FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Ethan Owens	)	MUR 7901
Angela Fisher	)	
Adam Kokesh American Referendum Project	)	
and Angela Thornton in her official capacity as Treasurer	)	
Adam Kokesh	)	
Roger Ver	)	
	)	

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

This Matter came to the Commission's attention via a Reports Analysis Division ("RAD") Referral of the authorized committee of 2020 Libertarian Party presidential candidate Adam Kokesh (the "Committee"), which at its outset appeared to involve unauthorized disbursements on the Committee's 2018 April Quarterly Report. Based on the information in that referral, the Commission initially found reason to believe certain individuals connected with the Committee may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by commingling campaign and personal funds; failing to keep and maintain adequate records; and inaccurately reporting campaign receipts, disbursements, and loans.

After an investigation of these allegations and depositions of various parties involved, our Office of General Counsel ("OGC") recommended we continue to pursue this matter by finding reason to believe the Committee's treasurer was not correctly reported, and that the Committee failed to deposit its receipts in a properly designated campaign account and submitted inaccurate reports concerning its receipts, disbursements, and loans. OGC further recommended we find reason to believe that a foreign national made, and Kokesh and the Committee knowingly accepted and failed to report, prohibited contributions. OGC suggested that the Commission authorize further investigation into the circumstances of the alleged unreported foreign national contributions, as well as other alleged unreported contributions made via cryptocurrency and at a poker tournament that apparently occurred during an annual anarcho-capitalist conference in Mexico in 2018.

When the Commission was presented with this second round of recommendations, we voted to dismiss the allegations related to the Committee's reporting and depository account, invoking our prosecutorial discretion pursuant to *Heckler v. Chaney*.[1] Although we acknowledge that the Committee's recordkeeping and reporting during the period at issue in this Matter was, in a word, deficient, the statute of limitations on some of these alleged violations will expire completely in a matter of weeks, and the amount in violation for the remaining allegations is either unclear or relatively modest. As a result, there was not sufficient time to complete the various enforcement stages Congress has imposed upon us by law, and we did not believe that continuing to pursue efforts to investigate and/or conciliate with the relevant respondents under these circumstances was worth the Commission's limited time and resources.

As for the recommendation that we find reason to believe a foreign national made and Kokesh and the Committee knowingly accepted and failed to report prohibited contributions, we found that OGC's analysis and recommendation gave short shrift to the due process afforded to respondents under the Act by failing to clear the bar for a finding of reason to believe a violation occurred. Accordingly, and as described in further detail below, we voted to find no reason to believe with respect to those allegations.

I. FACTUAL BACKGROUND

This Matter first came to RAD's attention in or around April 2018, when the Committee reported that receipts totaling $11,551.04 and disbursements totaling $15,665.26 were "unauthorized" or "undocumented," and in a memo appended to its April 2018 Quarterly Report and a Miscellaneous Text submission, identified various violations allegedly committed by the Committee's former treasurer, Ethan Owens, and its former campaign manager, Angela Fisher.[2] RAD forwarded its referral in this Matter to OGC in August of 2018.[3] However, due to the Commission's lack of a quorum during much of 2019 and 2020 and the ensuing enforcement backlog, we did not vote to approve OGC's reason-to-believe recommendations until May of 2021.[4]

At that point, the Commission found reason to believe that Owens and Fisher violated 52 U.S.C. § 30102(b)(3) and 11 C.F.R. § 102.15 by commingling campaign funds with personal funds, and reason to believe that Owens violated 52 U.S.C. § 30102(c) and (d) and 11 C.F.R § 102.9 by failing to keep and maintain adequate records; 52 U.S.C. § 30102(h)(1) and 11 C.F.R. § 103.3 by failing to deposit receipts in an account at a properly designated campaign depository; and 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3 by failing to accurately report receipts, disbursements, and loans.[5] We took no action at that time with respect to the

[1] 470 U.S. 821 (1985).

[2] Adam Kokesh Am. Referendum Project, Amended 2018 April Quarterly Rpt. (Oct. 30, 2019); Adam Kokesh Am. Referendum Project, Miscellaneous Text (Apr. 22, 2018).

[3] RAD Referral 18L-29 (Aug. 20, 2018).

[4] Cert. ¶ 2 (May 5, 2021).

