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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7724/7752
Johnny Teague for Congress, *et al.*	)	
	)	

STATEMENT OF REASONS OF COMMISSIONER ALLEN J. DICKERSON

INTRODUCTION

The Constitution prohibits the government from discriminating against religious expression,[1] from privileging commercial speech over religious speech,[2] and from expressing official disapproval concerning the free exercise of religion.[3] In these Matters, our Office of General Counsel ("OGC") recommended, and several of my colleagues supported, an approach that would have done all those things.

Accordingly, I voted to dismiss these Matters pursuant to this agency's prosecutorial discretion, as the Office of General Counsel recommended.[4] But I

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[1] Discrimination on the basis of religious viewpoint is viewpoint discrimination under the First Amendment's Free Speech Clause. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) ("It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought…We conclude, nonetheless, that…viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake").

[2] *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165, (2002) ("Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions…that interest provides no support for its application to [the religious] petitioners, to political campaigns, or to enlisting support for unpopular causes").

[3] *U. Christian Scientists v. Christian Science Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1161-1162 (D.C. Cir. 1987) ("Government may not convey any message of endorsement or disapproval of religious activity…") (internal citations and quotation marks omitted).

[4] *Heckler v. Chaney*, 470 U.S. 821 (1985). I also voted to find no reason-to-believe a violation had occurred, where our Office of General Counsel had made that recommendation. Certification at 1-4 ("Cert."), MURs 7724/7752 (Johnny Teague for Congress, *et al.*), May 31, 2023. I adopt the reasoning of the First General Counsel's Report on that issue.

declined to adopt OGC's recommendation that the Commission issue letters of caution expressing its official disapproval of Respondents' sincere religious expression.[5]

I. The Speech and the Speaker

The Church at the Cross ("Church") has been formally organized as a nonprofit corporation with the State of Texas since 1952. One of the Church's employees is its current senior pastor, Dr. Johnny Mark Teague. As part of its mission "to seek and save those who are lost,"[6] the Church conducts outreach to the broader community of Houston, including through television commercials on local cable.[7] The ads, including one that aired in February and March of 2020, feature Dr. Teague, who welcomes viewers to attend services at the Church.[8] The Church also maintains an online presence on Facebook. It posts content there, including video of Pastor Teague preaching and photos of events.

In the Church's February-March 2020 television communication, Pastor Teague speaks to the viewer, saying:

> Have you ever asked a friend, 'Do I have anything in my teeth?' Did you want them to tell you the truth, or tell you what made you feel good? A lot of people go to Church to make them feel good. God's [W]ord does that but he also brings you the truth. What we need to clean up our lives and experience [H]is blessing. I'm Dr. Johnny Teague and I invite you to join us at the Church at the Cross where we study every Sunday God's truth at [the Church's address]."[9]

The ad includes "a text banner… at the bottom of the screen containing the Church's logo, address, phone number, and schedule of worship times."[10] Dr. Teague is also identified on screen by name and the position of "Pastor."[11]

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[5] Cert. at 3-4.

[6] Teague Resp. at 1, Apr. 7, 2020.

[7] First Gen'l Counsel's Report at 9-10 ("FGCR"), MURs 7724/7752 (Johnny Teague for Congress, *et al.*), Feb. 9, 2023 (describing television communications).

[8] *Id.* at 5-6.

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.*

This is obviously not a campaign ad, so one can reasonably wonder why the Federal Election Commission is involved at all.

As it happens, in 2020, Dr. Teague successfully sought the Republican nomination for a seat in the U.S. House of Representatives.[12] Four residents of Houston filed identical two-page complaints concerning, *inter alia*, the Church's TV spot.[13] The complaints alleged violations of the Internal Revenue Code, binding legal guidance from the Federal Communications Commission, and one of our regulations implementing the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act").

