



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

National Republican Senatorial Committee

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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 LRA 1163 (Madison Project, Inc.).²⁶ There, the Commission was asked to determine how to treat a political committee’s solicitations that included significant amounts of campaign-related speech and express advocacy, and specifically whether such solicitations constituted independent expenditures.²⁷ The Commission concluded that such communications were not independent expenditures—rejecting OGC’s recommendations and conclusion that the communications could be considered to have two purposes, both as solicitations and independent expenditures.²⁸ 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.

²⁶ *See* Request for Consideration of Legal Questions by the Commission (Dec. 27, 2022), LRA 1163 (Madison Project, Inc.).

²⁷ *Id.*

²⁸ *Compare* Certification (Feb. 28, 2023), LRA 1163 (Madison Project, Inc.) (“[D]ecided by a vote of 4-2 to: [r]eject the recommendation that the Commission conclude that the costs of relevant fundraising communications be included in the reporting of apparent independent expenditures audit finding.”), *with* Memorandum (Jan. 26, 2023), LRA 1163 (Madison Project, Inc.).

²⁹ *See* Advisory Op. 2022-21 (DSCC, *et al.*) at 4; *cf.* Certification (Feb. 28, 2023), LRA 1163 (Madison Project, Inc.) (“[D]ecided by a vote of 4-2 to: [r]eject the recommendation that the Commission conclude that the costs of relevant fundraising communications be included in the reporting of apparent independent expenditures audit finding.”).

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 ejusdem 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 ejusdem 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. In LRA 1163 (Madison Project, Inc.), the Commission considered and rejected OGC’s recommendation to treat various solicitation letters as independent expenditures because, in addition to seeking contributions, the communications also engaged in substantial political rhetoric and even express advocacy.⁴³ 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.

⁴³ See Memorandum (Jan. 26, 2023), Request for Consideration of Legal Questions Submitted by the Madison Project, Inc. (LRA 1163); Certification (Feb. 28, 2023), LRA 1163 (Madison Project, Inc.) (“[D]ecided by a vote of 4-2 to: [r]eject the recommendation that the Commission conclude that the costs of relevant fundraising communications be included in the reporting of apparent independent expenditures audit finding.”).

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).