



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

April 15, 2024

VIA EMAIL

Michael E. Toner
Brandis L. Zehr
Wiley Rein LLP
2050 M Street, NW
Washington, DC 20036
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RE: MUR 8071 (NRSC)

Dear Mr. Toner and Ms. Zehr:

On September 26, 2022, the Federal Election Commission (the “Commission”) notified your client, NRSC and Keith Davis in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (“the Act”). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you on your client’s behalf, the Commission, on February 8, 2024, voted to find no reason to believe that the NRSC and Keith Davis in his official capacity as treasurer violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing funds from its legal proceedings account under 52 U.S.C. § 30116(a)(9)(C) to TAG LLC and Simio Cloud for “digital consulting” and “direct mail production,” respectively. Also on that date, there was an insufficient number of votes to find reason to believe that the NRSC and Keith Davis in his official capacity as treasurer violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing funds from its legal proceedings account under 52 U.S.C. § 30116(a)(9)(C) to OnMessage Inc., SRCP Media Inc., and The O’Donnell Group for “media placement,” “media production,” and “media.” On February 27, 2024, the Commission voted to find no reason to believe that the NRSC and Keith Davis in his official capacity as treasurer violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing funds from its legal proceedings account under 52 U.S.C. § 30116(a)(9)(C) to American Rising, LLC for “research.” On March 12, 2024, the Commission voted to close the file effective 30 days after the date the certification of this vote is signed (or on the next business day after the 30th day, if the 30th day falls on a weekend or holiday). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter’s transmittal are enclosed.

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).

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

Sincerely,

Mark Allen

Mark Allen
Assistant General Counsel

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENTS:** NRSC and **MUR: 8071**
5 Keith Davis in his official
6 capacity as treasurer
7

8 **I. INTRODUCTION**

9 The Complaint in this matter alleges that the NRSC and Keith Davis, in his official
10 capacity as treasurer (the “NRSC”), violated the Federal Election Campaign Act of 1971, as
11 amended (the “Act”), by paying for “campaign activities” from its segregated account designated
12 for election recounts and contests and other legal proceedings (“legal proceedings account”).
13 Specifically, the Complaint points to twelve disbursements — nine disbursements for “media
14 placement,” “media production,” “media,” and “direct mail production,” and three disbursements
15 for “digital consulting,” and “research” — that it alleges were for campaign expenses.

16 The NRSC denies the allegations. It argues that the nine disbursements for “media
17 placement,” “media production,” “media,” and “direct mail production” were permissible
18 fundraising expenses, made in the form of TV ads and direct mail, that were allowed to be paid
19 from the NRSC’s legal proceedings account. It also argues that the three disbursements for
20 “digital consulting” and “research” were permissibly paid from that account because those
21 disbursements were for services related to recounts or preparations for potential legal
22 proceedings.

23 For the reasons set forth below Commission finds no reason to believe with respect to the
24 complained-of disbursements for “digital consulting” and “direct mail production.”

1 **II. FACTUAL BACKGROUND**

2 The NRSC is a national committee of the Republican Party.¹ It is “solely devoted to
3 strengthening the Republican Senate Majority and electing Republicans to the United States
4 Senate.”² Following the Consolidated and Further Continuing Appropriations Act, 2015 (the
5 “2015 Appropriations Act”), the NRSC established “[a] separate segregated account . . . which
6 is used to defray expenses incurred with respect to the preparation for and the conduct of election
7 recounts and contests and other legal proceedings.”³

8 **A. NRSC Finances During the 2021-2022 Election Cycle**

9 The Complaint cites a *New York Times* article that reported that the NRSC was short of
10 funds by September 2022.⁴ That article reported that at the start of the 2022 election cycle, the
11 NRSC had raised over \$181 million but by September 2022, weeks before the November 2022
12 midterm elections, it had spent 95% of the funds raised.⁵ In addition to reporting on the overall
13 state of the NRSC’s finances, the *New York Times* reported that the NRSC’s largest expense in

¹ NRSC, Amended Statement of Organization (Nov. 10, 2022), <https://docquery.fec.gov/pdf/540/202211109546748540/202211109546748540.pdf>.

² NRSC, About Us, <https://www.nrsc.org/about-us/> (last visited Oct. 26, 2023).

³ Resp. at 2 (Dec. 21, 2022) (quoting the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2773 (2014)).

⁴ Compl. at 3 n.3 (Sept. 19, 2022) (citing Shane Goldmacher, *How a Record Cash Haul Vanished for Senate Republicans*, N.Y. TIMES (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/us/politics/senate-republican-committee-funds.html>). Other news outlets also reported on the NRSC’s finances leading up to the 2022 midterm elections. See Isaac Aarnsdorf, *‘It’s a rip-off’: GOP spending under fire as Senate hopefuls seek rescue*, WASH. POST (Aug. 16, 2022), <https://www.washingtonpost.com/politics/2022/08/19/gop-senate-rescue-midterms/>; Manu Raju & Alex Rogers, *‘It concerns me a lot’: Republicans anxious about cash-strapped NRSC amid Scott’s feud with McConnell*, CNN POLITICS (Sept. 6, 2022), <https://www.cnn.com/2022/09/06/politics/rick-scott-mitch-mcconnell-republican-senate-fundraising/index.html>; Juliegrace Brufke, *Rick Scott stands by handling of NRSC in memo to donors*, WASH. EXAMINER (Sept. 8, 2022), <https://www.washingtonexaminer.com/news/campaigns/rick-scott-stands-by-handling-nrsc-memo-donors>.

⁵ Goldmacher, *supra* note 4.

1 July 2022, a \$1 million media buy for advertisements, was paid from NRSC’s legal proceedings
 2 account.⁶

3 **B. The Complaint**

4 The Complaint identifies twelve disbursements (*see* Figure 1) which it alleges violated
 5 52 U.S.C. § 30116(f) because they were made from the NRSC’s legal proceedings account but
 6 were for campaign activities and not any election recount, contest, or other legal proceeding.⁷
 7 The purpose descriptions of these disbursements were “media placement,” “media production,”
 8 “media,” “direct mail production,” “digital consulting,” and “research.”⁸ In addition to relying
 9 on the *New York Times* article regarding the NRSC’s funds, the Complaint contends that the
 10 NRSC’s disbursements appear to be campaign expenses because the websites of the various
 11 recipients of the NRSC’s payments (*i.e.*, the vendors) do not show their available services as
 12 including election recount or other legal services.⁹

FIGURE 1 – Disbursements Identified in the MUR 8071 Complaint			
Date	Recipient	Disbursement Description	Amount
1/19/2021	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$7,750.00
1/19/2021	AMERICA RISING LLC	LEGAL PROC - RESEARCH	\$27,709.00
3/26/2021	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$999,982.00
4/7/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$27,650.00
6/23/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$223,978.00
4/22/2022	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$1,067,235.00
5/10/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$19,995.00
5/18/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$11,154.00

⁶ *See id.*

⁷ Compl. at 8.

