



FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Iowa Values, Inc.)	MURs 7672, 7674, and 7732
Senator Joni Ernst)	
Joni for Iowa)	
and Cabell Hobbs in his official capacity as treasurer)	
Jobs Opportunity and New Ideas PAC)	
and Cabell Hobbs in his official capacity as treasurer)	
)	

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

These Matters involve various allegations regarding a § 501(c)(4) social welfare organization named Iowa Values and its activities in support of U.S. Senator Joni Ernst's candidacy for re-election in Iowa in 2020, as well as its relationship to Ernst and her campaign. Two of the Complaints alleged that Iowa Values' major purpose was the re-election of Ernst, and that after accepting contributions and making expenditures for the purpose of supporting Ernst, it should have registered and reported as a political committee with the Commission in accordance with 52 U.S.C. §§ 30102, 30103, and 30104.¹ One of the Complaints also alleged that Ernst, Ernst's principal campaign committee (Joni for Iowa), Ernst's Leadership PAC (Jobs Opportunity and New Ideas PAC), and their agents established Iowa Values for the purpose of supporting her campaign and soliciting non-federal funds, and that Iowa Values used these funds to pay for coordinated communications (including the republication of Ernst campaign materials) in violation of 52 U.S.C. §§ 30125 and § 30118(a).²

In its Response, Iowa Values denied that it should have registered as a political committee, asserting that its major purpose (as evidenced by its spending) was issue advocacy, and that the advertisements cited in the Complaints did not trigger any reporting

¹ Compl. at 1–2, MUR 7672; Compl. at 1, MUR 7674.

² Compl. at 10–11, MUR 7672. A third Complaint alleged that Joni for Iowa failed to itemize payroll disbursements to conceal funds paid to campaign employees who may have been working simultaneously for Iowa Values, but our Office of General Counsel recommended dismissing this allegation as a matter of prosecutorial discretion in light of amended reports that Joni for Iowa filed with the Commission. Compl. at 1–2; MUR 7732; First Gen. Counsel's Rpt. at 4, MURs 7672, 7674, and 7732.

with the Commission.³ Ernst, Joni for Iowa, and Jobs Opportunity and New Ideas PAC separately denied that they or their agents established, financed, maintained, or controlled Iowa Values, or solicited non-federal funds on its behalf.⁴

Our Office of General Counsel (“OGC”) recommended that we find reason to believe a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), had occurred with respect to the allegations that Iowa Values should have registered and reported as a political committee with the Commission.⁵ OGC also recommended that the Commission find reason to believe Iowa Values violated 52 U.S.C. § 30104(b), (c), or (g) by failing to file reports of independent expenditures for Internet advertisements that referred to or depicted Ernst; that Iowa Values made a prohibited in-kind corporate contribution to Joni for Iowa through the republication of campaign materials; and that Ernst violated the Act’s soft money provisions by impermissibly soliciting non-federal funds in excess of \$5,000.⁶

The Commission has considered OGC’s substantive recommendations, which did not carry the day.⁷ We voted against proceeding with these recommendations for the reasons stated herein: namely, because (1) Iowa Values’ advertisements at issue did not, in our view, qualify as reportable independent expenditures; (2) the evidence before us is insufficient to support a reasonable inference that the majority of Iowa Values’ spending was to support Ernst’s candidacy; (3) the evidence before us does not support a reasonable inference that Ernst or her agents established, financed, maintained, or controlled Iowa Values; and (4) Ernst’s or her agents’ conduct did not amount to prohibited solicitation of non-federal funds.

Following the vote on OGC’s substantive recommendations more than sixteen months ago, the Commission has voted twice on taking the ministerial act of “closing the file,” which would make the Complaints, Responses, vote certifications, and the Commission’s reasoning in these Matters available for public and judicial review.⁸ Our Democratic and Independent colleagues, however, twice voted against it.⁹ Since then, Chairman Dickerson has placed these Matters for consideration on an executive session agenda on seven separate occasions, and one of our colleagues has expressly requested that they be removed from consideration each time. As a result, these Matters have languished on the Commission’s docket for nearly a year and a half, as of this writing, and the files remain shielded from public view—even after the Commission failed to respond or enter an appearance in a civil action filed by one of the Complainants pursuant to 52 U.S.C. § 30109(a)(8)(A).

The Commission’s consideration of these Matters has concluded. With the expectation that our actions will eventually see the light of day, and to provide the reasoning for our votes

³ Iowa Values Resp. at 3–4.

⁴ Joni for Iowa/JONI PAC/Ernst Resp. at 3–13.

⁵ First Gen. Counsel’s Rpt. at 55, MURs 7672, 7674, and 7732.

⁶ *Id.*

⁷ Certification, MURs 7672, 7674, and 7732 (Jan. 26, 2021).

⁸ Certification, MURs 7672, 7674, and 7732 (Jan. 28, 2021); Certification, MURs 7672, 7674, and 7732 (Jan. 11, 2022).

⁹ *Id.*

to the public and the courts when that day comes, we provide this Statement of Reasons for inclusion in the file.

I. FACTUAL BACKGROUND

Joni Ernst was a candidate for re-election to the U.S. Senate in Iowa during the 2020 election cycle, and Joni for Iowa is her principal campaign committee.¹⁰ Jobs Opportunity and New Ideas PAC has been Ernst's leadership PAC since 2014.¹¹

Iowa Values was established in 2017 and notified the Internal Revenue Service ("IRS") that same tax year that it would operate as a § 501(c)(4) tax-exempt organization, stating that its mission was "[t]o educate the public about common-sense solutions to various public policy issues of national importance, including limited government, defending life, cutting wasteful spending, finding solutions for the challenges facing rural America, and building a strong national defense."¹² Iowa Values operates a website at www.ouriowavalues.com. The website's main page includes a statement describing the group as "a nonprofit, nonpartisan forum."¹³

Iowa Values' IRS filings reflect that it received \$390,000 in contributions in 2017 and \$187,000 in 2018, and paid \$268,014 in expenses in 2017 and \$295,680 in 2018.¹⁴ Iowa Values reported spending \$5,000 on political campaign activity in 2017 but reported no such spending in 2018. In its Response to the Complaint in MUR 7674, Iowa Values stated that it expected its 2019 Form 990 to reflect \$839,000 in total spending, and that its political spending at both the federal and state levels that year was no more than 41% of its overall activity.¹⁵ As of this writing, Iowa Values' 2019 and 2020 Forms 990 are not publicly available.

Iowa Values' website and Facebook page contain various videos, advertisements, and articles, several of which mention or depict Ernst and discuss her position on matters relating

¹⁰ Joni Ernst, Amended Statement of Candidacy (Apr. 4, 2019); Joni for Iowa, Amended Statement of Organization (June 26, 2020).

¹¹ Original Statement of Organization (Aug. 6, 2014); Amended Statement of Organization (Sept. 16, 2014) (reflecting name change to Jobs Opportunity and New Ideas PAC).

¹² See 2017 Form 990, Iowa Values (Nov. 13, 2018), *available at* https://apps.irs.gov/pub/epostcard/cor/815224793_201712_9900_2019020816074301.pdf. The group was also registered as a nonprofit corporation in the District of Columbia and as a foreign nonprofit corporation in the state of Iowa. See Application for Certificate for Authority (Nonprofit) for Iowa Values (June 26, 2017) and 2019 Biennial Report for a Foreign Nonprofit Corporation (Feb. 26, 2019), *available at* <https://sos.iowa.gov/search/business/search.aspx>.

¹³ See <https://ouriowavalues.com/> (last accessed May 12, 2022).

