



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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7464
 LZP, LLC and)
 Independence and Freedom Network, Inc.)
)

**STATEMENT OF REASONS OF VICE CHAIRMAN SEAN J. COOKSEY
 AND COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. “TREY” TRAINOR, III**

The Federal Election Campaign Act (“FECA” or the “Act”) of 1971, as amended, provides that after the Commission finds reason-to-believe (“RTB”) a violation of the Act has occurred, the Commission “shall make an investigation of such alleged violation.”¹ Following the investigation, our Office of General Counsel (“OGC”) must make a recommendation as to whether “there is probable cause to believe that any person has committed...a violation of the Act.”² At that stage, respondents are entitled to file a brief in opposition to OGC’s recommendation and request a hearing.³

That process played out here, and OGC ultimately recommended that we find probable cause that three entities violated the Act’s prohibition on contributions made in the name of another: LZP, LLC; Independence and Freedom Network, Inc. (“IFN”); and Honor and Principles PAC (“Honor PAC”).⁴ We voted against those

¹ 52 U.S.C. § 30109(a)(2).

² 52 U.S.C. § 30109(a)(4)(A)(i). Just as reason-to-believe is often transmuted into the administrative parlance of “RTB,” probable cause is often referred to as “PC.” *E.g.* Supp. Statement of Reasons of Vice Chair Dickerson at 3, 4, 8, 9, MUR 7165/7196 (Jesse Benton), Oct. 13, 2021.

³ This is unlike the procedures at the RTB stage, where OGC’s General Counsel’s Report has no explicit statutory basis, and to which respondents are not afforded an opportunity to directly respond. Instead, OGC’s RTB recommendations—which are often supplemented with publicly available information outside of the four corners of the complaint—merely take into account the respondent’s initial reply to a complaint, which may bear little resemblance to OGC’s final analysis.

⁴ 52 U.S.C. § 30122; Gen’l Counsel’s Br. at 22, MUR 7464 (LZP, LLC, *et al.*), Mar. 1, 2023 (“LZP Gen’l Counsel’s Br.”); Gen’l Counsel’s Br. at 22, MUR 7464 (Honor and Principles PAC), Mar. 1, 2023.

recommendations, and we write here to explain why we instead invoked the agency’s prosecutorial discretion and dismissed the allegations against IFN and LZP.⁵

I. THE LAW GOVERNING CONTRIBUTIONS IN THE NAME OF ANOTHER

The Act provides that “[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”⁶ The Commission’s regulations further state that “[n]o person shall...[m]ake a contribution in the name of another” and subsequently provides a non-exhaustive pair of relevant examples.⁷

The courts of appeal have imposed their own glosses on the statutory text, typically by affirming that the statute reaches so-called “straw donor” arrangements: where *A* gives a contribution to *B* with the intention that *B* immediately transfer those funds to *C*, but *C*, whether unknowingly or corruptly, reports the donation as coming from *B*, rather than *A*.⁸

For example, the D.C. Circuit has simply (and unhelpfully) described the name-of-another prohibition as a “provision requiring contributions to be made in the name of the source of the funding.”⁹ But other courts have gone further. The Ninth Circuit, after reviewing “the text, purpose[,] and structure of” the ban, concluded that § 30122 “unambiguously applies to a defendant who solicits others to donate to a

⁵ *Heckler v. Chaney*, 470 U.S. 821 (1985); 2d Certification at 1, MUR 7464 (LZP, LLC, *et al.*), Apr. 6, 2023. A majority of the Commission found no-PC regarding the allegations against Honor and Principles PAC, and those commissioners have explained their reasoning in a separate statement. 1st Certification at 1, MUR 7464 (LZP, LLC, *et al.*), Apr. 6, 2023; Statement of Reasons of Vice Chairman Cooksey, and Comm’rs Dickerson and Trainor, MUR 7464 (Honor and Principles PAC), July 5, 2023; Statement of Reasons of Chair Lindenbaum and Comm’r Broussard, MUR 7464 (Honor and Principles PAC), July 5, 2023.

⁶ 52 U.S.C. § 30122.

⁷ 11 C.F.R. § 110.4(b)(1). The two examples provided are “[g]iving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made...[and]...[m]aking a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.” 11 C.F.R. § 110.4(b)(2).

⁸ *United States v. O’Donnell*, 608 F.3d 546 (9th Cir. 2010); *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011); *United States v. Whittemore*, 776 F.3d 1074 (9th Cir. 2015).