[5] *Id.*

Committee, but authorized an investigation to determine the scope and context of the violations alleged.[6]

After Fisher and Owens declined to respond to informal methods of discovery, the Commission approved subpoenas for the two on January 27, 2022.[7] During depositions, Fisher and Owens provided information indicating that while Owens's name appeared on the Committee's 2017 Year-End Report, he did not at any point perform the duties the Commission requires of committee treasurers, and that instead, Fisher served as the Committee's *de facto* treasurer between December 2017 and March 2018.[8] During this time, Fisher opened and maintained a bank account for the Committee in her own name, accepted and processed Committee contributions, disbursed funds to cover the Committee's expenses, and kept and maintained the Committee's records.[9] OGC's investigation found that, although Fisher improperly maintained the Committee's bank account in her own name, failed to amend the Committee's Form 1 to reflect the bank where the account was located, and made unreported loans to the Committee from her personal funds, it did not appear that she misappropriated Committee funds for her personal use.[10]

During her deposition, Fisher also alleged that the Committee and Kokesh accepted contributions from Roger Ver, a foreign national;[11] that Kokesh held a poker tournament fundraiser at the "Anarchipulco" conference in Acapulco, Mexico, where he raised $7,750 in unreported campaign contributions;[12] and that Kokesh maintained an account with the "Steemit" cryptocurrency site that received unreported campaign contributions.[13] Accordingly, OGC notified Kokesh, Ver, and the Committee of those allegations on July 28, 2022.[14] On September 13, 2022, Ver filed a Response acknowledging that he made a series of $10,000 USD-in-cryptocurrency monthly transfers to Kokesh between December 2016 and December 2018 but denying the allegation that he made prohibited foreign national contributions.[15] Neither Kokesh nor the Committee responded to the additional notifications.

Subsequently, in its Second General Counsel's Report dated November 29, 2022, OGC recommended that the Commission find reason to believe Fisher and the Committee misreported its treasurer; that the Committee failed to deposit receipts in a properly designated campaign account and failed to file accurate reports concerning its receipts, disbursements, and loans; and reason to believe that Ver made, and Kokesh and the

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[6] *Id.*

[7] Cert. (Feb. 3, 2022).

[8] Second Gen. Counsel's Rpt. at 5–11.

[9] *Id.*

[10] *Id.* at 26.

[11] *Id.* at 11–12.

[12] *Id.* at 12–13.

[13] *Id.* at 13.

[14] *Id.*

[15] *Id.* at 28–30.

Committee knowingly accepted, prohibited foreign national contributions.[16] In pursuit of these allegations, OGC proposed an investigation into (1) whether the Committee accepted and failed to report campaign contributions made via cryptocurrency, (2) whether it accepted and failed to report funds raised at the poker tournament in Acapulco, Mexico, and (3) the alleged prohibited contributions by Ver to Kokesh and the Committee.[17]

II. LEGAL ANALYSIS

Congress provided the Commission with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act,[18] but courts have recognized that this mandate is constrained by the nature of the activity we regulate: First Amendment-protected political speech and association.[19] As a result, the Act, as amended, is structured to ensure that respondents are afforded due process throughout enforcement proceedings, and various statutory "gates" must be cleared for the Commission to enforce the Act's provisions.[20]

[16] *Id.* at 34–35.

[17] *Id.* at 33–34.

[18] 52 U.S.C. §§ 30106, 30107, 30108.

[19] *Buckley v. Valeo*, 424 U.S. 1, 6 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); *AFL–CIO v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) ("Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity").

[20] These statutory "gates" include, but are not limited to, the requirement that complaints filed with the Commission shall be "signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury" (52 U.S.C. § 30109(a)(1)); the requirement that proceeding with each stage of the enforcement process requires the affirmative vote of at least four Commissioners (52 U.S.C. § 30109(a)(2)); respondents' entitlement to input at the pre-RTB stage, the pre-probable cause stage, and during conciliation discussions (52 U.S.C. § 30109(a)(3)–(4)); and the fact that if the Commission finds probable cause to believe a violation occurred but is unable to conciliate with a respondent at the administrative level, it must seek civil penalties in federal court rather than directly (52 U.S.C. § 30109(a)(4)–(6)).

