FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

September 16, 2024

BY EMAIL
David H. Laufman
Wiggin and Dana LLP
600 Massachusetts Ave., NW
Suite 375
Washington, DC 20001
dlaufman@wiggin.com

RE: MUR 8123
Larry Pfeiffer

Dear Mr. Laufman:

On March 29, 2023, the Federal Election Commission notified your client, Larry Pfeiffer, 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 your client, the Commission, on August 13, 2024, voted to dismiss this matter effective September 16, 2024. 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).

If you have any questions, please contact Jacob Tully, the attorney assigned to this matter, at jtully@fec.gov.

Sincerely,

Mark Shonkwiler

Mark Shonkwiler
Assistant General Counsel

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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 8123/8182
Biden for President[1], *et al.*	)	
	)	

STATEMENT OF REASONS OF
CHAIRMAN SEAN J. COOKSEY AND
COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. "TREY" TRAINOR, III

INTRODUCTION

Former President Richard Nixon once observed that "every political man is…never satisfied with the press."[2] Accordingly, since time immemorial, political men and women have sought to shape press coverage through their agents and allies. These discussions with the press are protected by the same First Amendment that defends the press itself.

Against this backdrop, the Federal Election Commission has been tasked with the delicate job of enforcing a law, the Federal Election Campaign Act ("FECA" or "Act"), which regulates "the behavior of individuals and groups…insofar as they act, speak[,] and associate for political purposes."[3] Because that statute "'operate[s] in an

[1] On July 21, 2024, the Biden for President committee filed an amended Statement of Organization changing its name to "Harris for President." The Commission decided this case in August 2024, and as a result, the First General Counsel's Report, vote certifications, and other documents in the file bear the committee's current moniker. However, as this case concerns events in the 2020 election cycle, when the committee remained known as "Biden for President" and was dedicated to the election of now-President Joe Biden, this Statement will consistently refer to the committee's former name.

[2] Richard Nixon Found., "Richard Nixon On The Tonight Show Starring Johnny Carson – 1967," YouTube, Aug. 15, 2024, *available at*: https://www.youtube.com/watch?v=gP1pZSt-pQg.

[3] *Am. Fed'n of Labor and Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (internal citation and quotation marks omitted).

area of the most fundamental First Amendment [liberties],'"[4] the statute contains extensive exceptions[5] and has been treated to "nearly a half century of accumulated judicial decisions narrowing" its reach.[6]

Here, the complaints urged the Commission to jump these guardrails and sanction the Biden for President committee and dozens of its supporters for influencing press coverage during the 2020 election. We unanimously declined to do so.[7] But because our reasoning differs significantly from the analysis proposed by our Office of General Counsel ("OGC"), we write now to clarify the record.[8]

I. Standard of Review

In any given Matter, the Commission must first decide whether to find reason-to-believe ("RTB") or dismiss a complaint.[9] This agency will find RTB only "when a complaint (1) fairly invokes its jurisdiction, (2) is credible, and not merely a bare accusation of wrongdoing, (3) the response has not sufficiently answered the complaint, and (4) it determines that enforcement is a judicious use of the Commission's scarce resources."[10]

Here, the complaints asked us to sanction actions that fall outside the Act. Accordingly, since the complaints did not "fairly invoke[]"[11] our jurisdiction, we voted to dismiss.[12]

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[4] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 196 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*)).

[5] Importantly, for this Matter, the so-called "press" or "media exemption." *See infra* at 7.

[6] Supplemental Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 2, MURs 7821/7827/7868 (Twitter, Inc.), Sept. 13, 2021 ("Twitter Statement").

[7] Certification at 2.

[8] Fed. Election Comm'n, "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 89 Fed. Reg. 19729, 19730, Mar. 20, 2024 ("When the Commission votes to dismiss, a Statement of Reasons, a Factual and Legal Analysis, or a General Counsel's Report may provide further explanation of the Commission's conclusions").

[9] 52 U.S.C. §§ 30109(a)(1)-(2); *see also* 89 Fed. Reg. at 19729-30.