¹⁴ See 2017 Form 990, Iowa Values; 2018 Form 990, Iowa Values (Nov. 13, 2019), *available at* https://apps.irs.gov/pub/epostcard/cor/815224793_201812_9900_2020021017129842.pdf.

¹⁵ Iowa Values Resp. at 2, 12.

to health care and Medicare for All.¹⁶ Facebook’s ad library shows that Iowa Values spent \$60,909 on ads about “social issues, elections or politics” from June 23, 2018 through September 22, 2020; and Google’s ad database shows that Iowa Values spent \$46,500 on ads from June 27, 2019 through September 21, 2020.¹⁷

On June 27, 2019, Iowa Values posted a press release on its Facebook page announcing a six-month “Digital Advertising Blitz and Door to Door Canvassing” that would kick off “the beginning of an election-long effort by Iowa Values to highlight the work of Sen. Joni Ernst.”¹⁸ The announcement stated that Iowa Values “invested six-figures in a digital advertising campaign that will touch swing voters in all 99 counties.”¹⁹ It also included a preview of the group’s “2020 Election Planning” and stated that the group “plans to be a consistent and strong advocate for the conservative and free market principles it was founded to promote during the 2020 election” that “in particular will highlight the work of Sen. Joni Ernst.”²⁰ One Iowa Values board member is quoted in the press release reiterating the group’s support for Ernst’s re-election, stating that “Iowa Values is going to make sure everyone knows how [Ernst is] fighting for all Iowans in Washington.”²¹

In July of 2019, Iowa Values’ fundraising vendor, Claire Holloway Avella of Holloway Consulting, Inc., sent a fundraising solicitation that attached a strategy memo outlining the work that Iowa Values planned for the 2020 election cycle.²² The email appeared to be directed to a specific individual and based on its language, appeared to have come about after Ernst provided Holloway Avella with an introduction to the recipient.²³ The email included the subject line “Funding Request from Iowa Values 501(c)(4) – promoting issues Senator Joni Ernst advocates” and stated that the group was formed to educate Iowans about “issues

¹⁶ See *Our Videos*, <https://ouriowavalues.com/our-videos> (last accessed Apr. 19, 2022); @ouriowavalues, FACEBOOK, <https://www.facebook.com/pg/ouriowavalues/posts/> (showing most recent post on Apr. 2, 2020) (last accessed May 12, 2022).

¹⁷ See Iowa Values, @OurIowaValues, Facebook Ad Library, [https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=785144711668660&sort_data\[direction\]=desc&sort_data\[mode\]=relevancy_monthly_grouped; Advertiser: Iowa Values, Google Transparency Report, https://transparencyreport.google.com/political-ads/advertiser/AR237965927210024960?hl=en](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=785144711668660&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped; Advertiser: Iowa Values, Google Transparency Report, https://transparencyreport.google.com/political-ads/advertiser/AR237965927210024960?hl=en). Although Iowa Values started running Google ads in June 2019, it did not distribute any ads between September 2019 and June 2020.

¹⁸ *Iowa Values Announces Digital Advertising Blitz and Door to Door Canvassing* (June 27, 2019), @OurIowaValues, FACEBOOK, https://www.facebook.com/ouriowavalues/posts/1130033023846492?__tn__=-R (including link to Iowa Values Press Release) (June 27, 2019).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Compl. at 3–4, MUR 7674; Compl. at Ex. B, MUR 7672.

²³ The email begins with the statement “As a follow up to our introduction by Senator Ernst.” Compl. at n.13, MUR 7674 (including link to a redacted copy of the email at <http://www.documentcloud.org/documents/6570893-July2019-Email-From-Fundraiser.html>).

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of national, state and local importance for which Senator Ernst advocates.”²⁴ The email also described that another group made “a six-figure ad buy in media markets across the state attacking Senator Ernst,” stated that the “purpose of our group, Iowa Values, is to push back against these types of negative attacks,” and asked the recipient to “consider an investment of \$50,000.”²⁵ The email attached a strategy memo discussing an initiative called “Operation Firewall” aimed at engaging voters who “represent the ‘firewall’ between winning and losing in 2020 for Senator Ernst,” and noting that that “there is critical work with segments of the electorate that must begin now in 2019 so that Senator Ernst has the best possible jumping off point in 2020.”²⁶ The memo described a “ground game apparatus” as its approach to reach voters that would include a “paid door to door effort” and a “complimentary long-term digital messaging plan.”²⁷

Although the press release refers to a “six-figure” advertising campaign, the record before us only shows that Iowa Values spent \$60,909 on Facebook ads about “social issues, elections or politics” from June 23, 2018 through September 22, 2020; and \$46,500 on Google ads from June 27, 2019 through September 21, 2020.²⁸ Iowa Values did not file any reports of independent expenditures with the Commission for the 2020 election cycle.

II. IOWA VALUES’ ALLEGED FAILURE TO FILE REPORTS OF INDEPENDENT EXPENDITURES

1. Background

Although not specifically alleged in the Complaints, OGC recommended that the Commission find reason to believe Iowa Values created and disseminated Internet advertisements and engaged in door-to-door canvassing efforts that qualified as independent expenditures, and subsequently failed to report these communications to the Commission as the Act and Commission regulations require.²⁹

2. Applicable Law

An “independent expenditure” is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified federal candidate that is not coordinated with a candidate, a candidate’s authorized committee, a political party

²⁴ *Id.*

²⁵ *Id.*

²⁶ Compl. at 4–5, MUR 7674; *see also id.* at n.16 (including link to strategy memo at <https://assets.documentcloud.org/documents/6550822/Holloway-Email-Attachment-Iowa-Values-Strategy.pdf>); Compl. at Ex. B, MUR 7672 (attaching copy of memo).

²⁷ *See* Compl. at Ex. B, MUR 7672.

²⁸ *See supra* n.17 and accompanying text.

²⁹ First Gen. Counsel’s Rpt. at 32–34, MURs 7672, 7674, and 7732.

committee, or the agents of any of the foregoing.³⁰ Independent expenditures must be timely reported to the Commission.³¹

A candidate is “clearly identified” if their name, nickname, photograph, or likeness appears in the communication, or the identity of the candidate is otherwise apparent through an unambiguous reference in the communication.³² “Express advocacy” means that the communication includes a message that unmistakably urges the election or defeat of one or more clearly identified candidates.

There are two ways that a communication can qualify as “express advocacy:” first, if it includes certain words (specifically enumerated in our regulation) advocating a clearly identified candidate’s election or defeat, or words or slogans which in context can have no other reasonable meaning than to urge a candidate’s election or defeat; or second, by meeting the “only reasonable interpretation” standard.³³ The latter standard provides that a communication expressly advocates even though it does not contain a clear statement of support or opposition to a candidate if, “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identifiable candidate(s) because (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.”³⁴

This “only reasonable interpretation” standard is a codification of the Ninth Circuit’s holding in *FEC v. Furgatch*³⁵ and has been held unconstitutional by several courts.³⁶ But

³⁰ 11 C.F.R. § 100.16(a).

³¹ 52 U.S.C. § 30104(b)(6)(B)(iii). Independent expenditures of \$200 or less must be subtotaled and reported as unitemized expenditures. In addition to a political committee’s regular reporting obligations, when a committee makes or contracts to make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours before, the date of an election, the Act requires the committee to file an additional report describing those expenditures within 24 hours. *See* 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). Further, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more outside of that 20-day period, up to and including the 20th day, must file a report describing those expenditures within 48 hours. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

³² 11 C.F.R. § 100.17.