⁹ *Doe, 1 v. Fed. Election Comm’n*, 920 F.3d 866, 871 (D.C. Cir. 2019).

candidate for federal office in their own names and either advances the money or promises to—and does—reimburse them for the gifts.”¹⁰ And the Seventh Circuit has similarly determined that the statute reaches conspiracies “in which one solicits another to deliver funds to a campaign, and either advances or promises to reimburse the expenditure.”¹¹

These cases, taken together with the text of our statute and regulations, help illuminate the applicable standard. Accordingly, we conclude that a person makes a contribution in the name of another when he or she knowingly: (1) solicits a person to make a contribution to a federal candidate or political committee in that person’s own name, and (2) either advances the contributed funds or promises to – and does – reimburse the contribution.

II. ALLEGATIONS, INVESTIGATIONS, AND DEFENSES

At the RTB stage, it was alleged that during the 2018 election IFN created LZP as a mechanism to make several contributions totaling \$270,000 to Honor and Principles PAC, which were improperly reported as coming from LZP, not IFN.¹² In other words, the Commission was asked to determine whether there was reason to believe that IFN solicited LZP to make a contribution in LZP’s name, and advanced the funds for it to do so.¹³

On May 20, 2021, the Commission unanimously found RTB that IFN and LZP violated the Act’s name-of-another prohibition.¹⁴ We also unanimously found¹⁵ that an unknown source was responsible for seeding the money used by LZP.¹⁶

¹⁰ *O’Donnell*, 608 F.3d at 555.

¹¹ *Boender*, 649 F.3d at 660.

¹² First Gen’l Counsel’s Report (“FGCR”) at 2, MUR 7464 (LZP, LLC, *et al.*), Apr. 23, 2021.

¹³ *Id.* at 15-16.

¹⁴ Certification at 1, MUR 7464 (LZP, LLC, *et al.*), May 20, 2021.

¹⁵ The Commission fractured over how to handle the reporting of some of these contributions. *Id.* at 2. Regardless, the LLC attribution issue was not before the Commission at the PC stage, as OGC merely advanced a garden-variety name-of-another violation.

¹⁶ *Id.* OGC ultimately did not recommend a PC finding against the unknown person(s). *See* LZP Gen’l Counsel’s Br. at 20.

The Commission commenced an investigation, which lasted more than 18 months and was conducted both through formal process¹⁷ and “informal” discovery. During this lengthy period, the Commission’s investigation veered well past the initial issue of “Who gave the money to LZP?,” which was the basis of its RTB vote.¹⁸

In particular, having quickly discovered the identity of the source of funds to LZP – Respondent Ohio Works¹⁹ – OGC sought, informally and without Commission approval, information about, *inter alia*, the financial supporters of Ohio Works. Government agents in turn spoke to some of those persons, despite there being no evidence that those contributors gave to Ohio Works for the purpose of giving money to LZP.²⁰ We should not have done this. It was both unnecessarily invasive and unnecessarily time-consuming,²¹ especially as applied to “two dissolved nonprofit

¹⁷ Cert. at 1, MUR 7464 (Independence and Freedom Network, Inc. et al.: Circulation of Discovery Documents), Nov. 15, 2022.

¹⁸ FGCR at 13 (“The record in this [M]atter supports a finding that there is reason to believe that Unknown Respondents violated the Act’s prohibition against contributions in the name of another by making contributions through LZP, that IFN, Ray McVeigh, and LZP violated the Act by knowingly permitting LZP’s name to be used to effect such contributions, and that Honor PAC knowingly accepted those contributions”).

¹⁹ Second Gen’l Counsel’s Report at 3, 8, MUR 7464 (Ohio Works, *et al.*), May 5, 2023.

²⁰ As the D.C. Circuit has recognized, such forays into the inner workings of civil society groups are extraordinarily constitutionally sensitive. *See Am. Fed’n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm’n*, 333 F.3d 168, 179 (D.C. Cir. 2003) (“*AFL-CIO*”) (“[T]he Commission must attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a ‘delicate nature...represent[ing] the very heart of the organism which the [F]irst [A]mendment was intended to nurture and protect”) (quoting *Fed. Election Comm’n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981)) (ellipses and second brackets in original). This is especially true where the Commission’s informal investigation discovers associational information it is not legally entitled to know. “When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual’s ability to join with others to further shared goals. The risk of a chilling effect on association is enough, ‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Ams. for Prosperity Found. v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2389 (2022) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*) (“[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment”). This is so, “[e]ven if there [is] no disclosure to the general public,” and even if “donors might not mind—or might even prefer—the disclosure of their identities to the State.” *Bonta*, 141 S. Ct. at 2388 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (brackets in original)).