[10] Statement of Reasons of Chairman Cooksey and Comm'rs Dickerson and Trainor at 2, MUR 8110 (Am. Coal. for Conservative Policies), July 29, 2024.

[11] *Id.*

[12] Certification at 2.

II. Relevant Law

a. Contributions and coordinated expenditures.

In 1974, Congress passed significant amendments to FECA that were promptly subjected to a First Amendment challenge. Two years later, in *Buckley v. Valeo*, the Supreme Court drastically reduced the Act's scope by, in large part, imposing limits on two of the law's keystone definitions: "contribution" and "expenditure."[13]

Thus, while the "Act defines the term 'contribution' to include 'any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office,'"[14] the Court explained that the phrase "anything of value" should not be taken literally. Rather, it noted "the limiting connotation created by the general understanding of what constitutes a political contribution."[15] Specifically, "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act."[16]

Commission regulations recognize this limitation, defining "the term anything of value" to "include[]…the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services," and listing some examples of commercially-available items such as "[s]ecurities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists."[17]

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[13] 424 U.S. 1 (1976) (*per curiam*).

[14] First Gen'l Counsel's Report ("FGCR") at 9, MUR 8123/8182 (Biden for President), July 29, 2024 (quoting 52 U.S.C. § 30101(8)(A)(i)) (emphasis omitted).

[15] *Buckley*, 424 U.S. at 23, n.24.

[16] *Id.*

[17] 11 C.F.R. § 100.52(d)(1). We discuss the "anything of value" analysis offered by OGC at greater length *infra* at 6-7, but it bears noting that OGC's expansive thing-of-value analysis stems from its emphasis on the regulation's language that in-kind contributions "are not limited to" these specific examples. FGCR at 9, n.27. But such catch-all language simply acknowledges that the Commission cannot anticipate the goods and services available in a multi-trillion-dollar market, or what subset of that vast and ever-changing array might be donated to a campaign. OGC's error lies in misunderstanding that "anything of value" is limited to *goods and services*—things with a market value and a price chargeable in, or convertible to, dollars. *Buckley*, 424 U.S. at 23, n.24; *see also McCutcheon*, 572 U.S. at 192 (the anti-corruption interest furthered by constitutional limits on

The term "expenditure" likewise "includes 'any purchase, payment, distribution, loan, advance, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[18] This term has also been limited by the courts. In short, expenditures must be "unambiguously campaign related" and specifically geared to "advocacy of a political result,"[19] such as a direct exhortation to vote for a specified candidate.[20] FECA provides that an expenditure becomes a coordinated contribution when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of" that candidate or committee.[21]

b. The "press" or "media" exemption.

FECA's drafters knew that extending campaign finance restrictions to the press would squelch public reporting and debate.[22] "The Act has always included an explicit statutory protection for 'the press' and 'the media,'"[23] and specifically "exempts from its coverage any expenditures made for the purpose of a 'news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.'"[24]

III. Facts of the Matter

In October 2020, the *New York Post* published a news story referring to the contents of a laptop owned by Hunter Biden. In response, "Antony Blinken, who was

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campaign contributions "is the financial *quid pro quo*: dollars for political favors") (internal citation and quotation marks omitted).

[18] FGCR at 11 (quoting 52 U.S.C. § 30101(9)(A)(i)).

[19] *Buckley*, 424 U.S. at 79-81.

[20] *E.g.* 11 C.F.R. § 100.22(a)-(b).

[21] 52 U.S.C. § 30116(a)(7)(B)(i).

[22] Comm. on House Admin. at 4, "Federal Election Campaign Act Amendments of 1974," Report No. 93-1239, July 30, 1974 (expressing sense of the committee that it be made "plain that it is not the intent of the Congress to limit or burden in any way…the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns").

[23] Twitter Statement at 6 (quoting 52 U.S.C. § 30101(9)(B)(i); 52 U.S.C. § 30104(f)(3)(B)(i)).