³³ 11 C.F.R. § 100.22(a)–(b).

³⁴ *Id.* § 100.22(b).

³⁵ 807 F.2d 857 (9th Cir. 1987).

³⁶ *See, e.g., Fed. Election Comm’n v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff’d*, 92 F.3d 1178 (4th Cir. 1997) (unpublished), and *Fed. Election Comm’n v. Christian Action Network*, 110 F.3d 1049, 1052–54 (4th Cir. 1997) (concluding that “the entire premise of the court’s analysis [in *Furgatch*] was that words of advocacy such as those recited in footnote 52 were required to support Commission jurisdiction,” and that “[i]t is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech (*i.e.* ‘unmistakable,’ ‘unambiguous,’ ‘suggestive of only one meaning,’ ‘encourage[ment]’), and ignored those portions of *Furgatch* ... which focus on the words and text of the message;” *Va. Soc’y for Human*

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even assuming *arguendo* that this standard is constitutional and enforceable, it explicitly requires that the communication contain an “electoral portion”—in other words, an exhortation to the public to vote for, campaign for, or contribute to a clearly identified candidate; a reference to a particular person as a candidate; or a reference to an election.³⁷ That requirement was set forth in the *Furgatch* court’s opinion, which provided that a message must contain more than just “informative content” to constitute express advocacy—it must also include a clear call to electoral action.³⁸

3. Analysis

In its analysis, OGC posits that Iowa Values paid for various Internet ads expressly advocating in support of Ernst under the definitions at both 11 C.F.R. § 100.22(a) and (b), and therefore may have been required to file reports of independent expenditures with the Commission.³⁹ Upon closer review, however, this argument lacks merit under the plain language of the Act and Commission regulations.

With respect to § 100.22(a), none of the ads discussed in OGC’s analysis contain any of the explicit words of advocacy (*e.g.*, “vote for,” “support,” “re-elect,” “cast your ballot,” *et al.*) enumerated within our regulation. Additionally, OGC’s analysis appears to misinterpret the meaning of section § 100.22(a)’s provision addressing the use of “campaign slogans.” To be clear, the mere use of any type of slogan or other similar language by an outside group in a paid communication is not enough to come within § 100.22(a)’s regulatory reach. Instead, the regulation contemplates that the slogan or other similar language must be the same as (or at least resemble) a slogan that is being used by the campaign of the referenced federal candidate.⁴⁰ Because we have not been presented with evidence that Iowa Values’ ads

Life v. Fed. Election Comm’n, 263 F.3d 379 (4th Cir. 2001) (finding § 100.22(b) unconstitutional); *Right to Life of Dutchess Co., Inc. v. Fed. Election Comm’n*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding that “100.22(b)’s definition of ‘express advocacy’ is not authorized by FECA as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*”) (citation omitted).

³⁷ See Supplemental Explanation & Justification, Political Committee Status, 72 Fed. Reg. 5,595, 5,604 (Feb. 7, 2007) (“Political Committee E&J”) (“Express advocacy also includes exhortations ‘to campaign for, or contribute to, a clearly identified candidate.’”).

³⁸ *Furgatch*, 807 F.2d at 864 (“First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of the election or defeat of a clearly identified candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.”); see also *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (“*Furgatch* ... presumed express advocacy must contain some explicit words of advocacy.”)

³⁹ First Gen. Counsel’s Rept. at 32, 36–37, MURs 7672, 7674, and 7732.

⁴⁰ See, *e.g.*, Statement of Reasons of Chairman Bradley Smith and Comm’rs David Mason and Michael Toner at 5, MUR 5024 (Council for Responsible Government, *et al.*) (concluding that a slogan on a brochure, “New Jersey Needs New Jersey Leaders,” did not constitute a campaign slogan because there was no information that the slogan was employed or adopted by any of the candidates in the relevant election, and no basis to conclude that the slogan was identified with any campaign).

contained either the enumerated language in our regulation or a slogan that had been used or adopted by the Ernst campaign, we declined to reach a finding that the ads qualified as “express advocacy” under the definition at § 100.22(a).

With regard to § 100.22(b), OGC points to several of Iowa Values’ ads that contain language identifying “Ernst’s experience, personal qualities, characteristics in a positive light, and repeated slogans” (such as “Joni Ernst is Fighting for Us,” “Quality Care, Iowa Values, Joni Ernst,” “We Deserve Leaders who have Walked in Our Shoes and Share these beliefs, like Joni Ernst;” “Joni Ernst, Strong Compassionate Leadership in Difficult Times” and “Joni Ernst, Fighting for Iowa Values”) and concludes that these phrases constituted express advocacy, stating as its support the contention that “[the Commission has found that a communication contains express advocacy [under § 100.22(b)] where it uses a slogan referencing the candidate’s character, qualifications or accomplishments.”⁴¹ This conclusion, however, gives short shrift to § 100.22(b)’s requirement that the communication must also include an electoral portion. In fact, not one of the advertisements referenced in the First General Counsel’s Report contains a reference to an election, to Ernst as a candidate in an election, or a call for voters to take electoral action.

It is not enough to conclude that an ad contains an “electoral portion” simply because an individual identified in an ad run temporally proximate to a federal election happens to be a candidate. Nor is it enough to conclude that an ad contains an electoral portion simply because it contains praise or criticism of a particular individual. Notwithstanding any suggestion to the contrary, the standard for “express advocacy” is not whether a communication might somehow be read as campaign-related, or whether such a reading is a reasonable, or perhaps even the most reasonable, interpretation. Instead, as long as “reasonable minds” can plausibly interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad does not contain “express advocacy.”⁴² This is so even in cases where a communication “discusses or comments on a candidate’s character, qualifications, or accomplishments,”⁴³ as in Iowa Values’ ads referencing or depicting Ernst. The Commission has affirmed this approach on multiple occasions.⁴⁴

Because Iowa Values’ ads lack such any reference to an election, to Ernst as a candidate, or a call for voters to take electoral action, they lack the “electoral portion” required by § 100.22(b), and a reasonable person could conclude that they are encouraging actions other than voting for Ernst—specifically, support for the policy positions they

⁴¹ First Gen. Counsel’s Rept. at 28, MURs 7672, 7674, and 7732.

⁴² The suggestion that § 100.22(b)’s “reasonable person” test can turn on the understanding of the audience has been decisively rejected. *Va. Soc’y for Human Life v. Fed. Election Comm’n*, 263 F.3d. 379, 392 (4th Cir. 2001) (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)). *See also Fed. Election Comm’n v. Wisc. Right to Life*, 551 U.S. 449 (regarding the functional equivalent of express advocacy).

⁴³ Explanation & Justification, Express Advocacy, 60 Fed. Reg. 35,292, 35,296 (July 6, 1995) (“Communications discussing or commenting on a candidate’s character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.”).

⁴⁴ *See, e.g.*, MUR 5854 (Lantern Project) (ads critiquing federal candidates’ policy positions, but stopping short of electoral advocacy, were not express advocacy); MUR 6073 (Patriot Majority) (same).

