reported.”¹³ In OGC’s estimation, “the exact scope of the reporting violations at issue” would likely be determined by examining “contracts, order forms, invoices, payment confirmations, receipts, and communications” held by Christian Printers.¹⁴ OGC asked the Commission to authorize compulsory process, in case the company did not yield this information voluntarily.¹⁵ On March 26, 2024, the Commission declined to follow OGC’s recommendations to find reason to believe with respect to the disclaimer and reporting allegations, and instead voted to dismiss the Complaints and close the file.¹⁶

II. Legal Analysis

I declined to find reason to believe and open an investigation in this case because I concluded that OGC’s proposed investigation—which was needed to identify the source, cost, and distribution dates of the mailers—would have been an imprudent use of Commission resources. Beyond the uncorroborated references to “progressive” and “democratic-aligned groups” in the Complaints, the Commission has no evidence of who sent the mailers or whether that source is an individual, a federal political committee, or some other entity.¹⁷ The only organization named in the Complaints as a possible source for the mailers—ProgressNow Colorado—attested in a sworn declaration that it was not involved with the mailers in any way, and a search of the Commission’s records yielded no relevant information about the mailers.¹⁸ The Response filed by Christian Printers also shed no light on the mailers’ source.¹⁹

While OGC maintained that the “available information suggests that expenditures for each mailer likely exceeded \$250,” there is also nothing in the record that substantiates the actual costs of the mailers or when those costs should have been reported to the Commission, if at all.²⁰ And it is not certain at this point whether these particular mailers even qualified as “mass mailings” subject to 52 U.S.C. § 30120(a)’s disclaimer provisions, since the limited evidence available does not indicate whether more than 500 copies of the mailer were sent out within a 30-day period.²¹

¹³ *Id.* at 20.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Certification (Mar. 26, 2024), MURs 8017 & 8023 (Unknown Respondent(s), *et al.*).

¹⁷ FGCR at 4.

¹⁸ *See* ProgressNow Colorado Response (May 2, 2023), Declaration of Sara Loflin, MURs 8017 & 8023 (Unknown Respondent(s), *et al.*).

¹⁹ Christian Printers Response (Sept. 23, 2022), MURs 8017 & 8023 (Unknown Respondent(s), *et al.*).

²⁰ FGCR at 16.

²¹ The Act and Commission regulations require disclaimer statements to appear on all “public communications” by a political committee, and on all “public communications” by any other person that expressly advocate for or against the election or defeat of a clearly identified candidate. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). A “public communication” includes any “mass mailing,” defined as “a mailing by United States mail

notwithstanding OGC’s contention that the mailers’ “professional appearance” and inclusion of a U.S. Postal Service permit number, along with the high level of voter turnout in the 2022 Colorado elections, were “indicative of a mass mailing.”²²

Recent Commission investigations into similar complaints demonstrate the risks of pursuing resource-intensive investigations that seek to identify unknown persons responsible for political communications. For example, in MURs 7817 and 7822 (Unknown Respondents), the Commission found reason to believe unknown respondents had violated 52 U.S.C. §§ 30120(a) and 30104 in connection with two billboards that advocated for Donald Trump’s reelection in 2020 but did not include legally required disclaimers. OGC’s eighteen-month investigation, however, ultimately revealed the payor for only one of the two billboards.²³ Moreover, OGC found that the two billboards cost only \$3,125 and \$8,775, respectively.²⁴ In light of the low amount in violation, OGC proceeded to recommend that the Commission take no further action and close the case file.²⁵

In MUR 7543 (Jefferson United, Inc.), the Commission found reason to believe that the respondent, a nonprofit 501(c)(4) organization, had neither included a proper disclaimer on an express-advocacy mailer, nor filed a report disclosing expenditures for the mailer. OGC then initiated an investigation for the purpose of determining “the cost of the mailer and the number of times it was sent, the dates it was disseminated, and whether [respondent] sponsored additional communications in the 2018 election cycle.”²⁶ After nearly three years of investigation, OGC found that between 1,500 and 1,800 copies of the mailer were distributed, at a total cost of just \$5,000.²⁷ Again, OGC recommended that the Commission take no action and the close the file upon discovering the low amount in violation.²⁸

Finally, MUR 7537 (Care in Action, Inc., *et al.*) also involved allegations that unknown respondents had sent out several express-advocacy mailers without including disclaimers or reporting the mailers’ costs to the Commission. After two years of investigation, although OGC did identify the organization that was responsible for at least some of the mailers, it nonetheless could find “only limited information” about the mailers’ cost, in part because the respondent organization and various vendors did not cooperate with the investigation or voluntarily turn over relevant information.²⁹ As in MURs 7817 and 7822 and MUR 7543, OGC recommended that the Commission take no further action and close the case.³⁰

or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.” 52 U.S.C. § 30101(23); 11 C.F.R. § 100.27.

²² FGCR at 7.

²³ Second General Counsel’s Report at 2–4 (Dec. 12, 2023), MURs 7817 & 7822 (Unknown Respondents).

²⁴ *Id.*

²⁵ *Id.* at 8.

²⁶ Second General Counsel’s Report at 2 (Dec. 12, 2023), MUR 7543 (Jefferson United, Inc.).

²⁷ *Id.* at 4.

²⁸ *Id.* at 7–8.

²⁹ Second General Counsel’s Report at 8–9 (Dec. 12, 2023), MUR 7537 (Care in Action, Inc., *et al.*).

³⁰ *Id.* at 9.

Given the parallels between this case and those enforcement precedents, I am unwilling to commit Commission resources toward another investigation based on the minimal evidence before me. The same hurdles that hindered OGC's investigations in those earlier matters—including the prospect of seeking information from uncooperative respondents or third-party vendors, piecing together communications' costs and dates from an incomplete factual record, and the reasonable likelihood that a relatively small sum of money is ultimately at issue—exist in this matter, too. Therefore, the better course of action was to dismiss the Complaints as an exercise of prosecutorial discretion, as the Commission has done in the past.³¹

For these reasons, I declined to approve an investigation and instead dismissed the Complaints. This conclusion was separate and apart from the legal question of whether the mailers themselves contained express advocacy, as defined in the Commission's regulations.³²



Sean J. Cooksey
Chairman

April 23, 2024
Date

³¹ See Statement of Reasons of Chair Broussard, Vice Chair Dickerson, and Commissioners Cooksey, Trainor, Walther, and Weintraub (May 28, 2021), MUR 7460 (Fair People for Fair Government) and MURs 7536 & 7551 (Coalition for a Safe Secure America).

³² Were I to consider that question, I would likely conclude that the mailers do not contain express advocacy, as I have done in similar matters. See Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (May 26, 2021), MUR 7460 (Fair People for Fair Government) and MURs 7536 & 7551 (Coalition for a Safe Secure America); Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (October 7, 2021), MUR 7513 (Community Issues Project).