⁸ *Id.*

⁹ *Id.* at 4 (describing OnMessage Inc.’s website as advertising a variety of “campaign services,” such as “creative,” “digital,” “opinion research,” and “issue advocacy”), 5 (describing services provided by TAG, LLC as offering “consulting and advising,” “digital marketing and fundraising,” and “web design and development,” but “no legal or election recount-related services”), 6 n.15 (noting that “The O’Donnell Group” and “Simio Cloud” do not appear to have websites and that other committees have not reported payments to those vendors as being for legal services, but instead have reported payments for “travel,” “political consulting,” and “fundraising consulting,” and “list rental” or “list acquisition,” respectively).

6/8/2022	SRCP MEDIA INC.	LEGAL PROC - MEDIA PRODUCTION	\$2,618.00
6/8/2022	SIMIO CLOUD	LEGAL PROC - DIRECT MAIL PRODUCTION	\$3,250.00
6/22/2022	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$207,852.00
7/28/2022	ON MESSAGE INC	LEGAL PROC - MEDIA	\$1,006,751.00
		TOTAL	\$3,605,924.00

1 **C. The Response**

2 The NRSC’s Response acknowledges that it used its legal proceedings account to make
 3 the disbursements identified in the Complaint.¹⁰ The NRSC identifies the disbursements for
 4 “media,” “media placement,” “media production,” and “direct mail production,” as being for
 5 eight television advertisements and one mailing. The NRSC contends that it was permitted to
 6 pay for these communications from its legal proceedings account because they were not
 7 campaign expenses. In support of its assertion that the ads were not campaign expenses, the
 8 NRSC relies on what it characterizes as the “framework” established by Advisory Opinion 2022-
 9 21 (DSCC, *et al.*).¹¹ The NRSC views that framework as permitting disbursements from its legal
 10 proceedings account for solicitations to its legal proceedings account, unless the solicitations
 11 qualify as party coordinated communications.¹² The NRSC then concludes that its complained-
 12 of disbursements were not for party coordinated communications and are therefore permissible.¹³

13 The NRSC states that the two disbursements to TAG LLC were for a website that gave
 14 voters information on how to cure ballots after the 2021 U.S. Senate runoff election in Georgia,
 15 and for “digital and communication services rendered” to Doctor Oz for Senate in connection

¹⁰ Resp. at 11, 13 (stating the NRSC’s Legal Proceedings Account “properly paid for” the expenses).

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.*

1 with the 2022 Pennsylvania Republican U.S. Senate primary election recount.¹⁴ The NRSC
2 identifies the disbursement to America Rising LLC as being for research related to potential
3 litigation in connection with the 2021 Georgia runoff election.¹⁵ The NRSC’s Response includes
4 a declaration from its General Counsel attesting to details regarding each of the disbursements at
5 issue,¹⁶ as well as the specific mail piece and scripts and on-screen descriptions of the television
6 ads at issue.¹⁷

7 **III. LEGAL ANALYSIS**

8 The NRSC, as a national committee of a political party, may not solicit, receive, or direct
9 to another person a contribution,¹⁸ donation,¹⁹ or transfer of funds or any other thing of value, or
10 spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements
11 of the Act.²⁰ 52 U.S.C. § 30116(a) sets forth limits on how much a person may contribute to a
12 national committee of a political party.²¹ During the 2022 election cycle, persons could not
13 contribute more than \$36,500 in a calendar year to NRSC,²² except that contributions up to the
14 amount of \$109,500 were permitted to be made to the following two types of accounts:

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Id.* at Ex. A (Declaration of NRSC general counsel Ryan Dollar).

¹⁷ *Id.* at pp. 4-7, Exs. A-J.

¹⁸ The term “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election to Federal office.” 52 U.S.C. § 30101(8)(A).

¹⁹ A “donation” means a “payment, gift, subscription, loan, advance, deposit, or anything of value given to a person, but does not include contributions.” 11 C.F.R. § 300.2(e).

²⁰ 52 U.S.C. § 30125(a)(1); 11 C.F.R. § 300.10(a)(1) and (2); *see also* 11 C.F.R. § 102.5(c) (national committees of a political party “are prohibited from raising and spending non-Federal funds” after December 31, 2002).

²¹ 52 U.S.C. § 30116(a)(1)(B).

²² *Id.* § 30116(a)(1)(B) and 11 C.F.R. § 110.1(c); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021).

1 A separate segregated account of a national committee of a
 2 political party (including a national congressional campaign
 3 committee of a political party) which is *used solely to defray*
 4 *expenses incurred with respect to the construction, purchase,*
 5 *renovation, operation, and furnishing of one or more headquarters*
 6 *buildings of the party . . .*

7 A separate segregated account of a national committee of a
 8 political party (including a national congressional campaign
 9 committee of a political party) which is *used to defray expenses*
 10 *incurred with respect to the preparation for and the conduct of*
 11 *election recounts and contests and other legal proceedings.*²³

12 Section 30116(f) prohibits, among other things, candidates and political committees from
 13 knowingly accepting any contribution or making any expenditure in violation of the limits set
 14 forth in 52 U.S.C. § 30116(a).²⁴ Furthermore, Commission regulations state that “anything of
 15 value made with respect to a recount of the results of a Federal election, or an election contest
 16 concerning a Federal election,” is not a contribution or an expenditure.²⁵

²³ 52 U.S.C. § 30116(a)(9)(B)–(C) (emphases added).

²⁴ *Id.* § 30116(f). The word “knowingly,” as used in section 30116(f), turns on whether the committee had knowledge of the facts that make the conduct unlawful. *See FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1056 n.11 (C.D. Cal. 1999) (“A ‘knowing’ standard, as opposed to a ‘knowing and willful’ one, does not require knowledge that one is violating a law, but merely requires an intent to act.”) (quoting *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D. N.J. 1986)); *see also FEC v. Cal. Med. Ass’n*, 502 F. Supp. 196, 203-04 (N.D. Cal. 1980) (knowledge of the facts making conduct unlawful constitutes a knowing acceptance under the Act). Only one court appears to have ever interpreted “knowingly” as requiring actual knowledge of illegality. *See In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1047 n.3 (D.D.C. 1979). The Commission does not appear to have ever supported that interpretation. *See, e.g.,* F&LA at 4, MUR 6919 (Canseco for Congress, *et al.*) (“The ‘knowing’ acceptance of a contribution requires knowledge of the underlying facts that constitute the prohibited act, but not knowledge that the act itself — such as acceptance of an excessive contribution — is unlawful.”); Gen. Counsel’s Report (“GCR”) at 6 n.5 (Oct. 5, 1995) (recommending Commission apply standard articulated in *Dramesi* for “knowingly accept[ing]” excessive contributions) & Certification (“Cert.”) ¶ 1 (Dec. 6, 1995), MUR 3546 (Clinton for President Comm., *et al.*) (approving OGC’s recommendations); GCR at 3 (July 14, 1978) (recommending *against* applying the criminal law definition of knowingly) & Cert. ¶1 (July 19, 1978) (finding reasonable cause to believe campaign committee knowingly accepted excessive contributions) & Conciliation Agreement ¶ 10, MUR 515 (Comm. of 1976 for Bates for Congress) (in the context of accepting excessive contributions, “the term ‘knowingly accepted’ only implies that Respondent was aware of the facts of the situation and not that Respondent was aware that a violation of the Act had occurred”).