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reference. For example, one advertisement, entitled “Iowans Deserve Quality, Affordable Choices,” includes statements criticizing the “radical left’s plan” to “abolish private insurance,” and states that Ernst’s plan is to fight for “quality care.” Another ad, entitled “Won’t Stand for It,” depicts Senator Elizabeth Warren and Representative Alexandria Ocasio-Cortez and criticizes “Democratic elites” for health care plans that would “tak[e] away doctor choice,” and states that Ernst is “fighting for Iowa Values in Washington” by working to “cut prescription drug costs,” “end surprise medical billing,” and “improve health care for our nation’s veterans.”⁴⁵

In short, the ads at issue in these Matters clearly contained messaging regarding matters of public concern, and the fact that they referenced or depicted Ernst and other candidates for office does not diminish the issues they highlighted. The Supreme Court recognized in *Buckley v. Valeo* that because “[c]andidates, especially incumbents [like Ernst], are intimately tied to public issues involving legislative proposals and governmental actions,” to avoid vagueness and overbreadth concerns, the Act can only be construed as regulating “[f]unds spent to propagate one’s views on issues without expressly calling for a candidate’s election or defeat.”⁴⁶ Consequently, because we were not presented with evidence that Iowa Values’ ads at issue in these Matters contained express advocacy under either provision of § 100.22, we declined to support OGC’s recommendation that we find reason to believe Iowa Values failed to report them to the Commission as independent expenditures.

III. IOWA VALUES’ ALLEGED STATUS AS A POLITICAL COMMITTEE

1. Background

The Complaint in MUR 7674 alleged that Iowa Values failed to organize or register as a political committee in violation of 52 U.S.C. §§ 30102 and 30103, and accordingly failed to file the disclosure reports required of political committees with the Commission in violation of 52 U.S.C. § 30104(b).⁴⁷ In support of these allegations, the Complaint described Iowa Values’ activities in support of Ernst, including its June 27, 2019 press release, a series of Facebook and Google ads in which Iowa Values used a photo or video of Ernst or her name, and the July 2019 fundraising email and attached strategy memo discussing Ernst and her re-election.⁴⁸

In its Response, Iowa Values denied that it qualified as a political committee, stating instead that it is a § 501(c)(4) social welfare organization with a “primary purpose[]” of “educat[ing] the public about common-sense solutions to various public policy issues of national importance including limited government, defending life, cutting wasteful spending, finding solutions for the challenges facing rural America, and building a strong national defense.”⁴⁹ Iowa Values stated that it spent most of its funds in 2019 “in furtherance of policy

⁴⁵ *Our Videos*, <https://ouriowavalues.com/our-videos> (last accessed May 12, 2022).

⁴⁶ 424 U.S. 1, 43–44 (1976) (per curiam).

⁴⁷ Compl. at 10, 12, MUR 7674.

⁴⁸ *Id.* at 2–4.

⁴⁹ Iowa Values Resp. at 3.

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priorities,” including “spending for public opinion research, data development, message testing, grassroots targeting, policy white papers, educational communications, fundraising, and compliance.”⁵⁰ The Response indicated that the group’s 2019 Form 990 would show approximately \$839,000 in total spending, and that its political spending at both the federal and state levels was no more than 41% of its overall activity⁵¹—however, as of this writing, neither the 2019 nor the 2020 Form 990 is publicly available. Finally, Iowa Values acknowledged sending the July 2019 fundraising email and strategy memo discussing Ernst and her re-election, but asserted that it does not accept contributions earmarked for a specific purpose.⁵²

2. Applicable Law

The Act divides the entities we regulate into two groups: political committees that must register and report to the Commission, and other individuals and groups that incidentally engage in regulated political activity. This difference is not a mere technicality; political committee status is often burdensome and invasive.⁵³ As the Supreme Court recognized in *Citizens United v. FEC*, political committees “are expensive to administer and subject to extensive regulations.”⁵⁴

The Act defines a “political committee” as any group of persons that within a calendar year receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures.⁵⁵ In *Buckley v. Valeo*,⁵⁶ the Supreme Court held that the Act’s definition of “political committee” impermissibly swept within its ambit groups engaged primarily in issue discussion.⁵⁷ For this reason, the Court narrowly interpreted the definition of political committee to reach only groups that have “the major purpose” of electing federal candidates.⁵⁸ Under the statute as thus construed, an organization that is not controlled by a federal candidate must register as a political committee only if (1) it crosses the \$1,000 threshold, and (2) it has as its “major purpose” the nomination or election of federal candidates.

Although the Court in *Buckley* supplied the major purpose test, it did not provide guidance about the proper approach or criteria to be used in applying this test,⁵⁹ and Congress did not update the definitions of “contribution,” “expenditure,” or “political

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 2, 12.

⁵² *Id.* at 13–14.

⁵³ See, e.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (noting that “designation as a political committee often entails a significant regulatory burden”).

⁵⁴ 558 U.S. 310, 337 (2010).

⁵⁵ 52 U.S.C. § 30101(4)(A).

⁵⁶ 424 U.S. 1 (1976) (*per curiam*).

⁵⁷ *Id.* at 79 (additional citation omitted).

⁵⁸ *Id.*

⁵⁹ See, e.g., *Real Truth About Abortion, Inc. v. Fed. Election Comm’n*, 681 F.3d 544, 556 (4th Cir. 2012).

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committee” in the years that followed.⁶⁰ In a later case, *Massachusetts Citizens for Life v. FEC*, the Court noted that an organization’s independent spending is a relevant factor in determining its major purpose, but examined the entire record as part of its analysis and did not chart the outer bounds of the test.⁶¹ Lower courts have refined the major purpose test, but only to a limited extent.⁶²

As a result, the development and application of this test has largely been left to the Commission. We have explained that an organization “must ... have the major purpose of engaging in Federal campaign activity” before it may be regulated as a political committee.⁶³ To determine an entity’s “major purpose,” the Commission explained that it considers a group’s “overall conduct,” including public statements about its mission, organizational documents, government filings (*e.g.*, IRS notices), and the proportion of spending related to “federal campaign activity.”⁶⁴ One court has held that the Commission is entitled to deference on the question of where the threshold for political committee status might lie, concluding that “[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious.”⁶⁵ For its part, the IRS’s standards permit a § 501(c)(4) organization to engage in “political activity” so long as the organization’s primary purpose is not the “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”⁶⁶ This standard includes both federal and non-federal spending.

3. Analysis

In considering the question of whether an entity qualifies as a “political committee” under the Act, we must heed the limiting constructions that courts have placed on the definition of this term, which are premised on respect for the First Amendment rights of citizens to associate and speak on social and political issues and policy. Accordingly, while

⁶⁰ See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 103 (2003).

⁶¹ 479 U.S. 238 (1986)

⁶² See, *e.g.*, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) (holding that state statute defining an organization’s “major purpose” by reference to a small dollar amount of expenditures rather than by reference to the actual activities of the organization was unconstitutional as applied); *N.C. Right to Life v. Leake*, 525 F.3d 274, 287–88 (4th Cir. 2008) (holding that the nomination of a candidate must be *the* (*e.g.*, sole and exclusive) major purpose of an organization, not merely *a* (one of several) major purposes); *Nat’l Right to Work Legal Defense and Ed. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1154 (D. Utah 2008) (“Buckley did indeed mean exactly what it said”) (quoting *N.C. Right to Life*, 525 F.3d at 288); *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544, 556 (4th Cir. 2012) (“[t]he determination of whether the election or defeat of federal candidates for office is the major purpose of an organization, and not simply a major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group’s activities against others”).

⁶³ Political Committee E&J, 72 Fed. Reg. at 5,601.

⁶⁴ *Id.* at 5,597, 5,605.

⁶⁵ *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 209 F. Supp. 3d 77, 94–95 (D.D.C. 2016).