Pastor Teague, his campaign committee, and the Church took advantage of their legal right to file a response, and OGC provided the Commission with a series of recommendations, with which I largely agree.[14] I write separately, however, to address two points: (1) the state of Commission law concerning the television advertisements discussed above, and (2) OGC's recommendation – supported by three of my colleagues – that the Commission caution the Church from running similar advertisements in the future.

II. Campaign Finance Law and the Church's Televised Invitation

a. The Church's advertisement and the Commission's regulatory guidance concerning coordinated communications.

Candidates for Congress face a panoply of restrictions on their activities and associations. They are barred from receiving campaign contributions from all

[12] Dr. Teague subsequently lost the general election.

[13] FGCR at 2, n.1 (describing complaints and noting their "identical" text).

[14] The complaints focus on the television communication discussed above, but also suggested there were additional campaign finance violations due to Teague's position at the Church and the Church's use of Facebook. OGC recommended against enforcement on those allegations, for both legal and prudential reasons. FGCR at 27-28 (listing recommendations); *id.* at 24-27 (finding Church use of social media did not violate FECA and recommending no-RTB); *id.* at 23 ("Other than receiving mail there, holding the food fairs in 2020[,] and the May 28, 2022 lunch, it is unclear whether the Church would have provided any other service that would provide something of value to the Committee. Therefore, any value derived from Teague's apparent limited use of the Church facilities may have been minimal"). I agreed with those recommendations, which accord with caselaw. *E.g. Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1028-1030 (9th Cir. 2009) (incidental use of church property may not be constitutionally regulated as in-kind "participation in a campaign finance effort").

corporations, including those formed on a not-for-profit basis.[15] Further, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate…shall be considered to be a contribution to such candidate."[16] Such "coordinated communications," if done in conjunction with a prohibited source like a Texas nonprofit corporation, are illegal regardless of the amount spent.

OGC concluded that the Church's broadcast buy was a coordinated communication because it met the relevant three-part test under our regulations.[17] That complex standard requires (1) a third-party payor, (2) content regulable as a "electioneering communication," and (3) conduct indicative of "material" or "substantial" interaction between the candidate and third-party payor.[18] Due to the nature of the communication here—a church ad featuring a message from the pastor-candidate and broadcast in the general geographic area of the Congressional district that Dr. Teague was seeking—the Church's communication appears to have met that bar.

In particular, because the televised invitation merely mentioned the name of a candidate within 30 days of Texas's March 2020 primary election and plausibly cost more than $10,000,[19] it may have qualified as an "electioneering communication," which comes with its own reporting obligations regardless of coordination.[20]

b. Commission regulations provide no safe harbor for religious expression.

None of this should matter. Even if this advertisement met our highly-technical standards designed for campaigning, one would assume that unambiguous religious expression was exempted from regulation a long time ago. Especially because, in other contexts, the Commission has created safe harbors for

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[15] 52 U.S.C. § 30118(a); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003) ("Since 1907, federal law has barred corporations from contributing directly to candidates for federal office. We hold that applying the prohibition to nonprofit advocacy corporations is consistent with the First Amendment").

[16] 52 U.S.C. § 30116(a)(7)(B)(i).

[17] FGCR at 13-16.

[18] 11 C.F.R. § 109.21.

[19] Dr. Teague's response suggested that the Church paid for the ad using some portion of a $60,000 donation. Teague Resp. at 1.

[20] 52 U.S.C. § 30104(f).

"communications [that] are not intended to benefit the...candidate's election" or are otherwise "not made for the purpose of influencing the…candidate's election."[21]

But, embarrassingly, the Commission failed to adopt a safe harbor for the speech of nonprofit groups like the Church despite an opportunity to do so. In 2010, a proposed rule "would have excluded from the definition of a coordinated communication any public communication paid for by a non-profit organization described in 26 U.S.C. § 501(c)(3)," including nonprofit religious organizations, "in which a candidate expresses or seeks support for the payor organization…unless the public communication PASOs[22] the candidate or another candidate who seeks the same office."[23]