²⁵ 11 C.F.R. §§ 100.91, 100.151.

1 **A. Payments to TAG LLC for “Digital Consulting”**

2 The NRSC identified its January 19, 2021 disbursement to TAG LLC of \$7,750 as being
3 for “the creation of a website that provided voters with information on how to cure their absentee
4 ballots after the January 5, 2021 runoff election.”²⁶ The NRSC argues that in AO 2006-24, the
5 Commission permitted the NRSC’s recount fund to pay for “recount activities,” including
6 “expenses resulting from . . . counting of provisional and absentee ballots” in addition to “post-
7 election . . . administrative-proceeding expenses concerning the casting and counting of ballots
8 during the Federal election.”²⁷ The NRSC appears to be correct that a disbursement for the
9 creation of a website to inform voters how to cure their absentee ballots after a runoff election is
10 similar to “post-election . . . administrative-proceeding expenses concerning the casting and
11 counting of ballots during the Federal election,” which the Commission advised *could* be paid
12 for with recount funds.²⁸

13 TAG’s website advertises that it offers “web design and development” services, and
14 numerous committees have reported disbursements to TAG for “web”-related services, such as
15 “website development and hosting” and “web development/marketing.”²⁹ TAG appears to be a
16 marketing firm, and not an opposition research firm.³⁰ Thus, the available information indicates
17 that the NRSC’s January 19, 2021 disbursement to TAG was for the creation of a website and is

²⁶ Resp. at 12.

²⁷ *Id.*

²⁸ AO 2006-24.

²⁹ TAG Strategies, <https://tagstrategies.co/services/> (“TAG’s in-house web development team produces cutting-edge websites with stable and trusted site hosting. Tailored to your organization and goals, our team designs and creates beautiful and effective custom websites to tell your story and reach your audience.”); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&two_year_transaction_period=2024&min_date=01%2F01%2F2023&max_date=12%2F31%2F2024 (last visited Oct. 26, 2023) (search recipients for “TAG”).

³⁰ *Id.*

1 consistent with the statement in the NRSC’s general counsel’s declaration that the website
2 “provided voters who cast absentee ballots in the January 5, 2021 Georgia U.S. Senate runoff
3 election with information on how to cure their absentee ballots after the runoff election.”³¹

4 With respect to the NRSC’s June 22, 2022 disbursement to TAG of \$207,852, the NRSC
5 states that the disbursement was for “digital and communication services rendered” to Doctor Oz
6 for Senate in connection with the 2022 Pennsylvania Republican Primary recount.³² We have no
7 further information what the NRSC means by “digital and communication services.” Absent
8 additional information, and because TAG appears to be a marketing firm, and not an opposition
9 research firm, the record does not indicate that this disbursement falls outside the scope of
10 52 U.S.C. § 30116(a)(9)(C).

11 **B. Payment to Simio Cloud for “Direct Mail Production”**

12 The NRSC identified its June 8, 2022 disbursement of \$3,250 to Simio Cloud as being
13 for “a direct mail fundraising appeal for the Legal Proceedings Account.”³³ The NRSC also
14 included a copy of the mailing with its Response.³⁴ The mailing clearly requests funds for the
15 NRSC’s legal proceedings account: “I’m asking you to support the NRSC’s Legal Fund today,”
16 “send your most generous gift to the NRSC Legal Fund,” “[y]our generous support of the NRSC
17 Legal Fund.”³⁵ The mailing does not appear to be for any purpose other than raising funds for
18 the NRSC’s legal proceedings account. Accordingly, it appears that the entirety of the direct
19 mailing’s costs may properly be paid from the NRSC’s legal proceedings account.

³¹ Resp. at 12, Ex. A.

³² *Id.* at 3, Ex. A.

³³ *Id.* at 4, Ex. A.

³⁴ *Id.* at Ex. B.

³⁵ *Id.*



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
NRSC and Keith Davis in his official)	MUR 8071
capacity as treasurer)	
)	

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

The Complaint in this matter alleged that the NRSC paid for \$3.6 million of campaign activities from its legal proceedings account in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ This Statement addresses only a tiny sliver of that \$3.6 million – a \$28,000 disbursement on January 19, 2021 to America Rising that the NRSC disclosed as “research” in reports filed with the Commission.² The NRSC further explained in its Response, supported by the sworn Declaration of its General Counsel, that the \$28,000 was for research in preparation for litigation related to the January 5, 2021 Georgia U.S. Senate runoff election.³ The Act provides that national party committees, such as the NRSC, may establish a legal proceedings account to “defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”⁴ Nevertheless, the Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that the NRSC violated 52 U.S.C. §§ 30116(f) and 30125(a)(1) because America Rising marketed itself as an opposition research firm, not a legal research firm, and the disbursement was disclosed as “research,” as opposed to “legal research.”⁵ Further, OGC argued that the NRSC in its Response did not describe how the research related to its preparation for potential litigation.⁶

We disagreed with OGC’s analysis on this disbursement. The NRSC’s General Counsel credibly attested, under penalty of perjury, that the disbursement was made from its legal proceedings account for research in preparation of potential litigation. The timing of the disbursement, two weeks after the runoff election, supported the General Counsel’s Declaration.

¹ Compl. at 3 (Sept. 19, 2022).

² *Id.* at 4.

³ NRSC Resp. (Dec. 21, 2021), Declaration of Ryan Dollar ¶ 5.

⁴ 52 U.S.C. § 30116(a)(9)(C).

⁵ First Gen. Counsel’s Rpt. at 30-31 (Oct. 26, 2023).

⁶ *Id.* at 31.

Contrary to OGC’s analysis, research in preparation of litigation is not limited to traditional legal research but can include innumerable other types of research necessary to prepare for potential litigation. Furthermore, given the sensitivities and potential application of privileges, NRSC was under no obligation to detail in its Response how the research related to its preparation for potential litigation. Therefore, we voted to find no reason to believe that the NRSC violated 52 U.S.C. §§ 30116(f) and 30125(a)(1) by disbursing funds from its legal proceedings account to America Rising for “research.”⁷

4/9/24

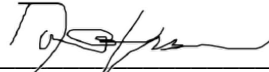
Date



Allen J. Dickerson
Commissioner

4/9/24

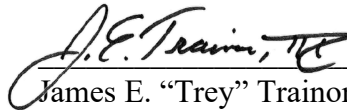
Date



Dara Lindenbaum
Commissioner

4/9/24

Date



James E. “Trey” Trainor, III
Commissioner

⁷ Certification ¶ 2 (Mar. 1, 2024). Commissioner Lindenbaum otherwise voted to approve OGC’s recommendations in the First General Counsel’s Report. Certification ¶¶ 2a, 3a, 6a (Feb. 12, 2024). Commissioners Dickerson and Trainor disagreed with OGC’s recommendations for the reasons given in their separate statement of reasons in this Matter.



