



FEDERAL ELECTION COMMISSION
Washington, DC

INTERPRETIVE STATEMENT OF CHAIRMAN ALLEN J. DICKERSON

From its inception, federal campaign finance law has carefully distinguished between “contributions” and “expenditures.” These two types of campaign spending receive different degrees of First Amendment protection,¹ and the differences in restrictions and reporting obligations for both the spender and the candidate are significant. Expenditures are not subject to amount limitations or certain source limitations and are reportable only by the spender above certain thresholds, while contributions are subject to amount and source limitations and are reportable by the benefiting candidate.

This well-established law notwithstanding, the question of what makes an expenditure “independent,” as opposed to “coordinated” with a candidate or their committee or agent (and therefore a contribution in kind to that candidate), remains an area of spirited debate for the Commission and the individuals and entities it regulates. A particular area of controversy within this debate involves whether and when a person’s republication of campaign materials prepared by a candidate is properly characterized as an expenditure or as a coordinated in-kind contribution. Enforcement matters involving alleged republication of campaign materials frequently come before the Commission, and the guidance we have provided in the past is, in my view, unclear.

This interpretive statement details my concerns with the Commission’s regulations governing the republication of campaign materials and sets forth what I believe to be the proper analytical framework for determining whether a public communication containing republished campaign materials qualifies as an in-kind contribution to a candidate. To summarize: I believe that portions of the Commission’s regulations governing republished campaign materials are contrary to law, and that when the Commission enforces the provisions that remain, it must establish actual coordination using the same standards applied to any other form of public communication. Failing such a finding, the independent republication of campaign materials is just that: an independent expenditure.

* * *

The Federal Election Campaign Act of 1971, as amended (the “Act”), provides that, for the purposes of limitations on contributions and expenditures, “the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his

¹ *Buckley v. Valeo*, 424 U.S. 1, 19–21 (1976) (holding, *inter alia*, that contribution limits—restrictions on the amount that a person can give to a candidate or committee—are broadly constitutional, while expenditure limits—on independent expenditures by individuals, on expenditures by candidates from their own personal resources, or on total campaign expenditures—are unconstitutional).

campaign committees, or their authorized agents shall be considered to be an *expenditure*....”² The Act also provides that an expenditure becomes a *contribution* to a candidate when it is “made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of” that candidate, their authorized committee, or their agent.³ In sum, under the Act, only if a person cooperates or consults with a candidate or committee on an expenditure does that expenditure become an in-kind contribution.

The Act, as amended, does not define the term “coordinated” or set forth concrete standards for when a public communication is made “in cooperation, consultation, or concert, with, or at the request or suggestion of” a federal candidate or political party. In 2002, however, Congress directed the Commission to promulgate regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees, and in particular to address, among other things, payments made by such persons for the republication of campaign materials.⁴ The Commission subsequently adopted two new regulatory provisions governing republication of campaign materials, at 11 C.F.R. §§ 109.21 and 109.23. These provisions were designed to capture situations where outside actors, in essence, subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, audience, and message are devised by the candidate.

Section 109.21 sets forth criteria aimed at determining whether coordination has occurred, in the form of a three-prong test detailing standards for the source of payment (the payment prong), the subject matter of the communication (the content prong), and the interaction between the person paying for the communication and the candidate or political party committee (the conduct prong).⁵ A public communication must satisfy all three prongs of this test to qualify as “coordinated,” and therefore as an in-kind contribution.⁶

Section 109.23, however, bypasses this three-prong test and states that *any* republication of campaign materials constitutes a *contribution* for the purposes of contribution limitations and reporting responsibilities of the person republishing the materials, rather than an *expenditure*, which is not subject to the Act’s source or amount limitations.⁷ Although § 109.23 further clarifies that the candidate who prepared the campaign materials does not accept or receive an in-kind contribution unless the communication is “coordinated” as defined by § 109.21,⁸ neither this caveat, nor the limited exceptions set forth at § 109.23(b), rescues this regulatory provision from its inherent contradiction of the Act.

My colleague has addressed this topic, and I concur with his view that § 109.23 is contrary to law because it improperly departs from and conflates the specific legal terms—contribution and expenditure—used in the underlying statute.⁹ Contributions and

² 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added).