⁶⁶ See Rev. Rul. 81-95; Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

not the only metric,⁶⁷ the simplest, cleanest, and fairest standard for determining whether an organization has the major purpose of the nomination and election of federal candidates is to analyze its total spending on federal campaigns. After all, the Act has always defined political committees solely in monetary terms, as groups receiving “contributions” and making “expenditures.”⁶⁸ Unless and until Congress enacts a new “political committee” definition with the “[p]recision of regulation” that “must be the touchstone in an area so closely touching our most precious freedoms,”⁶⁹ it is our duty to enforce that statute pursuant to the *Buckley* Court’s narrowing constructions “through a case-by-case analysis of a specific organization’s conduct.”⁷⁰ Thus, the Commission may regulate entities as “political committees” under the Act only if they first meet the statutory definition of the term and then, second, have as their major purpose the nomination or election of a federal candidate or candidates.⁷¹

Iowa Values’ Response does not directly address the question of whether it exceeded the \$1,000 threshold for contributions or expenditures, and does not deny that it discussed Ernst and her re-election in the July 2019 fundraising solicitation. Instead, the Response maintains that assuming *arguendo* (but not conceding) that the ads cited in the Complaint qualified as the functional equivalent of express advocacy, Iowa Values’ spending to promote these ads on Facebook and Google still amounted to only 6% of its total spending in 2019.⁷² As discussed previously, we do not agree that the Facebook and Google ads before us qualified as independent expenditures.⁷³

On the issue of whether it had the “major purpose” of engaging in federal political activity, Iowa Values represented through counsel that its total political spending in 2019—including non-federal activity over which we lack jurisdiction—did not exceed 41% of its budget.⁷⁴ Notwithstanding the statements in its press release, Iowa Values also denied disbursing funds for electioneering communications that would count toward a finding that

⁶⁷ Political Committee E&J, 72 Fed. Reg. at 5,596.

⁶⁸ 52 U.S.C. § 30101(4)(A); *Buckley*, 424 U.S. at 62 (“Political committee’ is defined in § 431(d) as a group of persons that receives ‘contributions’ or makes ‘expenditures’ of over \$1,000 in a calendar year.”).

⁶⁹ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

⁷⁰ Political Committee E&J, 72 Fed. Reg. at 5,596.

⁷¹ Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm’r Caroline C. Hunter at 9, MUR 6596 (Crossroads GPS, *et al.*).

⁷² Iowa Values Resp. at 12.

⁷³ *See supra* Part II.

⁷⁴ Iowa Values Resp. at 2–3. Iowa Values also stated that it did not engage in any political campaign activities in 2018 and disbursed only \$5,000 for political activities in 2017, as reflected in its Form 990s filed with the IRS. *Id.*

the group had the major purpose of political activity,⁷⁵ and neither the Complainant nor OGC were able to point us toward any such electioneering communications.⁷⁶

We see no reason to credit the premise that either Iowa Values' representations through its counsel, or the statement of purpose provided in its IRS and corporate filings, are false. The Complaint does not provide, and OGC was not able to find, evidence of actual advertising spending on express advocacy or electioneering communications that exceeded 41% of Iowa Values' proffered total 2019 budget. Instead, both the Complaint and OGC rely heavily upon a leaked strategy memo and a fundraising solicitation discussing a strategy to support Ernst and soliciting funds for these efforts. But leaked memos and solicitations alone are inherently subjective and ambiguous, and seldom reflect the full internal discussion within an organization or its actual activities. Absent evidence of discrete, concrete expenditures indicating that Iowa Values crossed the major purpose threshold, these materials are not enough to satisfy the major purpose test. What's more, their use as *prima facie* evidence of a major political purpose improperly shifts the burden of proving otherwise to the Respondent.

In our view, an organization's revealed goals are exposed by its actual spending, which is the surest guide to a group's major purpose.⁷⁷ This is assuredly a more reliable test than a necessarily subjective, and often contextless, review of leaked strategy memoranda and cherry-picked individual fundraising solicitations. Accordingly, we did not believe that sufficient evidence supported reason to believe Iowa Values had the major purpose of electing federal candidates.

IV. ALLEGED SOFT MONEY VIOLATIONS AND SOLICITATION OF NON-FEDERAL FUNDS BY ERNST

1. Background

The Complaint in MUR 7672 alleged that Ernst and her agents established Iowa Values for the purpose of supporting her campaign, rather than engaging in issue advocacy, in violation of the Act and the Commission's soft money regulations.⁷⁸ In support of these allegations, the Complaint pointed to current or previous relationships between three Iowa Values employees and consultants (two individuals and a fundraising vendor) and Ernst or her campaign.⁷⁹ Ernst, her campaign committee, and her leadership PAC categorically

⁷⁵ *Id.* at 12.

⁷⁶ *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 299 F. Supp. 3d 83, 101 (D.D.C. 2018) (“[The Commission is required] to presume that spending on electioneering communications contributes to a ‘major purpose’ of nominating or electing a candidate for federal office, and, in turn, to presume that such spending supports designating an entity as a ‘political committee’ under [the Act].”).

⁷⁷ *See, e.g.*, Statement of Reasons of Vice Chair Allen Dickerson and Commissioner James E. “Trey” Trainor, III, MUR 7181 (Independent Women's Voice).

⁷⁸ Compl. at 1, MUR 7672.

⁷⁹ *Id.* at 4–6.

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denied that Ernst or any of her agents were involved in the formation of Iowa Values, participated in the group's governance, or exercised any decision-making authority.⁸⁰

In its review of the Complaint, OGC noted that while there appeared to be insufficient information to support reason to believe that any of the named Iowa Values employees and consultants acted as Ernst's agents when they established or performed services for Iowa Values, Ernst herself may have played a role in soliciting funds for Iowa Values by allegedly connecting a potential contributor to a fundraising consultant who worked for both her campaign and for Iowa Values. It thus recommended that the Commission find reason to believe that Ernst and Joni for Iowa violated 52 U.S.C. § 30125 by soliciting non-federal funds via Iowa Values.⁸¹

2. Applicable Law

The Act and Commission regulations governing soft money prohibit federal candidates, their agents, and entities that are directly or indirectly established, financed, maintained, or controlled by or on behalf of federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending funds in connection with a federal election “unless the funds are subject to the limitations, prohibitions, and reporting requirements of th[e] Act.”⁸² The regulations set out ten non-exclusive factors to determine whether a person or entity (“sponsor”) “directly or indirectly established, financed, maintained or controlled” another person or entity, including whether the “sponsor, directly or through its agent,” “had an active or significant role in the formation of the entity,” “owns controlling interest” in the entity, has “the authority or ability to hire appoint, demote, or otherwise controls the officers or other decision-making employees or members of the entity,” or “has common or overlapping officers or employees with the entity that indicates a formal or ongoing relationship.”⁸³

For the purposes of the soft money regulations, an “agent” is “any person who has actual authority, either express or implied ... to solicit, receive, direct, transfer, or spend funds in connection with any election” on behalf of a federal candidate.⁸⁴ However, the definition of “agent” does not apply to individuals who only have apparent—rather than

⁸⁰ Joni for Iowa/JONI PAC/Ernst Resp. at 4.

⁸¹ First Gen. Counsel's Rpt. at 3, MURs 7672, 7674, and 7732.

⁸² 52 U.S.C. § 30125(e)(1)(A)–(B); 11 C.F.R. §§ 300.60, 300.61; *see also* 52 U.S.C. §§ 30116(a), 30118(a) (setting out contribution limitation and corporate contribution prohibition, respectively).

⁸³ 11 C.F.R. § 300.2(c)(2).