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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 8071
 NRSC)
)

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

In this Matter, our Office of General Counsel (“OGC”) “recommend[ed] that the Commission find reason to believe that the NRSC...a national committee of the Republican Party,” violated the Federal Election Campaign Act of 1971 (“FECA” or “Act”), as amended, “by using funds from its legal proceedings account to pay for campaign activities in the form of ‘media placement,’ ‘media production,’ ‘media,’ and ‘research.’”¹

Under amendments to FECA adopted by Congress in 2014, the national committees of political parties may create certain types of “separate, segregated account[s].”² These three types of accounts are for (a) presidential nominating conventions, (b) party headquarters buildings, and (c) legal proceedings.³

A convention account is a “separate, segregated account...which is used *solely* to defray expenses incurred with respect to a presidential nominating convention.”⁴ Similarly, a party headquarters account is a “separate, segregated account...used

¹ First Gen’l Counsel’s Report (“FGCR”) at 2, MUR 8071 (NRSC), Oct. 26, 2023.

² 52 U.S.C. § 30116(a)(9)(A-C). These three types of accounts were created by the Consolidated and Further Continuing Appropriations Act, which was signed into law by President Barack Obama on December 16, 2014. Office of the Press Secretary, Statement by the Press Secretary on H.R. 83, The White House, Dec. 16, 2014, *available at*: <https://obamawhitehouse.archives.gov/the-press-office/2014/12/16/statement-press-secretary-hr-83>.

³ 52 U.S.C. § 30116(a)(9)(A-C).

⁴ 52 U.S.C. § 30116(a)(9)(A) (emphasis supplied).

solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses.”⁵

By contrast, the relevant account here is a legal proceedings account, which is a “separate, segregated account...used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”⁶

When Congress created these three categories of separate, segregated accounts, it sharply delimited the purposes for which convention and party headquarters accounts could be used by restricting those accounts “solely” to specific purposes. But at the same time, Congress chose to drop that term from its language creating the legal proceedings accounts at issue here,⁷ and we have a responsibility to give effect to Congress’s choice of language. “[T]he people are entitled to rely on the law as written,” because “it is ultimately the provisions of those legislative commands...by which we are governed.”⁸

Here, OGC recommended that we fault the NRSC for “using funds from its legal proceedings account to pay for campaign activities in the form of ‘media placement,’ ‘media production,’ ‘media,’ and ‘research.’”⁹ At the threshold, “generic campaign activity” is a defined term under our regulations,¹⁰ but OGC appears to be

⁵ 52 U.S.C. § 30116(a)(9)(B) (emphasis supplied).

⁶ 52 U.S.C. § 30116(a)(9)(C).

⁷ *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 768 (2018) (“‘Solely’ means ‘alone’”) (quoting from Webster’s Third Int’l Dictionary 2168 (2002)); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91-92, 107 (1983) (“And § 4(b)(3) of ERISA...exempts from ERISA coverage employee benefit plans that are ‘maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws’...§ 4(b)(3)’s use of the word ‘solely’ demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law”) (internal citation omitted); see also *Bell Canyon Ass’n, Inc. v. Ironshore Specialty Ins. Co.*, 2023 WL 6784356 at *1 (9th Cir. Oct. 13, 2023) (“The word ‘solely’ ‘is defined as ‘to the exclusion of all else’ and ‘singly.’ Synonyms include ‘exclusively’ and ‘only’”) (quoting *Rallo v. O’Brian*, 52 Calif. App.5th 997, 1011 n.12 (Cal. Ct. App. 2020)).

⁸ *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 674 (2020) (quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

⁹ FGCR at 2.

¹⁰ 11 C.F.R. § 100.25.

using the term “campaign activity” in a colloquial sense; many of the communications OGC discusses simply do not fall under the regulatory definition. Ultimately, however, the fact NRSC used its account for communicative purposes, or even advocacy, is not determinative.¹¹ The strict test proposed by OGC is foreclosed by Congress’s express decision to permit at least some spending beyond the categories enumerated in § 30116(a)(9)(C), a fatal flaw in OGC’s analysis even if the NRSC’s activity were not anticipated by the statute’s enumerated categories.¹²

Against this backdrop, there is no real dispute as to the facts given the NRSC’s response. The Committee provided the text of the communications involved together with an un rebutted affidavit by the organization’s general counsel.¹³ That affidavit, sworn to under oath, explains that each of the categories of spending forming the basis for the Complaint were directly related to the NRSC’s post-election efforts and litigation, or to fundraising to support those activities.¹⁴ Given the statute before us, that direct connection is enough; we decline OGC’s invitation to impose government scrutiny of every second of the NRSC’s communications in order to fulfill an alleged “allocation requirement for solicitation costs that are attributable to a purpose other than defraying expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”¹⁵ That approach might be appropriate where Congress has instructed us to ensure funds are “solely” spent on particular activities. Not here.¹⁶

On this record, the payments for “media placement,” “media production,” “media,” and “research”¹⁷ are not prohibited uses of the funds in the legal proceedings

¹¹ *Id.* at 13-33 (describing various activities paid for with the NRSC legal proceedings account).

¹² FGCR at 13-29.

¹³ *See generally* NRSC Resp.

¹⁴ *See generally* Dollar Aff.

¹⁵ FGCR at 19.

¹⁶ This bedrock principle — that individuals are at liberty where the law is silent — predates the founding of the American Republic. *See* Thomas Hobbes, *Leviathan*, Chapter XXI (“In cases where the Sovereign has prescribed no rule, there the Subject hath the Liberty to do, or forbear, according to his own discretion”).

¹⁷ We have separately joined with Commissioner Lindenbaum to issue a Statement of Reasons discussing the specific allegations concerning Respondent’s research expenses. Statement of Reasons of Comm’rs Dickerson, Lindenbaum, and Trainor, MUR 8071 (NRSC), Apr. 9, 2024.

account. Media production and placement are part and parcel of the fundraising activities these accounts may engage in.¹⁸ In sum, the NRSC's spending was lawful.¹⁹

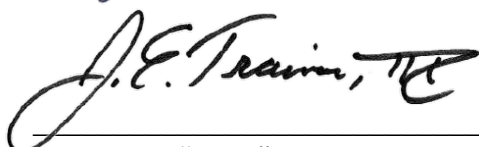
Accordingly, we voted to dismiss the complaint because there was no reason to believe that it credibly gave rise to a violation of the Act.²⁰



Allen J. Dickerson
Commissioner

April 10, 2024

Date



James E. "Trey" Trainor, III
Commissioner

April 10, 2024

Date

¹⁸ Advisory Op. 2022-21 (DSCC, *et al.*), Oct. 20, 2022. OGC believes this AO supports a finding of reason to believe. We disagree. First, "[a]dvisory opinions are shields, not swords." Statement of Reasons of Vice Chairman Cooksey and Comm'rs Dickerson and Trainor at 4, MUR 7491 (Am. Ethane), Oct. 27, 2022. Second, it does not follow that because the Commission has *permitted* allocation of expenses among accounts such allocation is *required*. Because such a rule is found nowhere in the Act, any enforcement on that basis would require a regulatory foundation that the Commission has thus far declined to adopt.