²¹ Probable Cause Reply Br. of LZP/IFN (“PC Br.”) at 1 (“It has been 1,681 days since the Complaint was filed in this matter, and an even longer 1,815 days since the alleged activity triggering the Complaint occurred, and yet, we might as well be back in 2021 at the very start of the...post-RTB investigation”).

organizations with no money,” leaving us “with no prospect of collecting civil penalties.”²²

Throughout this interminable process, IFN and LZP “never disputed that IFN transferred the funds to LZP that were used to make the contributions to Honor and Principles PAC,” and “consistently maintained that, with the guidance of advice from counsel, LZP was created as IFN’s disregarded entity because IFN sought to separate and organize its spending for purposes of simplifying its accounting procedures, and LZP believed, after consulting counsel, that it was required to convey its contribution to Honor PAC in its own name under Ohio corporate law.”²³ In other words, Respondents pled mistake, not malevolence, and they did so by pointing to Commission guidance that, in their view, suggested that a lack of malign intent was dispositive in their favor.²⁴

In addition, we were presented with a brief from the Office of General Counsel that relied, in substantial part, upon assertions of fact based upon unrecorded and unsworn statements allegedly made in informal meetings between witnesses and OGC attorneys.²⁵ Respondents cried foul, challenging – through a sworn affidavit – a number of the factual predicates undergirding OGC’s recommendation.²⁶ The Commission was forced to decide this evidentiary contest, culminating in an agency vote to “[d]etermine that in considering probable cause in MUR 7464, it will not consider factual assertions made in the probable cause brief that are based upon any withheld document or informal investigatory activity, to include any unsworn

²² *Id.* at 1.

²³ *Id.* at 2 (citation and quotation marks omitted). This was mistaken, but it is hardly the first time that counsel has been confounded by FECA and its attendant regulations. Tr. of Oral Arg. 17, *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (Oct. 8, 2013) (Scalia, J.) (“I agree that – that this campaign finance law is so intricate that I can’t figure it out”).

²⁴ PC Br. at 2, n.13 (citing Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 4-5, MUR 7754 (Pacific Env’tl Coal.), Dec. 1, 2021); *id.* at 8, n.33 (citing Supp. Statement of Reasons of Chairman Peterson and Comm’rs Hunter and Goodman at 2, MURs 6485/6487/6488/6711/6930 (W Spann LLC, *et al.*), Apr. 18, 2016).

²⁵ *Id.* at 4-6.

²⁶ *Id.* at Ex. A (“Declaration of Tom Norris”); *id.* at 1-2 (“OGC’s assertions and characterizations concerning interviews with two consultants for IFN are particularly striking, so much so in fact that Respondents are providing the attached sworn declaration from one of these consultants refuting OGC’s assertions and characterizations in an effort to correct the record”).

interview.”²⁷ In a conflict between refreshed recollections and sworn testimony, we could hardly have done otherwise.²⁸

Worse yet, the delays caused by OGC’s investigation imperiled our jurisdiction. FECA sets that clock at five years, and we were graced with sixty days—but no more—of tolling from Respondents. Because the Act requires us to engage in conciliation for thirty days before commencing an enforcement action,²⁹ and because the statutorily-required probable cause briefing did not conclude until March 16, 2023, by the time the Commission was in a position to vote on the PC recommendation, the agency was rapidly running out of runway to prepare a tricky and complicated case for federal court before a majority of the case expired in late May.³⁰

III. THE COMMISSION DECLINED TO FIND PROBABLE CAUSE IN AN EXERCISE OF PROSECUTORIAL DISCRETION.

When faced with a possible violation of the Act, we “must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”³¹

When we voted to find RTB against LZP and IFN, we believed that a relatively straightforward investigation would solidify the record, explain the timing of LZP’s

²⁷ Cert. at 1, MUR 7464 (LZP, LLC, *et al.*), Mar. 28, 2023.

²⁸ See Statement of Reasons of Chairman Dickerson and Comm’r Trainor at 3, MUR 7535 (Leah for Senate, *et al.*), March 28, 2022 (“Moreover, we have conclusive evidence that no specific solicitation was ever made. Ms. Vukmir and Mr. Uihlein both provided the Commission with categorical, sworn denials that they ever spoke to one another...we must credit the sworn statement”) (internal quotation marks and citation omitted); Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 9, MURs 7370/7496 (New Republican PAC, *et al.*), July 21, 2021 (“But this is speculation, and speculation directly refuted by the record before us. Ms. Hazelwood’s affidavit provides a categorical denial of any improper collusion...If this is so, and we must assume that it is absent credible counterevidence...”).