[24] *Id.* (quoting 52 U.S.C. § 30101(9)(B)(i) (cleaned up)).

a campaign advisor to [Biden for President] contacted former Acting Central Intelligence Agency Director Michael Morrell to discuss these news stories about Hunter Biden."[25]

Mr. Morrell later stated that this conversation spurred him to begin drafting a letter suggesting that these news reports were the result of Russian disinformation, and he later circulated that letter for signatures from intelligence community veterans.[26] Although Mr. Morrell's conclusion was speculative, and turned out to be false, fifty-one people ultimately signed. Mr. Morrell then caused the letter to be sent to media outlets, including *Politico,* which both published the letter and wrote a news story about it.[27]

After reviewing the record, OGC urged the Commission to "dismiss the allegation that the letter constitutes an unreported contribution to or an expenditure on behalf of" Biden for President or any other pro-Biden or Democratic group.[28]

IV. The Commission adopted OGC's recommendations, but not necessarily for the reasons given the First General Counsel's Report.

The Commission unanimously accepted OGC's recommendations.[29] We write separately to explain our reasons for doing so.

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[25] FGCR at 6.

[26] *Id.*

[27] *Id.* at 6-7.

[28] *Id.* at 9 (capitalization altered for clarity); *also id.* at 17-18. In addition, the complaint in MUR 8123 contended that "the individual signatory Respondents, who are all former employees of the federal government agencies involved in intelligence activities, can be considered federal contractors because they are 'bound by a lifelong contractual obligation with the Federal Government to maintain the secrecy of classified information,'" and that their signatures thus violated the ban on federal contractor contributions. *Id.* at 16 (quoting MUR 8123 Complaint at 7, 17).

We generally agree with OGC's analysis rejecting this argument. *Id.* at 16-17. Indeed, such a lifetime forfeiture of a fundamental First Amendment liberty would pose serious questions under the unconstitutional conditions doctrine. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 342, n.4 (2018) ("The [unconstitutional conditions] doctrine prevents the Government from using conditions to produce a result which it could not command directly") (citation and quotation marks omitted); *see also Koontz v St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). However, because we conclude that the alleged conduct was neither a contribution nor an expenditure, the federal contractor ban is not at issue.

[29] OGC cited two provisions for its dismissal recommendation, both of which rely on a determination that Mr. Morrell's work was a contribution or an expenditure within the meaning of the Act. FGCR at

a. Respondents never gave or received "anything of value" under FECA

Obviously, political campaigns value media coverage and are affected by media narratives.[30] But that does not necessarily make efforts to shape media coverage "things of value" under FECA.

OGC does not determine whether Mr. Morrell's letter is a thing of value under the Act. Nevertheless, its FGCR proclaims that "[t]he phrase 'anything of value' contemplates a broad, case-by-case application."[31] We disagree, and we have consistently rejected OGC's efforts to expand that phrase beyond its *Buckley*-delimited application and turn it into an amorphous facts-and-circumstances test.[32]

In short, as we have stated before, "the *Buckley* Court assumed that the Commission would interpret 'things of value' under the Act to mean things given in-kind that hold a specific monetary value and are available on the market. This gloss must govern our application of this provision" of FECA.[33]

Accordingly, Mr. Morrell's effort to shape news coverage in a pro-Biden direction was not a "thing of value" within the meaning of the Act.[34] No money changed hands, nor was Mr. Morrell providing a good or service he normally would offer to purchasers on the market. Because the writing, distribution, and publication of Mr. Morrell's project was not a "thing of value," it cannot be a "contribution" or an

13 ("For the purpose of this analysis, we assume *arguendo* that the Letter may be viewed as a thing 'of value'"). OGC argued that both the volunteer and internet exceptions would shield the letter from violating FECA. If the letter is a thing "of value," we agree that it would be protected by the volunteer exemption.

[30] *Id.* at 13 (discussing potential benefit to Biden campaign from the letter).

[31] *Id.* at 9.