Had the Commission taken that opportunity, this would be an open-and-shut case. Instead, the Commission declined to act because it was aware of "only [one] Commission action in which a 501(c)(3) organization paid for a public communication that satisfied all three prongs of the coordinated communication rule."[24] As these Matters amply show, that reluctance was error. Nevertheless, the 2010 Commission did explicitly note our "prosecutorial discretion to dismiss enforcement matters involving such communications."[25]

Perversely, the Commission *has* created a safe harbor protecting parallel commercial expression. We have exempted "[any] public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy" where those ads are similar to previous commercials run by the business and "do[] not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate."[26]

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[21] Fed. Election Comm'n, "Coordinated Communications," 71 Fed. Reg. 33190, 33201 (June 8, 2006) (creating safe harbor from coordinated communications rules for candidates appearing in ads for other candidates or soliciting funds for certain organizations regulated under 26 U.S.C. § 501(c)).

[22] PASO is an acronym for "Promotes, Attacks, Supports, or Opposes" and covers general advocacy for or against federal candidates seeking office.

[23] Fed. Election Comm'n, "Coordinated Communications," 75 Fed. Reg. 55947, 55960 (Sept. 15, 2010).

[24] *Id.*

[25] *Id.*

[26] 11 C.F.R. § 109.21(i).

In other words, had the Church's ad been for "Dr. Teague's Automotive Center" and encouraged viewers to "come on down to the lot this Sunday to view our outstanding selection of well-priced used vehicles," it would have been unequivocally exempt from regulation.[27] Thus, our regulations privilege commercial speech over similarly-situated religious expression. "This would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause."[28]

One of my colleagues has argued that the Church's ministry *does* fall into this exemption because "the Church's ad featuring Teague soliciting attendance and membership at the Church is a commercial communication entitled to the safe harbor, like any other business's ad."[29] While I agree that nonprofit organizations can and do sell goods, and that some can be said to "operate as businesses," I disagree that the Church's ad here is offering or advertising a commercial transaction.[30] Rather, the Church is engaged in direct religious ministry,[31] which cannot be analogized to advertising for a Goodwill store or school bake sale. After all, "the mere fact that [] religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project."[32]

While I believe that Vice Chairman Cooksey's interpretation of 11 C.F.R. § 109.21(i) is permissible and, were it adopted by the Commission, would survive judicial review under principles of agency deference,[33] I ultimately am not persuaded

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[27] *Id.*

[28] *Capitol Sq. Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (emphasis in original).

[29] Statement of Reasons of Vice Chairman Cooksey at 4, MURs 7724/7752 (Johnny Teague for Congress, *et al.*), July 12, 2023.

[30] *Id.*

[31] *See Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Sanchez-Ramos*, 647 F.Supp.2d 103, 115 (D.P.R. 2009) ("The right to espouse the religious beliefs of one's own choosing carries with it the right to engage in proselytization to disseminate religious teachings and seek converts to join a particular faith").

[32] *Murdock v. Commonwealth of Pa.*, 319 U.S. 105, 111 (1943).

[33] *Auer v. Robbins*, 519 U.S. 452, 464 (1997) ("There is simply no reason to suspect that the interpretation does not reflect…fair and considered judgment on the matter in question").

by it and abstained when that theory was presented to the Commission.[34] In my view the regulations are silent on the precise question before us, a silence occasioned by the Commission's intentional, if foolish, decision to provide a safe harbor for commercial activity while failing to protect essentially-identical nonprofit and religious advocacy.

c. Enforcement against the Church would not have been a prudent use of the Commission's resources.

As the Commission anticipated in 2010, and as the Office of General Counsel recommended, I joined three of my colleagues in exercising our "prosecutorial discretion to dismiss enforcement matter involving such communications" as these.[35]

Even if we had not forecast that result, it is constitutionally compelled. I could not have authorized the enforcement of a legal regime that privileges the selling of cars over pure religious ministry, nor spent our scare resources to defend a patently indefensible position.[36]

III. The Federal Government Has No Authority To "Caution" Americans Against Expressing Their Religious Beliefs.

In some cases, where a monetary penalty appears fruitless or inappropriate, the Commission will instead "send a letter admonishing the respondent."[37] In an

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[34] Cert. at 1-2.