⁸⁴ *Id.* § 300.2(b)(3). In promulgating this regulation in 2002, the Commission explained that the definition of agent must cover “implied” authority because “[o]therwise, agents with actual authority would be able to engage in activities that would not be imputed to their principals so long as the principal was careful enough to confer authority through conduct or a mix of conduct and spoken words.” Explanation and Justification, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,082 (July 29, 2002) (“Non-Federal Funds E&J”). Thus, a principal may be held liable under an “implied actual authority theory” where “the principal's own conduct reasonably causes the agent to believe that he or she had authority.” *Id.* at 49,083.

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actual—authority to act on their principals’ behalf.⁸⁵ Furthermore, “a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals.”⁸⁶ In other words, even where an individual is an agent, a principal is only liable for that agent’s actions when the agent “act[s] on behalf of the principal.” The Commission thereby provided individuals with the ability to permissibly maintain agency relationships with a principal that may permissibly solicit and accept soft money and a principal that may not. This concept has withstood a challenge in federal court, as well as subsequent re-examination in a 2005–06 rulemaking.⁸⁷

The Commission has defined “to solicit” to mean “to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”⁸⁸ Our regulations also provide that a “solicitation” is “an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution” and “may be made directly or indirectly” but “does not include mere statements of political support[.]”⁸⁹

3. Analysis

OGC noted, and we agree, that while two of the individuals named in the MUR 7672 Complaint worked for Ernst in either or both a campaign or official capacity at some point in the past, there is insufficient information to surmise that they provided services to Iowa Values at the behest of Ernst or her campaign.⁹⁰ Apart from vague, speculative assertions that their “deep and longstanding ties” to Ernst could only lead to the conclusion that “[t]here is no plausible reason why [they] would decide on their own accord to help establish a

⁸⁵ Non-Federal Funds E&J at 49,082. The Commission has warned against confusing implied authority with apparent authority, emphasizing that a principal “may not be held liable, under an implied actual authority theory, unless the principal’s own conduct reasonably causes the agent to believe that he or she had authority.” *Id.* at 49,083.

⁸⁶ *Id.*

⁸⁷ *Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005); see Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4,975, 4,979 (Jan. 31, 2006) (“BCRA does not prohibit individuals who are agents of candidates ... from also raising non-Federal funds for other political parties and outside groups.”); see also Statement of Reasons of Vice Chair Allen Dickerson and Comm’rs Sean J. Cooksey and James E. “Trey” Trainor, III at 8–9, MUR 7354 (Friends of Chris McDaniel, *et al.*) (discussing “agency” in the context of the Commission’s soft money regulations).

⁸⁸ 11 C.F.R. § 300.2(m); see also Non-Federal Funds E&J, 67 Fed. Reg. at 49,086 (defining “to solicit” as to “ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary”).

⁸⁹ 11 C.F.R. § 300.2(m); see also Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006). In 2006, the Commission revised the definition of “to solicit” following a decision by the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, which held that the Commission’s former regulation was too narrow and failed to include “implicit requests for money.” *Id.* at 13,927 (quoting *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)).

⁹⁰ First. Gen Counsel’s Rpt. at 3, MURs 7672, 7674, and 7732.

501(c)(4) organization focused on the values of the State of Iowa other than to support the re-election of Sen. Ernst,”⁹¹ the Complaint simply does not provide any evidence that these two individuals possessed any actual authority as Ernst or her campaign’s agent in the course of their work for Iowa Values.

The third consultant—Holloway Consulting, Inc. (“Holloway”), a fundraising vendor—provided services to both Ernst’s campaign and Iowa Values during the period at issue in these Matters.⁹² OGC’s contention is that Holloway’s July 2019 fundraising email and attached strategy memo sent to an unnamed recipient qualified as “at least an ‘implicit and indirect request[] and recommendation[]’ that made Ernst’s intention behind the introduction [*e.g.*, facilitating a contribution to Iowa Values] clear.”⁹³ Specifically, OGC averred that the first line of Holloway’s fundraising email—“[a]s a follow up to our introduction by Senator Ernst, I am reaching out to you on behalf of Iowa Values”—supported a finding of reason to believe that Ernst and her campaign violated 52 U.S.C. § 30125(e)(1)(A) by soliciting non-federal funds.⁹⁴ Apart from this single statement made by Holloway to an unidentified third party, however, there is no specific information in the record indicating whether Ernst actually made the introduction, or if she did, its purpose. In our view, this statement does not meet the evidentiary burden required at the reason to believe stage for a finding that Ernst solicited non-federal funds for Iowa Values by using Holloway as an intermediary.

Moreover, as for Holloway itself, the Explanation & Justification for the Commission’s regulations governing soft money is clear that individuals can wear multiple hats and serve different principals in the context of fundraising activities.⁹⁵ The Supreme Court has affirmed this, holding that even “party officials may solicit soft money in their unofficial capacities.”⁹⁶ During the period at issue in these Matters, Holloway was providing services to both Ernst’s campaign and Iowa Values. It seems more than likely that an introduction by Ernst could have occurred in the context of an earlier solicitation Holloway made on behalf of the Ernst campaign, and that Holloway’s email cited in the Complaint was sent separately and in its capacity as an agent of Iowa Values. The fact that Holloway later solicited the recipient of that email on behalf of Iowa Values, after the purported initial introduction to the recipient by Ernst, does not, standing alone, suggest that Ernst herself asked, requested, or recommended (directly or indirectly, explicitly or implicitly) that the recipient contribute non-federal funds to Iowa Values. We therefore declined to support OGC’s recommendation that we find reason to believe Ernst and Joni for Iowa violated 52 U.S.C. § 30125(e)(1)(A) by soliciting non-federal funds.

⁹¹ Compl. at 4, 10, MUR 7672.

⁹² *Id.* at 5 n.15.

⁹³ First. Gen Counsel’s Rpt. at 41, MURs 7672, 7674, and 7732.

⁹⁴ *Id.* at 42.

⁹⁵ Non-Federal Funds E&J, 67 Fed. Reg. at 49,083 (July 29, 2002) (“In light of the foregoing, it is clear that individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties.”).

⁹⁶ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 159–61 (2003).

V. ALLEGED COORDINATION AND REPUBLICATION OF ERNST CAMPAIGN MATERIALS BY IOWA VALUES

1. Background

The Complaint in MUR 7672 also alleged that Iowa Values and the Ernst campaign impermissibly coordinated efforts with respect to certain Internet advertisements disseminated by Iowa Values.⁹⁷ Although the advertisements at issue incorporated photographs that originally appeared on Ernst’s campaign website and Facebook page,⁹⁸ the Complaint did not include any specific information supporting the inference that Iowa Values and Ernst or her agents privately communicated concerning their creation or dissemination. Instead, it appeared to rely on the theory (addressed in Part IV of this Statement of Reasons) that certain consultants with “close ties” to Ernst acted at her direction in performing services for Iowa Values, or that the Ernst campaign requested or suggested Iowa Values republish the images from its website and Facebook page, resulting in impermissible coordination between the two.⁹⁹ As a result, the Complaint concluded that Iowa Values made, and Joni for Iowa accepted, illegal in-kind contributions by coordinating communications and republishing Joni for Iowa campaign materials.¹⁰⁰

In its review of the Complaint, OGC noted that the evidence before the Commission was not, on its own, sufficient to support a finding of reason to believe that Iowa Values and the Ernst campaign shared information or coordinated improperly.¹⁰¹ However, OGC recommended that we find reason to believe Iowa Values violated 52 U.S.C. § 30118(a) by making a prohibited in-kind corporate contribution to Joni for Iowa when it disseminated Facebook and Google advertisements that included pictures that appeared on the Ernst campaign’s website and Facebook page.¹⁰²

2. Applicable Law

The Act provides that “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*....”¹⁰³ Such expenditure is considered 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.¹⁰⁴ Thus, under the Act, *only if* a person cooperates or

⁹⁷ Compl. at 11–12, MUR 7672.