[32] *E.g.* Statement of Reasons of Chairman Dickerson and Comm'rs Cooksey and Trainor, MURs 7645/7663/7705 (Trump), Aug. 31, 2022 (President's request that a foreign head of state open an official investigation is not a thing of value) ("Trump-Ukraine Statement"); Statement of Reasons of Vice Chairman Dickerson and Comm'rs Cooksey and Trainor, MUR 7271 (Democratic Nat'l Comm.), June 10, 2021 (public statement by Ukrainian president condemning Trump campaign manager Paul Manafort would not be a thing "of value") ("Chalupa Statement"); *see also* Statement of Reasons of Comm'rs Dickerson and Trainor at 4, MUR 8056 (Bob Healey for Congress), Aug. 17, 2023 ("brief and barely-legible display of a corporate logo on a shirt" not a thing of value).

[33] Trump-Ukraine Statement at 6.

[34] *Cf.* Chalupa Statement.

"expenditure" under FECA. Respondents, like all Americans, "are at liberty where the law is silent."[35]

b. Even if Morrell's letter were a "thing of value," it would be protected under the media exemption.

FECA specifically excludes funds or activities for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication."[36] It is undisputed that Mr. Morrell's actions were undertaken entirely for the purpose of producing a "news story" or "commentary." Indeed, he appears to have successfully secured both the independent publication of his letter and an accompanying article about its substance.

Thus, Respondents' actions lie in the heartland of the media exemption, and even if OGC were correct that this effort could be a "contribution" or an "expenditure" under FECA, the statute's media exemption would bar the agency from enforcing on these facts.[37] Respondents are "entitle[d] to engage in these traditional media activities—even if done with a political motive or bias—without tripping into a campaign finance violation."[38]

c. Even if Morrell's letter were a "thing of value," and FECA regulated media activities, the letter would be protected by the First Amendment's Press Clause.

Finally, even if none of the foregoing is correct, the First Amendment's injunction against "abridging the freedom…of the press" protects Respondents in full. The Press Clause vests every American, including Respondents, with "the right to distribute, contextualize, and editorialize concerning current events, even political ones."[39] This right applies in full to the distribution of opinion through audience-enhancing channels, such as *Politico*. It would be odd otherwise, given the

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[35] Statement of Comm'rs Dickerson and Trainor at 3, n.16, MUR 8071 (NRSC), Apr. 10, 2024 (*see* citing Thomas Hobbes, *Leviathan*, Chapter XXI ("In cases where the Sovereign has prescribed no rule, there the Subject hath the Liberty to do, or forbeare, according to his own discretion")).

[36] 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

[37] *Id.*

[38] Statement of Comm'r Cooksey at 3, MUR 7821/7827/7868 (Twitter, Inc.), Sept. 13, 2021 (punctuation altered).

[39] Twitter Statement at 8.

longstanding "honorable tradition of advocacy and of dissent"[40] via the circulation of signed letters and other public petitions.[41]

Accordingly, assuming *arguendo* that the plain text of FECA could be understood to reach the conduct of Mr. Blinken, Mr. Morrell, and their confederates, the statute would manifestly infringe upon Respondents' First Amendment right "to disseminate opinions" and the Commission would be constitutionally forbidden from finding RTB.[42] Because the constitutional violation from such a reading is so clear – again, the complaints argue that private citizens may not circulate open letters for signature and publication if they intend to affect an election – the statute is best read to avoid that result under the well-established canon of constitutional avoidance.[43]

CONCLUSION

For the foregoing reasons, we voted to dismiss the complaints.

[40] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[41] As the Smithsonian National Postal Museum notes, "One of the most effective ways for revolutionary leaders to spread their message throughout the colonies was to publish open letters addressed to the public in local newspapers…This is, in fact, where our modern term 'news correspondent' comes from—the authors of letters that were published in such a fashion could really be said to be corresponding with the whole town." "Public Political Letters," Smithsonian Nat'l Postal Museum; *available at*: https://postalmuseum.si.edu/research-articles/letter-writing-in-america-letters-of-the-revolutionary-war/public-political. Individuals, singly and in concert, have weighed in on public issues in this fashion since the Republic's birth. There is a direct line from the Benjamin Franklin-led "Pennsylvania Society for Promoting the Abolition of Slavery… rely[ing] upon its constitutional right to present Congress with a petition in which its membership held no 'private interest,'" Shireen A. Barday, "FEC v. Wisconsin Right to…Petition?," 61 Stanford L. Rev. 443, 450 (Nov. 2008), to the present day. Meg Kinnard, "More Than 200 Former Republican Presidential Staffers Sign Open Letter Endorsing Harris Over Trump," Associated Press, Aug. 27, 2024.