A reason to believe ("RTB") finding is the first "gate" the Commission itself must open during the enforcement process. Under the Act, the Commission will find RTB "only if a complaint sets forth sufficient separate facts, which, if proven true, would constitute a violation of the FECA."[21] A decision to find RTB, which requires four affirmative votes, does not trigger any penalties; rather, it initiates either further investigation or efforts to conciliate with respondents.[22] And while it is true that RTB is a preliminary finding that does not assign guilt, but rather opens the door to a more robust investigation, the investigation itself bears First Amendment implications and costs for respondents.[23]

All in all, before finding RTB, the Commission must scrutinize both the law and the facts alleged.[24] We are not required to accept all the allegations in a complaint as true; if the record contains or respondents provide facts or information that credibly contradict an allegation contained in a complaint, we must weigh this information in deciding whether to proceed with enforcement.[25] Commissioners also have discretion to weigh various factors—including whether the use of Commission resources on a given matter is warranted or fits the Commission's general policies and priorities, as well as the likelihood of success—and decide that pursuing enforcement is not warranted.[26]

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[21] Statement of Reasons of Comm'rs David A. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1, MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.) (Dec. 21, 2000).

[22] 52 U.S.C. § 30109(a)(2); Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).

[23] *Fed. Election Comm'n v. LaRouche Campaign*, 817 F.2d 233, 234 (2nd Cir. 1987) ("the [FEC's] investigation and [] subpoena … tread in an area rife with first amendment associational concerns.").

[24] *See, e.g.*, Statement of Reasons of Comm'r Sean J. Cooksey at 8–9, MURs 7165 and 7196 (Great America PAC, *et al.*); *see also* Statement of Reasons of Vice Chairman Donald F. McGahn II and Comm'rs Caroline C. Hunter and Matthew S. Peterson at 5–6, MUR 5878 (Ariz. State Dem. Cent. Comm., *et al.*) ("[Reason to believe] requires some assessment by the Commission of the facts and their credibility as well as the law before finding reason to believe. The Commission cannot find reason to believe unless it considers a properly submitted response, and the Commission cannot investigate alleged violations until it makes this finding. Together, these requirements provide procedural safeguards that protect respondents from frivolous complaints meant to harass, prevent unwarranted or premature discovery, and streamline enforcement by excluding innocuous respondents while allowing the Commission to better focus its resources.").

[25] *See, e.g.*, First Gen. Counsel's Rpt. at 5, MUR 5467 (Michael Moore) ("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the [Act] has occurred.").

[26] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

A. Alleged Misreporting of Committee Treasurer and Depository Account and Alleged Failure to File Accurate Reports

As OGC noted in its Second General Counsel's Report, the statute of limitations for Fisher's failure to properly designate herself (rather than Owens) as the Committee's treasurer expires on January 31, 2023, and the statute of limitations for the Committee's failure to deposit receipts in a properly designated depository account expires on March 5, 2023.[27] Nevertheless, OGC expressed optimism that Fisher would be willing to accede to tolling and conciliate. We, however, were not convinced that such an outcome was likely, or that pursuing Fisher if she declined to conciliate was prudent.[28]

The Commission lacks plenary power to impose sanctions on persons or organizations that violate the Act. Unless a party voluntarily chooses to conciliate, we must seek redress in the federal courts.[29] What is more, even the opportunity to pursue litigation occurs only after we have passed through an arduous procedure imposed upon us by Congress, including obtaining OGC's recommendation as to probable cause, providing respondents with at least 15 days to respond, holding a hearing, finding probable cause, and attempting to conciliate the matter for a minimum of thirty days.[30] Given this timeline, the Commission would be required to seek tolling from Fisher in order to proceed with conciliation efforts.[31] But if Fisher did not agree to provide the Commission with additional time to pursue her, our hands would be tied because we would lack the temporal runway needed to go forward due to the expiring statute of limitations for both alleged violations.

Simply put, there was no possibility of navigating these obstacles in the time remaining to us. The Commission should, in our view, avoid pursuing enforcement when insufficient time remains under our statutory scheme and where the blame for our failure to act expeditiously lies largely with us.[32] And we are especially wary of creating a double standard by seeking to conciliate with unsophisticated parties in situations where knowledgeable respondents would know we have no lawful way to compel agreement.

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[27] Second Gen. Counsel's Rpt. at 33–34.

[28] *Cf.* Statement of Reasons of Chairman Allen Dickerson and Comm'rs Sean J. Cooksey and James E. "Trey" Trainor at 5–6, MURs 7581 and 7614 (Yang, *et al.*) (Sept. 6, 2022).