¹⁹ Dollar Aff. at 1-2 (describing conduct paid for with the NRSC legal proceedings account). Where "no ambiguity exists about how [the statute's] terms apply to the facts before us," it is irrelevant whether "the statute's application in these cases reaches beyond the principal evil legislators may have intended or expected to address." *Bostock*, 590 U.S. at 674 (internal citation and quotation marks omitted); *contra* FGCR at 24-25 (proposing reliance on legislative history contradicted by the plain text of the statute).

²⁰ Cert. at 1, MUR 8017 (NRSC), Feb. 8, 2023.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
NRSC, *et al.*) MUR 8071
)

**STATEMENT OF REASONS OF VICE CHAIR ELLEN L. WEINTRAUB
AND COMMISSIONER SHANA M. BROUSSARD**

This matter involved allegations that the NRSC disbursed more than \$3.6 million from its legal proceedings account for various campaign-related activities, notably including \$3,359,363 on television advertisements.¹ In 2015, Congress amended the Federal Election Campaign Act (the “Act”) to permit national party committees — such as the NRSC — to establish and maintain legal proceedings accounts “to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”² These special purpose accounts have a contribution limit that is 300% of the otherwise applicable contribution limit for national party committees, or \$109,500 in 2022.³ However, both Congress, through the Act’s plain language, and the Commission, through unambiguous precedent, have confirmed that the legal proceedings account can only be used for the enumerated purposes. In other words, national party committees, like the NRSC, cannot use the legal proceedings account to fund campaign-related activity. Campaign-related activity must be funded through the committees’ operating account.

Interpreting this statute, the Commission unanimously applied its pre-2015 precedent on recount funds to legal proceedings accounts, stating that any funds spent from such an account “must have no relation to campaign activities,” and that “any resulting surplus of funds may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations.”⁴ This is consistent with statements made by House and Senate leaders during the passage of the 2015 Appropriations Act.⁵

¹ First Gen. Counsel’s Rpt. (“FGCR”) at 1-2, MUR 8071 (NRSC, *et al.*).

² Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(C)).

³ The Act allows for seven distinct special purpose accounts: one account for presidential nominating conventions, as well as separate accounts for party headquarters and recounts and other legal proceedings for its national party committee, national senatorial committee, and national congressional committee — each of which may accept up to 300% of FECA’s otherwise-applicable contribution limit. *See* 52 U.S.C. §§ 30116(a)(1)(B), (a)(9). A single contributor could provide as much as \$1,734,600 to these accounts over the two-year election cycle.

⁴ *See* Advisory Opinion 2019-02 at 3 (Bill Nelson for Senate) (citing Advisory Opinion 2010-14 at 5 (DSCC)).

⁵ 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 160 CONG. REC. S6814(daily ed. Dec. 13, 2014) (statement of Sen. Reid).

MUR 8071 (NRSC, *et al.*)

Statement of Vice Chair Ellen L. Weintraub and Commissioner Shana M. Broussard

Recently, the Commission reaffirmed this position, in Advisory Opinion 2022-21 (DSCC, *et al.*), in which the Commission advised that the DSCC must pay for television advertisements that feature federal candidates and solicit donations to its legal proceedings account subject to a reasonable cost allocation among the committee's accounts.⁶ That Congress provided for a separate and increased contribution limit for legal proceedings accounts underscores why those funds cannot be used for campaign activities. Rather, these accounts were created for specific purposes, and funding campaign ads is unambiguously not one of those specific purposes.⁷

In this matter, the NRSC's TV ads did not mention recounts or any legal proceedings and appear to have been conventional attack ads.⁸ Each ad included a solicitation for contributions via a short code text number. The contributions received from that number were directed towards the legal proceedings fund — but there is no way for anyone to have known that.⁹ A brief, covert solicitation to a legal proceedings fund does not transform a campaign ad into a legal expense. At most, the respondent might have been able to allocate a very small portion of the costs of the advertisements to its legal proceedings fund, based on the small portion of the advertisements devoted to the solicitation. As the Commission has opined, “to the extent that [a] Solicitation . . . is attributable to more than one purpose, the [party committee] must use a reasonable method to allocate the costs for its solicitation of donations to its Legal Proceedings Account and allocate the costs for other purposes to other accounts from which such disbursements are permissible.”¹⁰ No such allocation took place here.

The NRSC told the Commission in 2017 that “[t]he Appropriations Act did not introduce any new concepts to the law, and the national party committees have extensive experience with convention funding, building and legal funds.”¹¹ Since the Commission has applied long-standing precedent from recount funds to legal proceedings accounts, the NRSC was correct that the rule has always been clear on the spending limitations of these accounts.¹²

⁶ Advisory Opinion 2022-21 at 5, 8 (DSCC, *et al.*).

⁷ The argument has been made that the absence of the word “solely” renders meaningless the words Congress actually used in the statute — “to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.” We disagree. That interpretation contradicts both the statutory language and congressional intent. Nor do MURs 7358 (Rosen) or 7390 (RNC) support dismissal here as, unlike this matter, both of those matters indisputably involved payments to lawyers for representation in legal proceedings.

⁸ FGCR at 28.

⁹ *Id.*

¹⁰ Advisory Opinion 2022-21 at 8 (DSCC, *et al.*). While this Advisory Opinion also involved questions about coordination, nothing in the Opinion limits its rationale on allocation to matters involving coordination. Moreover, respondents here could not have been relying on Advisory Opinion 2022-21, as it was adopted after the events at issue in this matter. *See also* Stmt. of Reasons of Comm’r Shana M. Broussard at 2 n.5, Advisory Opinion 2022-01 (DSCC, *et al.*) (citing Advisory Opinion 2010-14 (DSCC) (stating the Commission’s allocation regulations “stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes.”)).

¹¹ FGCR at 27 (citing Comment of NRCC and NRSC) (Jan. 30, 2017); Notice 2016-10 (Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015).

¹² The NRSC’s own words demonstrate that not pursuing these violations out of any concern for ambiguity due to pending rulemakings is misplaced.

MUR 8071 (NRSC, *et al.*)

Statement of Vice Chair Ellen L. Weintraub and Commissioner Shana M. Broussard

Simply put, campaign attack ads are not legal services. It is disheartening that the Commission could not reach a four-vote consensus to proceed on such a straightforward violation of the Act.¹³ Failure to enforce the law breeds contempt for the law. The sad consequence of the Commission's failure to enforce the law in this matter is that more political actors will feel emboldened to disregard the explicit restrictions on the use of legal proceedings accounts that Congress expressly enacted.