³ *Id.* at (a)(7)(B)(i).

⁴ BIPARTISAN CAMPAIGN REFORM ACT OF 2002, Pub. L. 107–155, Tit. II, § 214(c), March 27, 2002, 116 Stat. 95.

⁵ 11 C.F.R. § 109.21(a).

⁶ *Id.*

⁷ 11 C.F.R. § 109.23(a).

⁸ *Id.*

⁹ Interpretative Statement of Comm’r Sean J. Cooksey (Nov. 30, 2021).

expenditures reflect different types of spending, and the law carefully distinguishes between them. As our predecessors on the Commission have observed, a straightforward reading of the Act precludes the conclusion that non-coordinated republication constitutes a contribution.¹⁰ Given this legal reality, and the high probability that a reviewing court would simply invalidate § 109.23 because it directly contradicts our governing statute, the Commission should avoid wielding that provision as a cudgel in enforcement matters alleging republication, and the regulation should be amended to conform with applicable law.

I would add, however, that § 109.23 does not stand alone: § 109.21 also contains language addressing republication of campaign materials within both the “content” and “conduct” standards of the coordination analysis. Specifically, § 109.21(c)(2) provides that the content standard is satisfied if a public communication “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee” (unless the dissemination falls under one of § 109.23’s limited exceptions).¹¹ Similarly, the conduct prong is satisfied if one of the enumerated standards is met and, with respect to the candidate, occurred after the original preparation of the campaign materials that are disseminated, distributed, or republished.¹² In other words, the Commission can still find that a public communication containing republished campaign materials is a contribution in kind—but it needs to undertake the coordination analysis at § 109.21 and find that all three prongs have been satisfied. These provisions do not suffer from the same legal infirmities as § 109.23.

Because allegations of coordination related to republication of campaign materials will often satisfy the payment and content prongs of our regulations, controversy frequently centers around one of the five standards that satisfies the conduct prong: that is, if the public communication at issue is created, produced, or distributed at the “request or suggestion” of the candidate. But as the Commission has previously explained, a “request or suggestion” must be privately made or targeted to a select audience; it cannot be inferred based solely on the existence of information or materials that the campaign makes available to the general public, including on a website.¹³ And while the Commission, in 2006, added a safe harbor for

¹⁰ See MURs 6603, 6777, 6801, 6870, and 6902, Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm’rs Caroline C. Hunter and Lee E. Goodman at 2 n.4.

¹¹ In my view, these exceptions are less than helpful. They are either redundant (Exception 1, for candidate committees republishing their own campaign materials), addressed elsewhere in the statute (Exceptions 3 and 5, for, respectively, campaign materials republished by media entities already exempted from the Act and campaign materials republished under coordinated party expenditure authority detailed elsewhere in the Act), unconstitutional viewpoint-based restrictions (Exception 2, for communications advocating the defeat of the candidate that prepared the material), or more properly addressed as a matter of prosecutorial discretion. Their principal role appears to be blunting the plain illegality of the first sentence of § 109.23 by addressing a few of that provision’s more problematic applications.

¹² 11 C.F.R. § 109.21(d)(6).

¹³ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003); see also MUR 6821 (Shaheen for Senate), Factual & Legal Analysis at 1–3, 7–8 (finding no coordination when IEOPC released advertisements conveying information that Shaheen campaign and Democratic Senatorial Campaign Committee had previously posted to campaign website and Twitter); MUR 7124 (Katie McGinty for Senate), Factual & Legal Analysis at 9–10 (finding no coordination when IEOPC and 501(c)(4) released advertisements conveying similar language and themes that McGinty’s campaign had previously posted on its website); MURs 7138 and 7229 (Friends of Patrick Murphy, *et al.*), First Gen. Counsel’s Rept. at 7–9 (recommending finding no coordination when IEOPC released

“publicly available information” to every conduct standard except the “request or suggestion” standard, the Explanation & Justification released at the time explicitly notes that the Commission made this decision to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate’s privately conveyed request or suggestion.¹⁴ Simply put, unless a private request or suggestion occurred, similarities between a campaign’s public materials and an outside actor’s public communication alone are insufficient to transmogrify an independent expenditure into a coordinated one.