[35] 75 Fed. Reg. at 55960.

[36] *Chamber of Commerce. v. Fed. Election Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("[T]he interpretation the [Federal Election] Commission has codified presents serious constitutional difficulties…We are obliged to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress. Accordingly, the Commission is not entitled to *Chevron* deference with regard to its interpretation of the statute"); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("Because the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution, courts make every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations. This canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency's interpretation of a statute if it 'presents serious constitutional difficulties") (internal citations and quotation marks omitted); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due").

[37] Fed. Election Comm'n, "Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process," 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007).

attempt to lessen the opprobrium of official "admonishment," the Commission has also developed an informal policy of issuing letters, in appropriate cases, cautioning a respondent against future violations of the Act.[38] The differences between letters of admonishment and letters of caution, and their appropriate role in resolving enforcement matters, is the subject of rich debate.

Three of my colleagues voted to issue a letter of caution to the Church for producing its television spot, even though "the ad identified Teague only in his capacity as operator of the Church and the ad makes no mention of the election."[39]

As already explained, the Church's communication was *bona fide* religious expression, produced and distributed as part of the Church's mission. It reflected the "sincere religious beliefs and convictions" of Dr. Teague and his congregation.[40] It falls within the heartland of the First Amendment's guarantees concerning the free exercise of religion.

Had we sent a letter cautioning Dr. Teague against producing such a communication, this agency would have unconstitutionally taken "official action[]" that "violated the Nation's essential commitment to religious freedom."[41] The Supreme Court has long defended "[t]he principle that government, [even] in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[42] And, again, the Commission would have cautioned a pastor for attempting to grow his flock, while our formal regulations—with the force of law—blessed essentially identical commercial solicitations.

The central danger posed by our campaign finance regime, since its inception, is the likelihood that imprecision and overreach will "blanket[] with uncertainty whatever may be said," causing speakers to "hedge and trim."[43] A related, and

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[38] *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-468 (2009) ("A government entity has the right to 'speak for itself.' 'It is entitled to say what it wishes,' and to select the views that it wants to express…Indeed, it is not easy to imagine how government could function if it lacked this freedom") (quoting *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 219, 229 (2000) and *Rosenberger*, 515 U.S. at 833) (brackets omitted).

[39] FGCR at 16.

[40] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. __; 138 S. Ct. 1719, 1723 (2018).

[41] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993).

[42] *Id.* at 543.

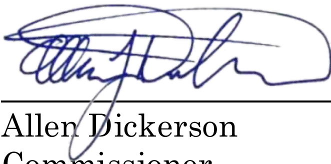
[43] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (*per curiam*) (citation and quotation marks omitted).

perhaps underappreciated, danger is that the sheer baroque complexity of this agency's rules will lead even people of good faith to struggle in their application and lose sight of the bigger picture.

So it is here. OGC's recommendation, and my colleagues' votes on this point, were doubtless made in good faith and without malice. But the Constitution protects liberty, not good intentions.[44] We have an obligation to take greater care, especially where our flawed regulations obscure the path.[45]

CONCLUSION

For the foregoing reasons, I opposed the issuance of a letter of caution, and voted to exercise our prosecutorial discretion and dismiss these Matters.



Allen Dickerson
Commissioner

July 12, 2023
Date

[44] *See Freedom from Religion Found. Inc. v. City of Marshfield, Wisc.*, 203 F.3d 487, 493 (7th Cir. 2000) (government action is unconstitutional "'irrespective of the government's actual purpose, [when] the practice under review in fact conveys a message of endorsement or disapproval'" under the Establishment Clause) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring op.)).

[45] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 ("[A]ll officials must pause to remember their own high duty to the Constitution and to the rights it secures").