FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

INTERPRETIVE STATEMENT OF
COMMISSIONER SEAN J. COOKSEY

Section 109.23(a) of Title 11 of the Code of Federal Regulations provides that "[t]he financing of the dissemination, distribution, or republication … of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either … shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities."[1] By subjecting this spending to contribution limits, the regulation's intent and practical effect is to prohibit outside parties from using a campaign's media content—such as logos, campaign photos, or B-roll footage—in their own political communications.[2] Importantly, § 109.23 makes no distinction whether the republication is done in coordination with the campaign or separately—both are considered "contributions." As a consequence, the scope of the regulation is quite broad: individuals may not work in concert with a campaign committee to republish campaign materials, but they are also barred from using publicly available campaign content in their own independent political speech.

I believe this regulation is patently illegal. As explained below, § 109.23 contradicts the plain text of its underlying statute, and it exceeds the Commission's constitutionally limited authority under the Federal Election Campaign Act of 1971, as amended (the "Act"). As a result, § 109.23 cannot withstand a legal challenge under the Administrative Procedure Act,[3] and it may also fail constitutional scrutiny. I think the Commission should revise it.

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The Commission has long struggled over what constitutes a prohibited "republication" under § 109.23. Is it a republication for an outside group to use a campaign photo from a candidate's website as part of its political mailers?[4] What about when a super PAC uses campaign

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1 11 C.F.R. § 109.23(a).

2 52 U.S.C. § 30116(a), (c). The contribution limit for the 2021-2022 election cycle is $2,900 per candidate per election. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bunding Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021).

3 5 U.S.C. § 706(2)(A), (C).

4 *See* Statement of Reasons of Commissioners von Spakovsky and Weintraub at 4 (Jan. 23, 2007), MUR 5743 (Betty Sutton for Congress, *et al*.) (reasoning that the political committee EMILY's List did not engage in a republication when it used a campaign photo as part of a larger mailer). *See also* Statement of Reasons of Vice Chair Petersen and Commissioners Hunter and McGahn at 1 (Dec. 2, 2009), MUR 5996 (Tim Bee for Congress, *et al*.) ("[W]e do not believe the republication of photographs from a candidate's publicly available website, particularly 'head shot' photos, constitutes republication of campaign materials.").

footage from YouTube in its own television advertisements?[5] While the Commission's Office of General Counsel has taken a maximalist view that an outside party's incorporation of any amount of campaign materials into its own communications is an illegal republication, the Commission's precedents have evolved over time and failed to articulate such a bright-line rule.[6]

But disagreements over the proper interpretation of "republication"—while important—I believe are secondary to § 109.23's latent legal defect. Put simply, the regulation is illegal because it improperly departs from the specific terms used in the underlying statute.[7] This is apparent when comparing the relevant text of each:

52 U.S.C. § 30116(a)(7)(B):

> (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall be considered to be a contribution* to such candidate;
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> (ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, *shall be considered to be contributions* made to such party committee; and
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> (iii) 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 campaign committees, or their authorized agents *shall be considered to be an expenditure* for purposes of this paragraph.[8]

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5 *See* Statement of Reasons of Chair Hunter and Commissioner McGahn at 3–5 (Feb. 22, 2012), MUR 6357 (American Crossroads, *et al.*) (concluding that an independent expenditure-only political committee's use of snippets of campaign footage taken from YouTube did not constitute republication).

6 *Compare* First General Counsel's Report at 8 (June 3, 2013), MUR 6667 (House Majority PAC, *et al.*) (arguing that the regulation's language about republication "in whole or in part" covers any use of campaign materials), *with* MUR 6357 (American Crossroads, *et al.*) (involving republication allegations where a committee used 10–15 seconds of b-roll footage in a 30-second TV ad, and where the Commission did not proceed with enforcement).

7 Although past Commissioners have noted this inconsistency between the regulation and the statute, to my knowledge, no one has thoroughly examined the question. *See, e.g.*, Statement of Reasons of Chair Hunter and Commissioner McGahn at 3 n.6 (Feb. 22, 2012), MUR 6357 (American Crossroads, *et al.*); Statement of Reasons of Vice Chair Petersen and Commissioners Hunter and Goodman at 2 n.4 (Dec. 17, 2015), MURs 6603 (Ben Chandler for Congress, *et al.*), 6777 (Kirkpatrick for Arizona, *et al.*), 6801 (Senate Majority PAC, *et al.*), 6870 (American Crossroads, *et al.*) & 6902 (Al Franken for Senate 2014, *et al.*).

8 52 U.S.C. § 30116(a)(7)(B) (emphasis added).

11 C.F.R. § 109.23(a):

> (a) The financing 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, the candidate's authorized committee, or an agent of either of the foregoing *shall be considered a contribution* for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. …[9]

As the emphasized language shows, the statute sets up a clear framework distinguishing between coordinated and uncoordinated republication. Under § 30116(a)(7)(B)(iii), any republication of campaign materials is considered an *expenditure*.[10] Then, the preceding two paragraphs at (i) and (ii) further provide that if an expenditure is made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate committee or political party committee, then it becomes a *contribution*.[11] In other words, the statute plainly provides that coordination is a necessary element for any republication of campaign materials to be considered a contribution. Otherwise, uncoordinated republication is only an expenditure. The Commission's regulation at § 109.23(a), however, collapses this distinction by treating any republication—whether coordinated or uncoordinated with a campaign—as a contribution.

