



FEDERAL ELECTION COMMISSION

Washington, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

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

**STATEMENT OF REASONS OF CHAIR SHANA M. BROUSSARD AND
COMMISSIONERS ELLEN L. WEINTRAUB AND STEVEN T. WALTHER**

The Complaint in this matter alleges that End Citizens United (“ECU”), a multicandidate committee, disseminated a fundraising solicitation via email that fraudulently misrepresented that it was from congressional candidate Connor Lamb, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The Complaint also alleges that the solicitation failed to include the appropriate disclaimer. The body of the email asked for funds for ECU and for congressional candidate Conor Lamb.² 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.”³

ECU, in response to the Complaint, acknowledges that the Lamb campaign consented to the email solicitation.⁴ Given this fact, the Commission, on July 23, 2019, found reason to believe that ECU violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(b) because the disclaimer in the email solicitation failed to state it was authorized by Conor Lamb or his

¹ See Compl. (Mar. 13, 2018). Lamb was a candidate in Pennsylvania’s special election for the 18th Congressional District held on March 13, 2018.

² See Compl. at Ex. A. 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 ECU. *Id.*

³ *Id.*

⁴ ECU Resp. to Compl. at 2 (May 4, 2018).

authorized committee.⁵ The Commission also authorized pre-probable cause conciliation with ECU.⁶

A little over a month after authorizing pre-probable cause conciliation, the Commission lost its quorum for approximately nine months.⁷ The Commission regained its quorum in June 2020 before losing it again a month later,⁸ and then went without a quorum for nearly six months.⁹ On December 18, 2020, the Commission regained its quorum. During the nearly 15 months the Commission lacked a quorum, the Commission could not vote on matters, including approving or rejecting proposed settlement terms in this matter. Considering the Commission's backlog of other pressing matters and in light of the likely modest civil penalty and the protracted state of the negotiations, we did not believe further conciliation efforts in this matter would be an efficient use of the Commission's limited resources. For these reasons, on March 25, 2021, we joined our colleagues in dismissing this matter under *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).¹⁰

Three of our colleagues issued a Statement of Reasons ("SOR") explaining that they credited ECU's argument that the "not authorized" disclaimer in the email solicitation was appropriate based on the lack of agency guidance and Commission precedent.¹¹ Claiming that it relied on MUR 6044 (Musgrove) and MUR 6037 (Merkley), ECU argues that communications paid for by third parties require candidate authorization statements only where the communications satisfy the Commission's definition of coordinated communications.¹² Noting that its email solicitation is not a coordinated communication, ECU asserts that these matters

⁵ See Certification ¶ 2 (July 23, 2019); Factual & Legal Analysis at 4–6. The Commission found no reason to believe that ECU violated 52 U.S.C. § 31024(b) by fraudulently misrepresenting that it was soliciting funds on behalf of Conor Lamb. Certification ¶ 2. The Commission also took action on other allegations in the Complaint, namely, dismissing the allegations that Conor Lamb and his authorized committee, Conor Lamb for Congress, violated 52 U.S.C. § 30125(e)(1)(A) and 52 U.S.C. § 30116(f) by soliciting and accepting excessive contributions, and finding no reason to believe that ActBlue, which administered the webpage through which the contributions were made, violated the Act. See *id.* ¶¶ 3–4.

⁶ See *id.* ¶ 6.

⁷ See Press Release, FEC, FEC remains open for business, despite lack of quorum (Sept. 11, 2019), <https://www.fec.gov/updates/fec-remains-open-business-despite-lack-quorum/>; Press Release, FEC, James E. Trainor III sworn in as Commissioner (June 5, 2020), <https://www.fec.gov/updates/james-e-trainor-iii-sworn-commissioner/>.

⁸ See Press Release, FEC, Caroline C. Hunter to depart Federal Election Commission (June 26, 2020), <https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/>.

⁹ See Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners (Dec. 18, 2020), <https://www.fec.gov/updates/shana-broussard-sean-cooksey-allen-dickerson-sworn-commissioners/>.

¹⁰ Certification ¶ 1 (Mar. 25, 2021).

¹¹ Statement of Reasons, Comm'rs Allen Dickerson, Sean Cooksey, & James E. "Trey" Trainor, III at 1–2.

¹² See ECU Resp. to Compl. at 2–3; ECU Resp. to RTB Notif. at 2–3 (Sept. 4, 2019).

supported its choice to use the “not authorized” disclaimer.¹³ Our colleagues believe ECU’s “reasonable reliance” argument warranted dismissal.¹⁴ We disagree.