Finally, I offer the observation that the term “campaign materials,” while defined elsewhere in the Act and our regulations,¹⁵ is not defined for the purposes of republication beyond the phrase “broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents.”¹⁶ In prior enforcement matters, complainants and our Office of General Counsel have tended to characterize silent “b-roll” footage and “talking points” as campaign materials.¹⁷ But the statutory definition suggests that “campaign materials” are more reflective of a campaign’s finished advocacy products—such as broadcast ads, as well as the “pins, buttons, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs” referenced elsewhere in the Act.¹⁸

To be sure, once campaign materials are identified, their republication in whole or in part triggers the content prong of our coordination regulation.¹⁹ But to avoid inconsistent enforcement and provide adequate notice to the regulated community, the Commission should harmonize its understanding of this term throughout our regulations. In doing so, it

advertisement targeted to geographic areas and containing information referenced on “Media” page on Murphy campaign’s website); MUR 5743 (Betty Sutton, *et al.*), Statement of Reasons of Comm’rs Hans A. von Spakovsky and Ellen L. Weintraub (noting that an outside group’s incidental use of a photograph downloaded from a candidate’s publicly available website does not constitute coordination).

¹⁴ Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

¹⁵ *See, e.g.*, 52 U.S.C. §§ 30101(8)(B)(viii); 30101(8)(B)(ix); 30101(8)(B)(x) (defined as including “pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs,” but not “the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising” in the context of volunteer materials); 11 C.F.R. §§ 100.87; 100.147 (defined as including “pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs” in the context of volunteer activity for party committees); 11 C.F.R. § 100.88(a) (defined as including “pins, bumper stickers, handbills, brochures, posters, and yard signs” in the context of volunteer activity for candidates); 11 C.F.R. § 9034.4(e)(4) (defined as including “bumper stickers, campaign brochures, buttons, pens and similar items,” in the context of qualified campaign expenses); 11 C.F.R. § 106.2(ii) (defined as including mass mailings, as well as “pins, bumperstickers, handbills, brochures, posters and yardsigns” in the context of matching funds regulation).

¹⁶ 52 U.S.C. § 30116(a)(7)(B)(3).

¹⁷ *See, e.g.*, MUR 6603 (Ben Chandler for Congress, *et al.*), Compl. at 3 and First Gen. Counsel’s Rpt. at 9 (characterizing b-roll footage as campaign materials); MUR 6777 (House Majority PAC, *et al.*), Compl. at 3 and First Gen. Counsel’s Rpt. at 8 (same); MUR 6870 (American Crossroads, *et al.*), Compl. at 2–3 and First Gen. Counsel’s Rpt. at 4–6 (same); MUR 7080 (Babeu for Congress, *et al.*), Compl. at 1–2 (characterizing talking points as campaign materials).

¹⁸ *See supra* n.15.

¹⁹ 11 C.F.R. § 109.21(c)(2).

is appropriate for the Commission, as courts have so often done, to look to our governing statute as a whole for guidance while avoiding unnecessary hardship or surprise to affected parties.²⁰ Accordingly, we must be wary of excessively broad interpretations of “campaign materials” that exceed the defined uses of the term throughout the Act and our regulations.²¹ In particular, a view that anything produced by a campaign is, *ipso facto*, “campaign materials”²² cannot be squared with the definition Congress chose to adopt throughout the Act.

* * *

I believe that the Commission’s regulations addressing republication of campaign materials need significant revision and clarification, and a rulemaking on this subject is appropriate and overdue. Until then, I offer these views to the Commission and the public for their consideration.

March 24, 2022
Date



Allen J. Dickerson
Chairman

²⁰ See, e.g., *Citizens to Save Spencer Cty. v. U.S. Env’t Prot. Agency*, 600 F.2d 844, 871 (D.C. Cir. 1979).

²¹ See *supra* n.15.

²² *Contra* MUR 6777 (House Majority PAC, *et al.*), First Gen. Counsel’s Rpt. at 7 n.22 (which incorrectly states, without providing pincites, that “for republication, the Commission has concluded that ‘campaign materials’ include any material belonging to or emanating from a campaign”).