[42] Michael W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412, 441 (Nov. 2013).

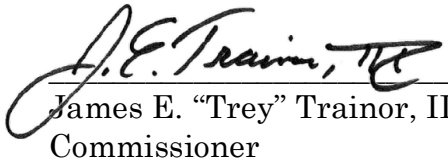
[43] *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("Under the constitutional avoidance canon, when statutory language is susceptible of multiple interpretations" an adjudicator "may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems") (punctuation altered); *Edward J. DeBartolo Co. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("Another rule of statutory construction, however, is…where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied…that it is beyond debate") (internal citation omitted).

Sean J. Cooksey
Chairman

September 6, 2024
Date

Allen J. Dickerson
Commissioner

September 6, 2024
Date



James E. "Trey" Trainor, III
Commissioner

September 6, 2024
Date

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Biden for President (n/k/a Harris for President) and Keana Spencer in her official capacity as treasurer, *et al.*[1]	)	MURs 8123 and 8182

STATEMENT OF REASONS OF VICE CHAIR ELLEN L. WEINTRAUB AND COMMISSIONERS SHANA M. BROUSSARD AND DARA LINDENBAUM

I. INTRODUCTION

These two Complaints focus on an October 2020 public statement (the "Public Statement") signed by 51 former United States intelligence officials, which was published by *POLITICO*. The Complaints allege that the Public Statement constituted an unreported, coordinated, in-kind contribution and a prohibited government contractor contribution to then-presidential candidate Joseph R. Biden and other political committees.

The Office of General Counsel ("OGC") recommended that the Commission dismiss the allegations.[2] OGC first reasoned that the Public Statement did not constitute an in-kind contribution because the uncompensated volunteer exemption applies and because the Public Statement did not satisfy the definition of a coordinated contribution.[3] Further, OGC concluded that the individual signatories were not government contractors under the Act.[4]

While the Commission unanimously voted to dismiss the Complaints, the Commission did not approve a factual and legal analysis.[5] We therefore write this Statement of Reasons to explain the basis for our vote.

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[1] The committees "Biden for President" and "Biden Victory Fund" have been renamed "Harris for President" and "Harris Victory Fund," respectively. *See* Harris for President, Amended Statement of Organization (July 21, 2024), https://docquery.fec.gov/pdf/297/202407219665705297/202407219665705297.pdf; Harris Victory Fund, Amended Statement of Organization (July 21, 2024), https://docquery.fec.gov/pdf/305/202407219665705305/202407219665705305.pdf. Because the activity discussed herein occurred while both committees used their prior names, this analysis refers to Biden for President and Biden Victory Fund.

[2] First Gen. Counsel's Rpt. at 17-18.

[3] *Id*. at 9-15.

[4] *Id*. at 16-17.

[5] Certification at 2 (Aug. 13, 2024).

II. FACTUAL BACKGROUND

Joseph R. Biden, Jr. was a candidate for President of the United States during the 2020 election cycle.[6] At that time, Biden for President ("BFP") was his principal campaign committee.[7] Biden Victory Fund ("BVF") and Biden Action Fund ("BAF") were joint fundraising committees.[8] The DNC is a national committee of the Democratic Party.[9]

During the latter part of the 2020 presidential campaign, news stories emerged regarding various emails purportedly sent by Hunter Biden, while he served as a board member of a Ukrainian energy company during his father's term as Vice President of the United States. On or about October 17, 2020, Antony Blinken, who was a campaign advisor to BFP, contacted Michael Morell to discuss these news stories about Hunter Biden.[10] According to Morell, his conversation with Blinken led him to initiate drafting the Public Statement advancing the opinion that the purported emails and related news stories might be part of a disinformation campaign orchestrated by Russian intelligence agencies.[11] According to his later testimony, Morell also had discussions with Blinken and BFP regarding disseminating the Public Statement to the media.[12]

The Public Statement was signed by 51 individuals who previously worked in the U.S. intelligence community.[13] On October 19, 2020, weeks before the 2020 election, *POLITICO* published the Public Statement, which, among other things, opined that "the recent disclosure of emails allegedly belonging to Joe Biden's son [Hunter Biden] 'has all the classic earmarks of a

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6 Joseph R. Biden, Jr., Amended Statement of Candidacy (Aug. 11, 2020), https://docquery.fec.gov/pdf/584/202008149261305584/202008149261305584.pdf.