April 11, 2024

Date



Ellen L. Weintraub
Vice ChairApril 11, 2024

Date



Shana M. Broussard
Commissioner

¹³ Cert. ¶¶ 1.a, 6.a. (Feb. 8, 2024).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

National Republican Senatorial Committee)

) MUR 8071
)
)

STATEMENT OF REASONS OF CHAIRMAN SEAN J. COOKSEY

This matter arose from a Complaint alleging that the National Republican Senatorial Committee (“NRSC”) and Keith Davis, in his official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by paying for “campaign activities” from its separate segregated account designated for “election recounts and contests and other legal proceedings” (“legal proceedings account”).¹ Respondents deny this because the disbursements identified in the Complaint were either for: (1) services directly related to the conduct of recounts or preparations for potential legal proceedings, or (2) bona fide fundraising expenses on behalf of the NRSC’s legal proceedings account.²

The Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that the NRSC violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing funds from its legal proceedings account to pay for campaign activities in the form of “media placement,” “media production,” “media,” and “research.”³ I disagreed. Because I declined to have the Commission engage in rulemaking-by-enforcement without providing due process or fair notice to the regulated community, I did not accept OGC’s recommendations.⁴ This statement explains the reasons for my vote.

I. Factual Background

The NRSC is a national committee of the Republican Party.⁵ Like other national party committees, since 2015, the NRSC has maintained a legal proceedings account, along with other segregated accounts allowed by law. During the 2021–2022 election cycle, the NRSC made

¹ See Complaint (Sept. 19, 2022), MUR 8071 (NRSC, *et al.*).

² Response of NRSC at 1 (Dec. 21, 2022), MUR 8071 (NRSC, *et al.*).

³ First General Counsel’s Report at 2 (Oct. 26, 2023), MUR 8071 (NRSC, *et al.*).

⁴ Certification (Feb. 8, 2024), MUR 8071 (NRSC, *et al.*).

⁵ NRSC, Amended Statement of Organization (Nov. 10, 2022), <https://docquery.fec.gov/pdf/540/202211109546748540/202211109546748540.pdf>.

various disbursements from its legal proceedings account that form the basis of this Complaint. The Complaint alleges that the NRSC made twelve disbursements for impermissible campaign activity that were not related to any “election recount, contest, or other legal proceeding” as allowed by law.⁶ The NRSC maintains, instead, that the disbursements fall into two permissible categories: “(1) expenses related to potential litigation and recounts; and (2) fundraising expenses for the Legal Proceedings Account.”⁷

Of the first disbursement category, the NRSC made payments for “research” to America Rising LLC from its legal proceedings account.⁸ According to the NRSC, the research related to preparing for potential litigation.⁹ Of the second disbursement category, the NRSC made disbursements for “media placement,” “media production,” and “media,” from its legal proceedings account for TV ads that solicited viewers to donate to the NRSC legal proceedings account. The TV ads also contained messaging that discussed incumbent officeholders’ positions on policy issues, which, according to the NRSC, was done “in an effort to motivate the audience to donate.”¹⁰ The ads then displayed a screen message (in English or Spanish) that stated, “Text DONATE to 55404,” along with audio saying “donate today.”¹¹ According to the NRSC, the on-screen 55404 is a short code for “written instructions to donate to the NRSC’s Legal Proceedings Account.”¹²

II. Legal Framework

Congress created separate segregated accounts for national party committees through the Consolidated and Further Continuing Appropriations Act, 2015 (the “2015 Appropriations Act”).¹³ That law allowed for national party committees to maintain three separate segregated accounts for different purposes, and to accept contributions for each account at 300 percent of the committees’ general contribution limit.¹⁴ The first segregated account may be “used solely to defray expenses incurred with respect to a presidential nominating convention.”¹⁵ The second may be “used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party.”¹⁶ Finally, the third may be “used

⁶ Complaint at 3 (Sept. 19, 2022), MUR 8071 (NRSC, *et al.*).

⁷ Response of NRSC at 2–3 (Dec. 21, 2022), MUR 8071 (NRSC, *et al.*). The NRSC admits that it identified two *de minimis* expenses totaling \$4,025.80 that should have been paid for from the NRSC’s general account but were inadvertently paid from the Legal Proceedings Account. The NRSC made a corrective transfer to properly pay for these minor expenses on December 19, 2022. *Id.* at 3 n.6.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 2.

¹¹ *Id.*, Exhibits C–J (Scripts of TV Ads).

¹² *Id.*, Exhibits A (Declaration of Ryan Dollar) and J (“Goes Along” Script).

¹³ Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(A)–(C)).

¹⁴ 52 U.S.C. § 30116(a)(1)(B), (2)(B).

¹⁵ 52 U.S.C. § 30116(a)(9)(A).

¹⁶ 52 U.S.C. § 30116(a)(9)(B).

to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”¹⁷ Notably, the word “solely” is not included in 52 U.S.C. § 30116(a)(9)(C) when describing the purposes of the legal proceedings account.

While the Commission issued guidance to national party committees on reporting receipts to and disbursements from the new segregated accounts in 2015 following their creation, its engagement with the statute has stopped there.¹⁸ In the nine years since the 2015 Appropriations Act was signed into law, the Commission has failed to engage in any rulemaking—formal or informal—to provide further interpretations of the statutory language or guidance to the regulated community on the permissible uses of these accounts.

Indeed, as recently as 2021, the Commission has voted twice to exercise its prosecutorial discretion and dismiss allegations regarding the permissible use of a legal proceedings account given the lack guidance from the Commission and due-process concerns for the regulated community.¹⁹ The Commission publicly noted that it “ha[d] yet to provide guidance to the regulated community on the scope of permissible uses of these accounts under 52 U.S.C. § 30116(a)(9)(C) or the effect of the payments from these accounts under 52 U.S.C. § 30101(8)(A)(ii).”²⁰ Likewise, the Commission observed that a national political party’s use of its legal proceedings account “implicated novel and complex issues regarding relatively-new statutory text for which the Commission has yet to provide guidance.”²¹ Those statements remain true—the Commission has yet to issue guidance to the regulated community regarding the scope of permissible uses of the legal proceedings account.

At the same time, the Commission has made two noteworthy decisions that post-date the activity at issue in this Complaint, but that are relevant to the legal analysis. First, in Advisory Opinion 2022-21 (DSCC, *et al.*), the Commission determined that a national political party could disburse funds from its legal proceedings account to pay for TV advertisements that solicit funds to its legal proceedings account.²² The opinion noted that the “Commission has not previously addressed the issue of payment for solicitations in the context of an account established under 52 U.S.C. § 30116(a)(9)(C),”²³ but stated that “in previous advisory opinions that ‘Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to

¹⁷ 52 U.S.C. § 30116(a)(9)(C).

¹⁸ Federal Election Commission Press Release, *FEC Issues Interim Reporting Guidance for National Party Committee Accounts* (Feb. 13, 2015), available at <https://www.fec.gov/updates/fec-issues-interim-reporting-guidance-for-national-party-committee-accounts>.

¹⁹ See Factual & Legal Analysis at 2 (Sept. 13, 2021), MUR 7390 (Republican National Committee, *et al.*); Certification (Sept. 2, 2021), MUR 7390 (Republican National Committee, *et al.*); Factual & Legal Analysis at 2 (Sept. 15, 2021), MUR 7358 (Rosen for Nevada, *et al.*); Certification (Aug. 31, 2021), MUR 7358 (Rosen for Nevada, *et al.*).

²⁰ Factual & Legal Analysis at 6 (Sept. 15, 2021), MUR 7358 (Rosen for Nevada, *et al.*).