²⁹ “[I]f the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe...the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved.” 52 U.S.C. § 30109(a)(4)(A)(i).

³⁰ As noted *supra*, Respondents also asserted that they lacked the ability to pay a financial penalty.

³¹ *Heckler*, 470 U.S. at 831.

contribution to Honor and Principles PAC, and identify the source of funds provided to IFN for that transaction.³² But, as this Matter proves, an RTB finding does not guarantee a finding of probable cause. PC is a heightened form of review,³³ and requires the conscious building of a record that is subsequently likely to succeed in federal court should conciliation fail.³⁴

Instead, as noted above, OGC's investigation ballooned in a manner inconsistent with the "delicate nature" of our mission: "the regulation of core constitutionally protected activity."³⁵ This investigation, which went far beyond anticipated bounds and reached well past the legal theory actually approved by the Commission, took almost two years.

At that point, we were faced with Respondents which barely existed on paper and had no resources to speak of, who over five years ago, in reliance on advice of counsel and guidance published on this agency's letterhead,³⁶ chose to route

³² Factual and Legal Analysis at 9, MUR 7464 (Unknown Respondents) ("The record in this matter supports a finding that there is reason to believe that Unknown Respondents violated the Act's prohibition against contributions in the name of another by making contributions through LZP to Honor PAC. LZP implies that it was provided funds by its purported single member to make the contributions to Honor PAC and does not dispute the assertion that it appears to have engaged in no activity other than making the contributions at issue and appears to have been formed solely to make contributions using the funds of another").

³³ One of us has suggested that "[t]he evidence required to move from an RTB finding to a PC finding...may be analogized to the difference between the evidence a peace officer needs to stop a vehicle versus what she needs to arrest someone." Statement of Reasons of Vice Chair Dickerson at 4, MURs 7165/7196 (Jesse Benton), Oct. 13, 2021.

³⁴ Filing suit without such a factual record would require us to embark on a "self-defeating path [that] would risk making bad law and wasting the agency's litigation resources." Statement of Reasons of Chairman Dickerson and Comm'rs Cooksey and Trainor at 6, MURs 7581/7614 (Yang/Gong), Sept. 6, 2022.

³⁵ *AFL-CIO*, 333 F.3d at 170 (citation and quotation marks omitted).

³⁶ PC Br. at 9-10 ("This intent requirement was discussed in detail in the controlling Statement of Reasons in MURs 6485, 6487, 6711, and 6930, in which those Commissioners explained: '[T]he proper focus in these [M]atters is whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements, making the individual, not the corporation or corporate LLC, the true source of the funds. Thus, in matters alleging section 30122 violations against such entities, the Commission will examine whether the available evidence establishes the requisite purpose'...In short, intent matters." (second bracket supplied, citations omitted, emphasis in original).

donations through a separate, disregarded entity.³⁷ While we believe that Respondents' reading of the Act is wrong, it was not intentionally so.

Worse, due to errors made by the Commission in investigating this Matter, enforcement would have been unusually difficult. Because OGC's recommendations relied upon information directly contradicted by sworn testimony, the Commission was vulnerable to extensive and burdensome discovery were this Matter to proceed to litigation, which would drain our limited resources and risk making bad law (for us and others). And because virtually all of the case had been lost to the statute of limitations by the time we voted, there was little upside to compensate for these risks.

As the Supreme Court has recognized, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."³⁸ So it was here.


Having considered the Respondents' lack of malicious intent, their reliance upon the advice of counsel, the press of time as to the statute of limitations, the relatively small amount-in-violation remaining under the statute of limitations, the litigation risk to the agency, and the Respondents' limited resources, we could not justify further pursuit of this Matter.

CONCLUSION

For the foregoing reasons, we declined to proceed with further enforcement consistent with our prosecutorial discretion.

³⁷ See *id.* at 9-11; *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) ("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").

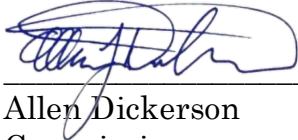
³⁸ *Heckler*, 470 U.S. at 831.



Sean J. Cooksey
Vice Chairman

July 7, 2023

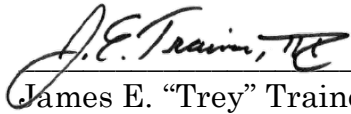
Date



Allen Dickerson
Commissioner

July 7, 2023

Date



James E. "Trey" Trainor, III
Commissioner

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Date