7 Biden for President, Amended Statement of Organization (Aug. 11, 2020), https://docquery.fec.gov/pdf/378/202008219266863378/202008219266863378.pdf.

8 Biden Victory Fund, Amended Statement of Organization (Aug. 31, 2020), https://docquery.fec.gov/pdf/685/202009019267073685/202009019267073685.pdf; Biden Action Fund, Amended Statement of Organization (Aug. 16, 2020), https://docquery.fec.gov/pdf/353/202008219266863353/202008219266863353.pdf. Biden Action Fund terminated on December 11, 2020. *See* Biden Action Find, Termination Report 2020 (Dec. 11, 2020), https://docquery.fec.gov/pdf/799/202012119374346799/202012119374346799.pdf.

9 DNC Services Corp / Democratic National Committee ("DNC"), Amended Statement of Organization (Sept. 22, 2020), https://docquery.fec.gov/pdf/029/202009299284981029/202009299284981029.pdf. The DNC continues to be the Democratic Party's National Committee. *See* DNC, Amended Statement of Organization (Apr. 25, 2023), https://docquery.fec.gov/pdf/359/202304259581294359/202304259581294359.pdf.

10 Compl., Ex. 1 at 2 (Oct. 23, 2023), MUR 8182; *see also* Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary & Michael R. Turner, Chairman, H. Permanent Select Comm. on Intel., to the Hon. Antony Blinken, Sec'y, U.S. Dep't of State (Apr. 20, 2023).

11 Compl., Ex. 1 at 2-3, Ex. 5 at 2, MUR 8182.

12 Compl., Ex. 1 at 7, 36-52, Ex. 5 at 3-4, MUR 8182. In an email to Nick Shapiro, Morell expressed that BFP requested the Public Statement be sent to a particular reporter at the Washington Post, who did not publish it. Compl., Ex. 1 at 3, MUR 8182 (citing an email from Michael Morell to Nick Shapiro (Oct. 19, 2020)). Shapiro distributed the Public Statement to multiple news outlets, ultimately making an arrangement with *POLITICO*. *Id.*

13 For a complete list of all signatories and their former official roles, *see* Compl. at 1-6, MUR 8123.

Russian information operation.'"[14] The Public Statement qualified its opinion by stating that, although the signatories had no evidence of Russian involvement in the emails and news stories, they were "deeply suspicious" that they were part of a Russian operation to "undermine the candidacy of former Vice President Biden and thereby help the candidacy of President Trump."[15]

The Complaints argue that the Public Statement constituted an in-kind contribution and that BFP failed to report the Public Statement as a contribution. Further, the MUR 8182 Complaint alleges that the Public Statement also constituted an unreported contribution to DNC, BVF, and BAF. The MUR 8123 Complaint alleges that the individual signatories were federal contractors prohibited from making any political contributions, and that BFP was likewise prohibited from soliciting or accepting a contribution from the individual signatories due to their statuses as federal contractors.[16]

BFP argues that the Complaints fail to establish that the Public Statement's publication was coordinated with BFP or that the Public Statement constituted a contribution or expenditure under the Act; it also argues that the MUR 8123 Complaint fails to establish that the individual signatories were federal contractors at the time of the Public Statement's publication.[17] Specifically, BFP emphasizes that the Complaint fails to allege either that a payment was made in connection with the Public Statement or that any of the "content standards" are met.[18] Finally, DNC, BVF, and BAF argue that the MUR 8182 Complaint alleges no violation against them and, as such, the Complaint should be dismissed without further analysis as to these Respondents.[19]

III. LEGAL ANALYSIS

A. The Public Statement Does Not Constitute an In-Kind Contribution Because It Is Not a Coordinated Communication

The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[20] Under Commission regulations, a communication is "coordinated," and therefore constitutes an in-kind contribution, when the communication meets a three-part test: (1) payment, in whole or in part, for the communication by a person other than

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[14] Compl., Ex. 2; Natasha Bertrand, *Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officials Say*, POLITICO (Oct. 19, 2020), https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276.