²¹ Factual & Legal Analysis at 2 (Sept. 13, 2021), MUR 7390 (Republican National Committee, *et al.*).

²² Advisory Op. 2022-21 (DSCC, *et al.*) at 4.

²³ *Id.*

be used to defray the costs of those activities.”²⁴ Advisory Opinion 2022-21 also declared that, to the extent a disbursement functioned as both (1) a solicitation to its legal proceedings account and (2) as a party-coordinated communication, the party committee must use a reasonable method to allocate the costs for its communication between the legal proceedings account and its general funds.²⁵ The opinion did not, however, define what a “reasonable method to allocate the costs” is.

The second recent Commission decision that bears on this matter is

The Commission’s decision necessarily suggests that solicitation communications are best understood overall to be only solicitations—not independent expenditures—notwithstanding the mere use of express advocacy or other campaign speech in their messages.

These two decisions may offer some minimal, albeit conflicting, legal guidance on the permissible uses of legal proceedings accounts for communications going forward. Solicitations for donations to a legal proceedings account are permissible, and as the Commission has concluded, solicitation communications can include express advocacy and other campaign-related content without losing their character as solicitations. Conversely, national party committees may not use their legal proceedings fund to make independent expenditures or party-coordinated communications, and dual-purpose communications must use reasonable methods to allocate costs.²⁹

²⁴ *Id.* at 4 n.18 (citing Advisory Opinion 2010-14 (DSCC) at 5 (“The DSCC may also use recount funds to defray the costs of soliciting donations to the recount fund.”)(citing 11 C.F.R. §§ 102.17(c)(7)(i)(A), 9003.3(a)(2)(i)(E), Advisory Opinion 2003-15 (Majette)); *see also* 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (explaining that permissible uses of funds in 52 U.S.C. § 30116(a)(9)(C) account “include[e] the costs of fundraising for this segregated account”); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

²⁵ *Id.* at 5.

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²⁹ *See* Advisory Op. 2022-21 (DSCC, *et al.*) at 4;

III. Legal Analysis

A. This matter warrants the exercise of prosecutorial discretion.

Weighing the lack of clarity and the Commission’s failure to issue guidance and regulations, limited Commission resources, and fairness and due-process concerns, I voted to dismiss this matter as an exercise of prosecutorial discretion. In assessing whether to exercise such discretion under *Heckler v. Chaney*, I must “not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies,”³⁰ among other factors. I concluded that those considerations weighed in favor of dismissal.

First, the circumstances that drove the Commission to exercise its prosecutorial discretion in MUR 7358 (*Rosen for Nevada, et al.*) and MUR 7390 (*Republican National Committee, et al.*) still obtain today. The Commission has not issued interpretive guidance or regulations on the permissible uses of legal proceedings accounts, and the same open questions about the statute’s limitations on such accounts remain. Troublingly, OGC ignored the Commission’s direction in those previous matters, and instead it offers the same novel interpretive theories of the statute that the Commission previously rejected.³¹ To proceed with this matter while the Commission has dismissed similar complaints in the past—without any intervening change in the law—risks arbitrary enforcement and raises significant due-process concerns. I see no principled basis for why this matter should be treated differently.

Moreover, the Commission has two open rulemaking petitions asking it to promulgate new regulations governing segregated party accounts, and one of those petitions is currently the subject of ongoing litigation.³² Only two months ago, the Commission approved a new Notice of Inquiry seeking public comment on whether or how it should consider new regulations for these accounts.³³ That too counsels in favor of discretionary dismissal. Any enforcement matter here will lack the careful consideration that comes with any agency rulemaking, and it would be

³⁰ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

³¹ Compare First General Counsel’s Report at 8–9 (July 20, 2021), MUR 7358 (*Rosen for Nevada, et al.*) (“Applying bedrock canons of statutory construction, by its plain meaning, the phrase ‘other legal proceedings’ is limited by the more specific terms that precede it, namely ‘election recounts and contests.’ Under the canon of *eiusdem generis*, where, as here, ‘a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. ...”), and Factual & Legal Analysis at 6 (Sept. 15, 2021), MUR 7358 (*Rosen for Nevada, et al.*) (rejecting OGC’s textual analysis and reasoning and instead dismissing the matter in an exercise of prosecutorial discretion), with First General Counsel’s Report at 22 (Oct. 26, 2023), MUR 8071 (*NRSC, et al.*) (“The phrase ‘other legal proceedings’ in the statutory language is limited by the more specific terms that precede it, namely ‘election recounts and contests.’ Under the canon of *eiusdem generis*, where, as here, ‘general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned...”).

³² Federal Election Commission, Petition for Rulemaking, Segregated Party Accounts, REG 2014-10 (Jan. 8, 2016); Federal Election Commission, Petition for Rulemaking, Reporting Segregating Party Accounts, REG 2019-04 (Aug. 5, 2019); *Campaign Legal Center, et al. v. Federal Election Commission*, No. 23-3163 (D.D.C. Oct. 10, 2023).

³³ *Party Segregated Accounts*, 89 Fed. Reg. 11,227 (Feb. 14, 2024).

tantamount to announcing a regulatory interpretation without the benefit of notice-and-comment rulemaking. Similarly, because there is a significant chance that enforcement in this matter would require litigation and judicial adjudication, enforcement raises significant dangers to the Commission's rulemaking authority, because ultimately a federal court would likely be required to interpret the underlying statute in the first instance, prior to the Commission itself. Rather than risk undermining any future regulations through a potentially inconsistent enforcement proceeding and litigation, the better course of action, in my view, is to preserve the Commission's rulemaking authority, and to follow the Commission's practice thus far to dismiss the matter.

Finally and separately, I am mindful that pursuing enforcement in the face of such regulatory uncertainty may waste the agency's limited resources. Agency enforcement that is premised on novel legal theories raises the likelihood of both a more protracted enforcement process and also an ultimate defeat for the agency. Likewise, pursuing rulemakings through both the enforcement docket and the traditional regulatory process duplicates and wastes agency efforts. As the agency faces unpredictable resource constraints in upcoming fiscal years, commissioners must prudently allocate enforcement and policy resources toward their highest and best uses. In light of the circumstances, I concluded that this matter is not one of those uses.³⁴

B. OGC is wrong on the merits.

Setting aside the prudential considerations against enforcement, OGC's analysis is still incorrect, and I would have nonetheless dismissed allegations against the NRSC on the merits. OGC recommends that the Commission adopt a narrow statutory interpretation of "other legal proceedings," which the Commission has previously rejected. I still disagree with that approach. More specifically, I believe that OGC overemphasizes the alleged dual-purpose of the communications at issue, and it further fails to give sufficient allowances for the permissible use of a legal proceedings fund for legal research.

1. Statutory interpretation of 52 U.S.C. § 30116(a)(9)(C)

OGC's general interpretive theory of the statute fails to account for the more permissible statutory language and structure Congress used for legal proceedings accounts. As noted above, the 2015 Appropriations Act limits two of the three enumerated separate segregated accounts to be "*used solely*" for the statutorily list purposes: presidential nominating conventions and party headquarters buildings.³⁵ By contrast, Congress did not include a similar limitation in 52 U.S.C. § 30116(a)(9)(C) for the accounts to be used for "the preparation for and the conduct of election recounts, contests, and other legal proceedings."³⁶ This difference is critical because "where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

³⁴ Certification (Feb. 8, 2024), MUR 8071 (NRSC, *et al.*).