ECU raised, and the Commission *previously rejected*, this same argument at the reason to believe stage. In its Factual and Legal Analysis, the Commission unanimously found this matter readily distinguishable from MUR 6044 (Musgrove) and MUR 6037 (Merkley) because here, unlike those matters, the third party (ECU) admitted that the candidate (Lamb) authorized the solicitation.¹⁵ To be sure, five Commissioners dismissed the alleged disclaimer violation in MUR 6044 (Musgrove) because there was insufficient information to conclude that the ad was authorized by the candidate, given that the ad contained video of the candidate but the candidate did not speak, there was no information that he reviewed the ad before it aired, and the ad did not constitute a coordinated communication.¹⁶ In MUR 6037 (Merkley), which also involved ads, OGC’s recommendation to find reason to believe there was a disclaimer violation did not receive the required support of at least four commissioners.¹⁷ Three Commissioners issued an SOR explaining that MUR 6044 (Musgrove) was “indistinguishable in all material respects” and the matter merited the same result.¹⁸ Although our colleagues conclude that it was reasonable for ECU to rely on the SOR in MUR 6037 (Merkley), it is well settled that an SOR by less than four Commissioners is not binding and does not establish agency precedent.¹⁹ Thus, contrary to the views expressed by our three colleagues, these matters, as the Commission previously determined, do not reasonably support ECU’s disclaimer choice.²⁰

¹³ ECU Resp. to RTB Notif. at 2.

¹⁴ Statement of Reasons, Comm’rs Allen Dickerson, Sean Cooksey, & James E. “Trey” Trainor, III at 4.

¹⁵ Factual & Legal Analysis at 5; *see* Advisory Opinion 2003-23 (WE LEAD) at 5 (concluding that a solicitation coordinated with a candidate must include in the disclaimer that the candidate authorized the communication).

¹⁶ *See* Statement of Reasons, Comm’rs Walther, Petersen, Bauerly, Hunter & McGahn at 6–7, MUR 6044 (Musgrove for Senate); Certification ¶ 3, MUR 6044 (Musgrove for Senate) (May 15, 2019).

¹⁷ *See* Certification, MUR 6037 (Merkley for Oregon) (Nov. 17, 2009).

¹⁸ Statement of Reasons, Comm’rs Hunter, Petersen, & McGahn at 4–5, MUR 6037 (Merkley).

¹⁹ *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (“[A] statement of reasons would not be binding legal precedent or authority for future cases.”); *see id.* (“The statute clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote.”). It is also noteworthy that two of the three Commissioners that issued the SOR in MUR 6037 (Merkley) concluded that it was distinguishable from this matter. Further, the Factual and Legal Analysis in this matter was unanimously supported by a bipartisan Commission less than two years ago, which included the support of Commissioners Weintraub and Walther, who now join this SOR.

²⁰ Moreover, there is no statutory or regulatory support for ECU’s argument that the “authorized by” disclaimer applies only where a communication qualifies as a coordinated communication. *See* ECU Resp. to RTB Notif. at 2–3; ECU Resp. to Compl. at 2–3. The terms “authorized” and “coordinated” are not interchangeable, and one district court, in rejecting an argument similar to the one raised here, explained that whether a disclaimer noting candidate authorization applied was a separate issue from whether the ad was a coordinated communication, *Brown v. FEC*, 386 F. Supp. 3d 16, 30 (D.D.C. 2019); *see* Def. FEC’s Opp’n at 22-23, 386 F. Supp. 3d, ECF No. 14 (indicating that candidate authorization disclaimer could have been required for an ad that was not coordinated

Nor do we agree with our colleagues that the disclaimer here is similar to other technical disclaimer violations that the Commission has dismissed because there was sufficient information to avoid confusion about who paid for the communication.²¹ The issue here is not who paid for the communication, but whether Lamb or his campaign authorized the communication. Again, the Factual and Legal Analysis addressed this particular argument and concluded that the Commission had not dismissed a disclaimer violation under these circumstances,²² and for good reason: the statement that no candidate authorized the solicitation is false and deprives the electorate of the transparency that the Act is intended to ensure.²³

May 26, 2021

Date



Shana M. Broussard
Chair

May 26, 2021

Date



Ellen L. Weintraub
Commissioner

May 26, 2021

Date



Steven T. Walther
Commissioner

(citing Statement of Reasons, Comm’rs Walther, Petersen, Bauerly, Hunter & McGahn at 6 MUR 6044 (Musgrove for U.S. Senate))).

²¹ See Statement of Reasons, Comm’rs Allen Dickerson, Sean Cooksey, & James E. “Trey” Trainor, III at 4.

²² Factual & Legal Analysis at 5–6.

²³ See *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (explaining that disclaimers “provide the electorate with information and ensure that the voters are fully informed about the person or group who is speaking) (internal citations and alterations removed).