[15] *Id.* (asserting that "with Trump down in the polls, there is incentive for Moscow to pull out the stops to do anything possible to help Trump win and/or to weaken Biden should he win").

[16] *See generally* Compl. (Mar. 22, 2023), MUR 8123.

[17] *See generally* BFP Resp., MUR 8123 (May 16, 2023); Resp., MUR 8182 (Dec. 14, 2023). DNC, BVF, and BAF joined BFP in the Response to MUR 8182 and argued that the Complaint should be dismissed as to them because it alleges no violation against DNC, BVF, or BAF. Resp. at 1, MUR 8182.

[18] Resp. at 4, MUR 8182.

[19] *Id.* at 1.

[20] 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).

the candidate, authorized committee, or political party committee; (2) satisfaction of one of five "content" standards; and (3) satisfaction of one of six "conduct" standards.[21]

Here, neither Complaint alleges any payment made in connection with the Public Statement, let alone by an individual other than the candidate, authorized committee, political party committee, or an agent thereof.[22] The available information indicates that Morell, the drafter of the Public Statement, and the signatories, were all unpaid. Consequently, the Public Statement does not meet the first prong of the test for a coordinated communication and is thus not an in-kind contribution.[23] Because the Public Statement fails the first part of the test, we need not address the other two parts.

B. The Federal Contractor Allegation Fails Because the Public Statement Does Not Constitute an In-Kind Contribution

The Act and the Commission's regulations prohibit contributions to political committees by any person who enters into a contract with the United States or its departments or agencies for "furnishing any material, supplies, or equipment," if payment on such contract "is to be made in whole or in part from funds appropriated by Congress."[24] The prohibition covers contributions to any political party, political committee, federal candidate, or "any person for any political purpose or use."[25] The Act also bars any person from knowingly soliciting a contribution from a federal contractor during the prohibited period.[26]

The MUR 8123 Complaint asserts that the individual signatories, who are all former employees of the federal government agencies involved in intelligence activities, can be considered federal contractors because they are "bound by a lifelong contractual obligation with the Federal Government to maintain the secrecy of classified information."[27]

However, as explained above, the Public Statement did not constitute an in-kind contribution, and therefore, Respondents could not have solicited or received a prohibited federal contractor contribution. Further, we agree with OGC that the federal contractor allegation fails for the separate and independent reason that the individual signatories are not federal contractors

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21 11 C.F.R. § 109.21(a)(1)-(3). Although the MUR 8182 Complaint cites to the definition of "coordination" in 11 C.F.R. § 109.20, that regulation does not apply to coordinated communications.

22 *See generally* Compl., MUR 8123; Compl., MUR 8182.

23 11 C.F.R. § 109.21. It is therefore unnecessary to address whether the uncompensated volunteer exemption also applies. *See id.* § 100.74.

24 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a). Such contributions are barred for the period between (1) the earlier of commencement of negotiations or when requests for proposal are sent out, and (2) the later of the completion of performance on or termination of negotiations for the contract. 11 C.F.R. § 115.1(b).

25 11 C.F.R. § 115.2(a).

26 52 U.S.C. § 30119(a)(2); 11 C.F.R. § 115.2(c).

27 Compl. at 7, 17, MUR 8123.

under the Act.[28]

Accordingly, we voted to dismiss the Complaint.[29]

9/9/24
Date

Ellen L. Weintraub
Vice Chair

9/9/24
Date

Shana M. Broussard
Commissioner

9/9/24
Date

Dara Lindenbaum
Commissioner

[28] *See* First Gen. Counsel's Rpt. at 16-17.

[29] Certification at 2 (Aug. 13, 2024).