³⁵ 52 U.S.C. § 30116(a)(9)(A), (B).

³⁶ 52 U.S.C. § 30116(a)(9)(C).

exclusion.”³⁷ The Commission must give effect to this difference and Congress’s decision not to limit the uses of funds in a legal proceedings account “solely” to the listed categories.

Here, the NRSC used funds in its legal proceedings account to pay for 12 disbursements, all of which were either for the purpose of soliciting funds to the NRSC’s legal proceedings fund or for the purpose of preparing for potential litigation. The disbursements for “media placement,” “media production,” and “media” were made for the purpose of soliciting donations to the legal proceedings fund and not for the purpose of influencing a federal election. The disbursement for “research” was made for the purposes of preparing for potential litigation. Both disbursements made to produce solicitations for donations to the legal proceedings account and to conduct research for the purpose of preparing for potential litigation are permissible uses of the legal proceedings account. I believe they fall within the wider scope of uses that Congress allowed for in drafting 52 U.S.C. § 30116(a)(9)(C).

2. Disbursements for “media placement,” “media production,” and “media”

The NRSC’s disbursements for “media placement,” “media production,” “media,” were made from the legal proceedings account to pay for communications soliciting funds to the legal proceedings account. As described above, in addition to soliciting contributions, the ads contained messaging about incumbent officeholders’ positions on policy issues, which, according to the NRSC, was done “in an effort to motivate the audience to donate.”³⁸ The TV ads contained a short code with written instructions to donate to the NRSC’s legal proceedings account.³⁹

OGC believes that the contents of any solicitations to a legal proceedings account must “articulate, mention, or even suggest the idea of mounting a legal challenge...”⁴⁰ in the communication itself. OGC cites no authority for this claim, however, and it is instead based on OGC’s independent theory of the statute. Nonetheless, according to OGC, because the NRSC ads “appear mostly or entirely designed to influence viewers to view their subjects negatively and raise funds for unspecified use,” this “indicates a purpose separate and apart from a solicitation of funds for recounts, contests, and other legal proceedings.”⁴¹ This makes the ads “campaign related,” according to OGC, or at least gives them that primary purpose, in addition to solicitation. And this campaign-related purpose of the ads makes them—or at least that portion of them—an impermissible use of the legal proceedings fund.⁴²

³⁷ *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (alterations omitted). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) (reasoning that a distinction in two statutory provisions between “used” and “intended to be used” implies that the former provision’s reliance on “use” alone refers to actual and not intended use).

³⁸ Response of NRSC at 2 (Dec. 21, 2022), MUR 8071 (NRSC, *et al.*).

³⁹ *Id.* at 4–6; *see also id.*, Exhibit A at ¶¶ 8, 10–12.

⁴⁰ First General Counsel’s Report at 14–15 (Oct. 26, 2023), MUR 8071 (NRSC, *et al.*).

⁴¹ *Id.* at 14.

⁴² First General Counsel’s Report at 14–17 (Oct. 26, 2023), MUR 8071 (NRSC, *et al.*).

The first problem with OGC’s analysis is that it applies content guidelines that do not exist. Contra OGC, the Commission has never issued guidance governing how solicitations to a legal proceedings fund may be made, let alone mandating discussion related only to conducting “election recounts and contests and other legal proceedings.” In the absence of such restrictions, it is unremarkable that the NRSC chose to craft its messages in ways that it believed would be the most compelling to potential donors, namely, by relating the solicitation to hot-button political issues that motivate Republican contributors. The fact that the NRSC did not adhere to standards that OGC has only now made up in the context of this enforcement matter—and that the Commission has not approved—is unremarkable and not evidence of a violation.

The second problem with OGC’s analysis is that it adopts a dual-purpose analysis of the ads that is inconsistent with—or at minimum in tension with—recent Commission decisions.

The Commission’s implicit conclusion was that such communications must be considered, on the whole, as solicitations, which are distinct from independent expenditures that expressly advocate the election or defeat of a federal candidate. Similarly, in Advisory Opinion 2022-21 (DSCC, *et al.*), which post-dates this Complaint, the Commission drew a general distinction between solicitation communications and party-coordinated communications, saying that while solicitations were permissible uses of the legal funds, to the extent any solicitation qualifies as a party-coordinated communication, costs must be reasonably allocated.⁴⁴ But just as importantly, the Commission’s advisory opinion did not suggest that a solicitation that does not qualify as a party-coordinated communication would need to be allocated among the solicitation’s different purposes—to whatever extent different purposes could be divined. The advisory opinion therefore provides that solicitations that do not qualify as another type of legally defined communication (such as a party-coordinated communication or independent expenditure) do not need their costs allocated between a legal proceedings fund and general funds.

In light of these precedents, I believe that the better approach is to look at each of the NRSC’s communications as a whole. Doing so, it is apparent that, notwithstanding the messaging that precedes the ultimate solicitation, each ad is best understood in toto as a solicitation only, not as any hybrid of a solicitation and another kind of communication. And because the Commission has plainly said that solicitations to a legal proceedings fund are permissible uses of a legal proceedings fund, I disagree with OGC’s ultimate conclusion that the ads at issue were impermissible.

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44 Advisory Op. 2022-21 (DSCC, *et al.*) at 1.

3. Disbursements for “research”

The NRSC’s disbursement for “research” was made from the legal proceedings account to pay for research for potential litigation.⁴⁵ OGC believes that because the “research” was conducted by an entity other than a law firm or a legal search firm, that it cannot possibly be “research” that is used for litigation or “other legal proceedings” and therefore it is outside the scope of 52 U.S.C. § 30116(a)(9)(C).⁴⁶ OGC disregards entirely the only evidence in the record: a sworn declaration from the NRSC’s general counsel stating that the disbursement was for “research services rendered to the NRSC related to preparing for potential litigation in connection with the January 5, 2021 Georgia U.S. Senate runoff election.”⁴⁷ There is no regulation or guidance the Commission has issued that requires a law firm or a legal research firm to conduct research to prepare for potential litigation in order for disbursements to be paid from the legal proceedings account. Indeed, factual research is often just as critical to the preparation for litigation. The application of such an arbitrary rule in an enforcement matter is not only incorrect, but also raises due-process issues.

* * *

Accordingly, for the foregoing reasons, I voted to dismiss this matter as an exercise of prosecutorial discretion under *Heckler v. Chaney*.⁴⁸



Sean J. Cooksey
Chairman

April 11, 2024
Date

⁴⁵ Response of NRSC, Exhibit A at ¶ 5 (Dec. 21, 2022).

⁴⁶ First General Counsel’s Report at 30–31 (Oct. 26, 2023), MUR 8071 (NRSC, *et al.*).

⁴⁷ *Id.*

⁴⁸ 470 U.S. 821 (1985).