The regulation is inconsistent with "the unambiguously expressed intent of Congress" through the statute's text.[12] Both "expenditure" and "contribution" are distinct and separately defined terms under the Act, used carefully throughout the legislation.[13] By providing that republication generally is an expenditure, and that coordinated expenditures specifically are contributions, it follows that Congress intended that uncoordinated republications are *not* contributions under the interpretive principle *expressio unius est exclusio alterius*.[14] Moreover, there is no ambiguity that the Commission could be said to be interpreting to justify deviating from the statutory text and substituting "contribution" for "expenditure." As a result, if challenged under the Administrative Procedure Act, I do not think a reviewing court would grant the Commission's regulation any deference, and it would hold the regulation contrary to law.[15]

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9 11 C.F.R. § 109.23(a) (emphasis added).

10 52 U.S.C. § 30116(a)(7)(B)(iii).

11 52 U.S.C. § 30116(a)(7)(B)(i)–(ii).

12 *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

13 52 U.S.C. § 30101(8), (9) (defining "contribution" and "expenditure," respectively).

14 *See Alegria v. Dist. of Columbia*, 391 F.3d 262, 266 (D.C. Cir. 2004) ("[W]hen Congress enacts specific limitations in a general statute it is presumed to allow other circumstances not included in those limitations."); *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989) ("[I]f Congress banned the importation of apples, oranges, and bananas from a particular country, the canon of *expresio unius est exclusio alterius* might well indicate that Congress did not intend to ban the importation of grapefruits.").

15 *EMILY's List v. FEC*, 581 F.3d 1, 20–22 (D.C. Cir. 2009) (holding that certain FEC regulations violated the First Amendment and exceeded the agency's statutory authority).

Some may argue that Congress's intent for uncoordinated republication is ambiguous—and therefore open to regulatory interpretation—based on the statute's legislative history. When it first adopted the predecessor regulation of § 109.23 in 1977, the Commission cited statements in the Conference Report for the 1976 amendments to the Act that "expenditures for … republication of campaign materials are considered a contribution to the candidate."[16] A prior House Report addressing language identical to that in the final bill similarly explained that the language in § 30116(a)(7) "treats expenditures made in cooperation, consultation, or concert with or at the request or suggestion of a candidate as a contribution in kind to that candidate and provides further that the republication of a candidate's campaign materials shall be regarded as such a contribution."[17] Likewise, at least one legislator opposed the bill on the grounds that it prohibited private citizens from "financ[ing] the distribution or republication … of any campaign ad or other materials used by a candidate … without it falling under the contribution limits."[18] In a later recodification of the regulation, the Commission declined to depart from this "longstanding interpretation of the underlying republication provision" because it did "not discern any instruction from Congress, nor any other basis" to justify doing so.[19]

Even so, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it."[20] Federal courts have no need to resort to committee reports or legislators' floor statements to understand a statute with clear text. The Supreme Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[21] The same is true for administrative agencies. The fact that the Commission issued the regulation many years ago does not bear on whether it is contrary to the statute's plain meaning. Indeed, the Supreme Court has declined to defer to regulations much older than § 109.23 that it concluded were outside an agency's statutory authority.[22]

What's more, there are substantial consequences to improperly treating uncoordinated republications as contributions. While the Supreme Court in *Buckley v. Valeo* upheld limits on contributions to political candidates, it struck down limits on individuals' expenditures for political advocacy. [23] The Court reasoned that expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[24] So too here. By subjecting independent communications containing campaign content to the limits on contributions, the

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16 H.R. Doc. No. 95-4a, at 111 (1977) (citing H.R. Rep. 94-1057, at 55 (1976) (Conf. Rep.)).

17 H.R. Rep. No. 94-917, at 6 (1976).

18 122 Cong. Rec. 12,207 (daily ed. May 3, 1976) (statement of Representative Steiger).

19 Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) (explanation and justification).

20 *Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011).

21 *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

22 *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (declining to defer to a 64-year-old Department of Veterans Affairs regulation and holding it contrary to the statute).

23 *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976).

24 *Id.* at 20.

Commission is unjustly restricting individuals' and organizations' protected political speech. This is the unfortunate result of regulatory overreach by an agency that "has as its sole purpose the regulation of core constitutionally protected activity."[25] And its effects are more than merely hypothetical, as evidenced by the Commission's regular receipt of complaints seeking to enforce this regulation.[26]

Ultimately, it is the Commission's responsibility to ensure that our regulations remain within our constitutional and statutory bounds. I maintain that § 109.23 is not. By incorrectly treating the uncoordinated republication of campaign materials as a contribution rather than an expenditure, the Commission is acting beyond its legal authority and infringing on constitutionally protected activity. To correct this error, the Commission should repeal or revise this regulation to align it with the statute, before a federal court does it for us.

November 30, 2021

[25] *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003).

[26] *See*, *e.g.*, MUR 6603 (Ben Chandler for Congress, *et al*.); MUR 6777 (Kirkpatrick for Arizona, *et al*.); MUR 6801 (Senate Majority PAC, *et al*.); MUR 6870 (American Crossroads, *et al*.); MUR 6902 (Al Franken for Senate 2014, *et al*.); MUR 7432 (John James for Senate, Inc.).