



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7347
End Citizens United and Deanna Nesburg)
in her official capacity as treasurer)

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

This matter is about an email disclaimer. End Citizens United is a multicandidate political action committee, and around March 9, 2018, it sent out a broad email solicitation.¹ The body of the email asked for funds for End Citizens United and for congressional candidate Conor Lamb.² The message used Lamb's signature and included a fundraising link, which led to a landing page where contributors could allocate funds between Lamb's campaign and End Citizens United. At the bottom of the email was a disclaimer: "Paid For By End Citizens United PAC (endcitizensunited.org) and Not Authorized By Any Candidate or Candidate's Committee."

The Complaint alleged that, through this email, Lamb solicited and accepted excessive contributions, End Citizens United fraudulently misrepresented that its solicitation was sent on behalf of a federal candidate, and End Citizens United used an improper disclaimer.³

On July 23, 2019, the Commission resolved most of these allegations, including finding no reason to believe that End Citizens United fraudulently misrepresented its association with Mr. Lamb and dismissing allegations that Mr. Lamb solicited or accepted excessive contributions.⁴ The sole allegation remaining was that End Citizens United used the wrong disclaimer on its solicitation. On March 25, 2021, the Commission voted to dismiss this remaining allegation as a matter of prosecutorial discretion.

We voted to dismiss the remaining disclaimer issue because we credit Respondent's argument that, in crafting the disclaimer for the email, they relied upon past Commission precedent. In particular, End Citizens United cites the Statement of Reasons of Commissioners

¹ See Factual and Legal Analysis, MUR 7347, (End Citizens United, *et al.*).

² Complaint at Exhibit A (Mar. 13, 2018),

³ *Id.*

⁴ Certification (July 23, 2019), MUR 7347, (End Citizens United, *et al.*).

Hunter, Petersen, and McGahn in MUR 6037 (Merkley) and the Statement of Reasons of Commissioners Walther, Petersen, Bauerly, Hunter, and McGahn in MUR 6044 (Musgrove)—two matters dealing with the same issue.⁵

Under Commission regulations, political committees are required to include an appropriate disclaimer when they send “electronic mail of more than 500 substantially similar communications.”⁶ In general, there are three types of disclaimers a committee may use:

- (1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;
- (2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or
- (3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.⁷

Additional disclaimer standards apply to coordinated party communications and independent expenditures by political party committees.⁸

In MUR 6044 (Musgrove), the Commission dismissed allegations that the Democratic Senatorial Campaign Committee (“DSCC”) erred by using the “not authorized by” disclaimer on a television advertisement where the candidate consented to and willfully participated in filming clips used in the advertisement.⁹ In doing so, the Commission noted that the candidate did not have a speaking part in the advertisement, that there was no indication that the candidate reviewed and approved the advertisement before it aired, and that the advertisement was not a coordinated

⁵ Response of End Citizens United and Deanna Nesburg, in her official capacity as Treasurer (“Response”) at 2–3 (May 4, 2018), MUR 7347 (End Citizens United, *et al.*),

⁶ 11 C.F.R. § 110.11(a)(1).

⁷ 11 C.F.R. § 110.11(b).

⁸ 11 C.F.R. § 110.11(d).

⁹ See Statement of Reasons of Chairman Steve Walther, Vice Chairman Matthew S. Petersen, and Commissioners Cynthia L. Bauerly, Caroline C. Hunter, and Donald F. McGahn, MUR 6044 (Musgrove).

communication. The Commission concluded, “There is no basis on which to determine that Musgrove authorized the advertisement.”¹⁰

In MUR 6037 (Merkley), the Commission dismissed allegations that the DSCC and the Democratic Party of Oregon incorrectly used a “not authorized by” disclaimer and failed to include a “stand by your ad” statement in two television advertisements where a federal candidate appeared. As in MUR 6044 (Musgrove), the controlling group of Commissioners¹¹ concluded that although the candidate participated in the filming of the advertisement, there was no indication that the candidate “authorized” it.¹² Further, the controlling group of Commissioners reasoned that the respondent’s disclaimer was appropriate because the alternative—requiring the respondent to use both “authorized by” and “stand by your ad” language—would wrongly suggest that the ad was actually a coordinated communication.¹³ That approach would create a “Catch-22” for party committees.¹⁴

Citing to MUR 6044 (Musgrove) and MUR 6037 (Merkley), End Citizens United argues that “authorized by” is best understood in reference to the Commission’s test for coordinated communications, that the email at issue is not a coordinated communication, and that, because the communication is not a “coordinated communication,” it is not “authorized by” the candidate. As a result, End Citizens United concludes, the “not authorized by” disclaimer is appropriate.¹⁵ The reasonableness of this conclusion is supported by MUR 6037 (Merkley), where the controlling commissioners can fairly be read to have stated that only “coordinated communications” are “authorized by” a candidate for disclaimer purposes. As a matter of due process and basic fairness, the Commission should not punish speakers who act in good-faith reliance on reasonable interpretations of past Commission statements. “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”¹⁶ Therefore, when in doubt, “[w]here the First Amendment is implicated, the tie goes to the speaker.”¹⁷ This is especially true in circumstances like those presented in this matter, where the Commission has failed to provide clear legal guidance to the public.

¹⁰ *See id.* at 6.

¹¹ *See generally Campaign Legal Center and Democracy 21 v. FEC*, 952 F.3d 352, 355 (D.C. Cir. 2020) (identifying the three Commissioners who voted not to go forward with an enforcement action as the “controlling commissioners” because their statement of reasons “under our case law, ‘necessarily states the agency’s reasons for acting as it did.’” (quoting *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992))).

¹² Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Matthew S. Petersen and Donald F. McGahn at 5, MUR 6037 (Merkley).

¹³ *Id.* at 6–7.

¹⁴ *Id.* at 2.

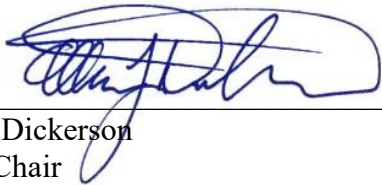
¹⁵ Response at 2–3, MUR 7347 (End Citizens United, *et al.*).

¹⁶ *Citizens United v. FEC*, 558 U.S. 310, 324 (2010).

¹⁷ *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

In addition to the Respondent's reasonable reliance on past Commission statements, we believe dismissal is appropriate because, as in MUR 6044 (Musgrove) and MUR 6037 (Merkley), the disclaimer clearly states who paid for the communication. Moreover, the solicitation link leads to a page where readers are presented with information sufficient to avoid public confusion or misunderstanding about the communication. Dismissal here is therefore consistent with the Commission's general approach to technical disclaimer violations,¹⁸ and the value to the public in pursuing this matter further is low.

In light of the foregoing, we concluded that pursuing this matter further was not an efficient use of the Commission's limited time and resources. Accordingly, we voted to exercise the Commission's prosecutorial discretion and dismiss this matter under *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).




Allen Dickerson
Vice Chair

April 30, 2021
Date



Sean J. Cooksey
Commissioner

April 30, 2021
Date



James E. "Trey" Trainor, III
Commissioner

April 30, 2021
Date

¹⁸ See Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Matthew S. Petersen and Donald F. McGahn at 6, MUR 6037 (Merkley) ("OGC consistently has recommended, and the Commission has agreed, to dismiss cases where a candidate appears in an ad that contains disclaimer language sufficient to avoid public confusion or misunderstanding regarding the ad's sponsor, even if the disclaimer does not comply with every technical requirement."). Procedurally, although such a dismissal often occurs at the initial stage of the enforcement process, it is equally appropriate at a later stage.