⁹⁸ See First Gen. Counsel’s Rpt. at 49–50, MURs 7672, 7674, and 7732.

⁹⁹ Compl. at 12, MUR 7672.

¹⁰⁰ *Id.*

¹⁰¹ First Gen. Counsel’s Rpt. at 47–48, MURs 7672, 7674, and 7732.

¹⁰² *Id.* at 48–50.

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

¹⁰⁴ *Id.* § 30116(a)(7)(B)(i).

consults with a candidate or committee on an expenditure (*i.e.*, only if the expenditure is “coordinated”) does that expenditure become an in-kind contribution. The Act does not define “coordination,” but two Commission regulations attempt to address it, including in the republication context.

First, 11 C.F.R. § 109.23 states that the republication of campaign materials “shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.”¹⁰⁵ The benefitting candidate “does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21.”¹⁰⁶

Second, 11 C.F.R. § 109.21 sets out a three-prong test for whether a public communication is a “coordinated communication” based on the source of the 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).¹⁰⁷ A public communication must satisfy all three prongs to qualify as “coordinated” under this test.¹⁰⁸

The payment prong is satisfied where a communication “[i]s paid for, in whole or in part, by a person other than [the] candidate, authorized committee, or political party committee.”¹⁰⁹ The content prong is satisfied if, *inter alia*, the communication is a “public communication” that “disseminates, distributes, or republishes in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee”¹¹⁰ (the term “public communication” includes a communication “by means of any broadcast, cable, or satellite communication” and ads placed for a fee on another person’s website¹¹¹). The conduct prong is satisfied by one of five types of interactions between the payor and the candidate or authorized committee regarding the communication: a request or suggestion, material

¹⁰⁵ 11 C.F.R. § 109.23(a). Under this provision, “[t]he candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21.”

¹⁰⁶ *Id.* As we have noted previously, this regulation does not require coordination for the person who republished the campaign materials to be considered to have made a contribution. We believe that this directly contradicts the Act’s requirement that an expenditure does not become a contribution to a candidate unless 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, and is therefore facially invalid. *See, e.g.*, Interpretive Statement of Chairman Allen J. Dickerson (March 24, 2022).

¹⁰⁷ 11 C.F.R. § 109.21(a).

¹⁰⁸ *Id.* For instance (and relevant here), one way that a communication can satisfy the content prong is if it republishes campaign materials prepared by a candidate or a candidate’s committee. *Id.* § 109.21(c)(2).

¹⁰⁹ *Id.* § 109.21(a)(1).

¹¹⁰ *Id.* § 109.21(c)(2).

¹¹¹ 11 C.F.R. § 100.26.

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involvement, substantial discussion, use of a common vendor, or involvement of a former employee or independent contractor.¹¹²

3. Analysis

Because administrative agencies like the Commission are creatures of statute, we “possess only the authority that Congress has provided.”¹¹³ And as we have stated on other occasions, to the extent that 11 C.F.R. § 109.23 treats non-coordinated republication as an in-kind contribution, it directly contradicts the Act’s text and is therefore contrary to law.¹¹⁴ We are not alone in observing this legal infirmity.¹¹⁵ In order to remain faithful to our enabling legislation, when the Commission enforces the republication provisions, 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 material is not a reportable in-kind contribution to that campaign. This is the inevitable result of the statutory text.

As a result, we declined to support OGC’s recommendation that we find reason to believe Iowa Values violated 52 U.S.C. § 30118(a).¹¹⁶

VI. LEGAL FRAMEWORK FOR COMMISSION ENFORCEMENT AND JUDICIAL REVIEW

Our governing statute provides that any person may allege a violation of the Act by filing a complaint with the Commission.¹¹⁷ The Commission then must give the respondent notice and an opportunity to reply.¹¹⁸ After considering the complaint and any response, the

¹¹² 11 C.F.R. § 109.21(d).

¹¹³ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct 661, 665 (2022) (per curiam).

¹¹⁴ *See, e.g.*, Interpretive Statement of Chairman Allen J. Dickerson (Mar. 24, 2022); Interpretive Statement of Sean J. Cooksey (Nov. 30, 2021); Statement of Reasons of Chairman Allen J. Dickerson and Comm’r James E. “Trey” Trainor, III, MUR 7781 (Fight for the American Dream PAC, *et al.*); Statement of Reasons of Chairman Allen J. Dickerson and Comm’r James E. “Trey” Trainor, III, MURs 7766, 7675, 7681, and 7715 (Peters for Michigan and VoteVets, *et al.*); Statement of Reasons of Chairman Allen J. Dickerson and Comm’r James E. “Trey” Trainor, III, MUR 7717 (Theresa Greenfield for Iowa, *et al.*).

¹¹⁵ *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm’rs Caroline C. Hunter and Lee E. Goodman at 2 n.4, MURs 6603, 6777, 6801, 6870, and 6902.

¹¹⁶ Alternatively, it is unclear whether the advertisements at issue in these Matters qualified as “republication” under our regulations. *See, e.g.*, Statement of Reasons of Chair Caroline C. Hunter and Comm’rs Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads, *et al.*) (finding that an independent expenditure-only political committee’s incidental use of a candidate’s publicly available footage in an advertisement containing the IEOPC’s own original messaging did not constitute republication).

¹¹⁷ 52 U.S.C. § 30109(a)(1).

¹¹⁸ *Id.*

Commission may—by an affirmative vote of four commissioners—find “reason to believe” (“RTB”) that there is a violation and open an investigation.¹¹⁹

Congress included this four-vote requirement to ensure that Commission enforcement action could not proceed absent bipartisan support.¹²⁰ We are thus prohibited by law from taking any action on a complaint until it is satisfied.¹²¹ If such a vote fails, that is the end of the matter. We simply lack any lawful authority to take further action.

But while we cannot proceed without a finding of RTB, a complainant may go to court and challenge our decision. In such cases, we are obligated to provide our rationale so that the reviewing court can determine whether the Commission acted reasonably in declining to pursue a matter. To that end, where “the Commission fails to muster four votes in favor of initiating an enforcement proceeding,” the courts expect that the three “naysayer[]” commissioners¹²² will issue “a statement of reasons” that serves as “an explanation for deadlock dismissals.”¹²³ “[F]or purposes of judicial review,” this statement of the “controlling commissioners” provides “the Commission’s rationale for dismissal” and is treated accordingly by the courts and released to the public when a matter’s file is closed.¹²⁴

If the Commission dismisses a complaint, or fails to act on a complaint within 120 days, there is further recourse: any aggrieved person may sue in the United States District Court for the District of Columbia.¹²⁵ The relief available in these “(a)(8) suits”—named for the provision of the Act that creates the cause of action—is a declaration that the Commission’s dismissal or failure to act was contrary to law.¹²⁶ If the court finds as much, it “may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.”¹²⁷

VII. PROCEDURAL DYSFUNCTION AND THE “CLOSE THE FILE” VOTE

In its early days, these Matters were several of numerous examples of the historical practice of voting to close the file in a matter after the Commission—acting with a lawful quorum—declined to find RTB by the required four votes. Until recently, the vote to close the

¹¹⁹ *Id.* § 30109(a)(2).

¹²⁰ *See generally* 52 U.S.C. § 30106(a)(1) (providing that no more than three of the six voting commissioners “may be affiliated with the same political party.”).

¹²¹ *Id.*

¹²² *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 892 F.3d 434, 437 (D.C. Cir. 2018) (“CREW”).

¹²³ *Common Cause v. Fed. Election Comm’n*, 842 F.2d 436 (D.C. Cir. 1988).

¹²⁴ *CREW*, 892 F.3d at 437.

¹²⁵ 52 U.S.C. § 30109(a)(8)(A).

¹²⁶ *Id.* § 30109(a)(8)(C).

¹²⁷ *Id.*

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file has, by all accounts, been regarded as an uncontroversial, ministerial act.¹²⁸ However, in these Matters, as well as certain others, after the Commission voted on (and failed to find) RTB in a matter, three commissioners voted against closing the file.¹²⁹ This represents a disturbing trend that has emerged among some members of this Commission in recent years.

First, and most fundamentally, it depends upon the legal fiction that an enforcement decision has not really been made until the Commission has concluded—by four votes, no less—to perform the ministerial act of “closing the file.” This cannot be reconciled with our enabling statute. To be sure, FECA requires four affirmative votes to proceed with enforcement.¹³⁰ But there is no similar requirement to dismiss a matter, as the D.C. Circuit explicitly acknowledged last year,¹³¹ nor to take a ministerial action like closing the file (a practice not mentioned anywhere in the Act). Moreover, the D.C. Circuit has explicitly acknowledged the existence of “deadlock dismissals.”¹³² That is precisely what occurred here, and the theory that a failed RTB vote has no effect is simply wrong as a matter of statutory construction. One of our colleagues has suggested that leaving a file open is a way to facilitate further discussion after a deadlocked RTB vote.¹³³ This excuse is disingenuous. In 2021, when a Democratic Chair wielded the gavel, no Democratic or Independent commissioner reached out to us regarding placing these Matters on a future agenda for discussion. And beginning in early 2022, after a Republican commissioner took over as chair, Commissioner Weintraub repeatedly requested that these Matters be held over rather than being discussed or voted upon at the Commission’s executive sessions.

Second, the recent invention of a “four-votes-to-close-the-file” requirement undermines Congress’s carefully crafted framework for enforcement by our agency and judicial review of the same. Where the Commission’s handling of a matter is challenged in

¹²⁸ Certification ¶ 2, MUR 6589 (June 24, 2014) (reflecting that, despite splitting 3-3 on whether to find RTB, the Commission unanimously voted to close the file). *See generally* Statement of Chair Trainor III on the Dangers of Procedural Disfunction at 2,7 (Aug. 28, 2020).

¹²⁹ Certification, MURs 7672, 7674, and 7732 (Jan. 28, 2021); Certification, MURs 7672, 7674, and 7732 (Jan. 11, 2022).

¹³⁰ 52 U.S.C. § 30109(a)(2).

¹³¹ *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 993 F.3d 880, 891 (D.C. Cir. 2021) (“The statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*. A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners”).

¹³² *Id.* (quoting *Common Cause v. Fed. Election Comm’n*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

¹³³ Because we were unable to informally convince our Democratic and Independent colleagues that the Commission should function today in the same way that it has for the previous forty years, we proposed a formal Policy Statement on Closing the File. Under that Policy Statement, the default rule would be that a file closes after the agency fails to find RTB, and only a bipartisan, four-vote majority could leave the file open if there were a good faith basis for doing so. Pursuant to Commission rules, our proposed Policy Statement was placed on an open meeting agenda and was publicly discussed on April 22, 2021. During that meeting, our Democratic and Independent colleagues made it plain that their reversion from the norm was designed to prevent those instances where commissioners fail to find RTB from being made public.

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an (a)(8) suit, courts have explicitly recognized that the statement of reasons issued by the controlling commissioners (*i.e.*, those who declined to find RTB) is necessary “to make judicial review a meaningful exercise.”¹³⁴ If a vote of four commissioners were really required to “close the file” on a matter, commissioners who disagreed with the result could block meaningful judicial review of Commission enforcement decisions where there are not four votes to find RTB (for instance, in the case of the “deadlock dismissals” discussed above). This could stymie the judicial review for which Congress deliberately provided.

Third, as a matter of policy, holding a matter open despite a vote by the Commission not to proceed with enforcement is an alarming effort to “commissioner shop.”¹³⁵ It undermines principles of fundamental fairness (not to mention foundational notions of due process) to hold an enforcement matter open in the hope that a future slate of commissioners will re-vote and reach a different result. This amounts to blatant gamesmanship and is an embarrassment to the Commission. It also prejudices respondents, who are entitled to know when the Commission has decided not to pursue enforcement action in connection with a complaint. And it is no fairer to complainants, who are entitled to learn the outcome of their complaint so that they may timely plan and pursue any legal action in response. Our governing statute prohibits us from announcing “any notification or investigation” without the respondent’s permission. But a decision not to move forward on a complaint would not seem to qualify, and we do not even tell respondents of this development privately. More fundamentally, these protections are already a farce in certain respects: people and organizations filing complaints actively use them for publicity and fundraising, and complaints are routinely discussed in news reports. Using these protections to prevent respondents from learning of action in their own case is perverse. There is no good faith reason to leave respondents with the false impression that they remain the subject of possible federal enforcement action.

Finally, this approach exercises a corrosive influence on the work and collegiality of the Commission. Once the Commission has voted and declined to find RTB, responsible stewardship of the public resources with which we are entrusted compels us to move forward with the other business of the agency. If an RTB vote fails, the matter should not be allowed to languish with the Commission, subject to being re-called and re-voted indefinitely, wasting taxpayer resources and rendering meaningless our efforts as commissioners.

* * *

For the foregoing reasons, we declined to support OGC’s recommendations in these Matters.

Moreover, we note that good faith disagreement on the scope of campaign finance law has existed since the Act was passed in the 1970s, and we have long had a process for managing those disagreements and committing them to judicial oversight. In contrast, the instant approach adopted by our colleagues—that is, failing to close a file when the

¹³⁴ *Nat’l Republican Sen. Comm. v. Fed. Election Comm’n*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

¹³⁵ We have observed this in the past. *See* Statement of Reasons of Vice Chair Allen Dickerson, MUR 7486 (45Committee, Inc.); *see also* Statement of Chairman James E. “Trey” Trainor, III on the Dangers of Procedural Disfunction (Aug. 28, 2020).

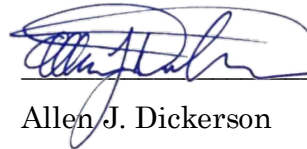
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Commission does not vote to proceed with enforcement and failing to appear or defend the agency in a subsequent delay suit, thus unilaterally denying both courts and the public the ability to gain insight into our decision-making—does not reflect a mere difference of opinion. It is specifically intended to hamstring this agency by bottling up particular matters, blocking public review of the Commission’s deliberations and decisions, and outsourcing the Commission’s duties and authority to outside allies.

Trusting that this cynical approach will not stand the test of time, we have entered our reasoning in these Matters into the file for future consideration by the public and the courts.

May 13, 2022

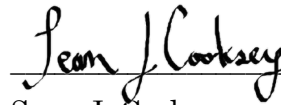
Date



Allen J. Dickerson
Chairman

May 13, 2022

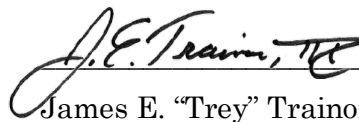
Date



Sean J. Cooksey
Commissioner

May 13, 2022

Date



James E. “Trey” Trainor, III
Commissioner