[29] 52 U.S.C. § 30109(A)(4)(c)(iii).

[30] 52 U.S.C. § 30109(a)(3)–(4).

[31] Second Gen. Counsel's Rpt. at 33–34.

[32] *See supra* n.3–4 and accompanying text.

With respect to the Committee's alleged failure to report contributions it may have received during a February 2018 poker tournament in Mexico and via Kokesh's Steemit cryptocurrency account, OGC requested that we authorize an investigation and compulsory process.[33] However, given the lack of clarity that the cryptocurrency transactions related to Kokesh's campaign (rather than payment for Kokesh's services for content creation), as well as the modest amount Kokesh allegedly received during the poker fundraiser ($7,750), we did not believe further investigation would be a judicious use of the Commission's limited resources.

In light of these fast-approaching statutory deadlines, the limited likelihood of success if the Commission were to pursue either enforcement or conciliation with Fisher, the unclear or modest alleged amount in violation for the Committee's alleged reporting violations, and the expense and time required to investigate those remaining claims, we believed that the further use of Commission resources with respect to these allegations was unwarranted. Hence, pursuant to our prosecutorial discretion under *Heckler v. Chaney*, we voted to dismiss OGC's recommendations

B. Alleged Foreign National Contributions

The Act and Commission regulations prohibit any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.[34] A "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence.[35] The Act also prohibits persons from soliciting, accepting, or receiving a contribution or donation from a foreign national.[36]

[33] Second Gen. Counsel's Rpt. at 33–34.

[34] 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

[35] 52 U.S.C. § 30121(b); 11 C.F.R. § 110.20(a)(3).

[36] 52 U.S.C. § 30121(a)(2).

A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[37] The Commission has concluded that the relevant question in determining whether the provision of funds or any other thing of value is a "contribution" under the Act and Commission regulations is whether that thing of value was "provided for the purpose of influencing a federal election [and] not whether [it] provided a benefit to [a federal candidate's] campaign."[38] To this end, we have found that activity lacking the requisite purpose of influencing a federal election—including, *e.g.*, engaging in legal or policy advocacy—does not result in a "contribution" or "expenditure," even if it confers a benefit on a candidate or otherwise affects a federal election.[39] The intent of the person providing the funds or other thing of value is therefore the determining factor as to whether a contribution, within the meaning of the Act, has been made.

With this in mind, we turn to the facts of the Matter before us. As described above, Fisher alleged in her deposition testimony that an individual foreign national named Roger Ver sent a series of "$10,000 USD-in-cryptocurrency monthly" transfers to Adam Kokesh between December 2016 and December 2018. The question of whether these transfers were made is not at issue; Ver acknowledged making them in his response to the Commission. What is disputed is Ver's intent in making them. In our view, the record before us more strongly supported the interpretation that Ver intended the funds be used to support Kokesh's ongoing and long-running libertarian-focused advocacy efforts, rather than his short-lived presidential campaign.

Through counsel, Ver contended that although he never regarded Kokesh as "a serious candidate for anything,"[40] he considered Kokesh an important and vocal advocate for the libertarian values he himself espouses and promotes.[41] As Ver explained, the transfers to Kokesh—which began nearly a year before Kokesh filed a statement of candidacy with the

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[37] 52 U.S.C. § 30101(8)(A)(i).

[38] Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate).

[39] *E.g.*, Factual & Legal Analysis at 8, MUR 7024 (finding free legal services provided to a federal candidate challenging FEC disclosure regulations were not contributions because the services were provided "for the purpose of challenging a rule of general application, not to influence a particular election"); Advisory Op. 2010-03 at 4 (Nat'l Democratic Redistricting Trust) (finding that federal candidates can solicit funds outside of the Act's limitations and prohibitions for redistricting litigation costs, because "[a]lthough the outcome of redistricting litigation often has political consequences, ... such activity is sufficiently removed that it is not 'in connection with' the elections themselves"); Advisory Op. 1982-35 at 2 (Hopfman) (advising that funds collected by federal candidate to challenge state party's ballot access rule precluding him from the ballot were not "contributions" because "the candidate is not attempting to influence a Federal election by preventing the electorate from voting for a particular opponent [but instead] proposes to use the judicial system to test the constitutionality of the application of a party rule to his candidacy").

[40] Ver Resp. at 1 (Sept. 12, 2022).

[41] *Id.* at 3.

FEC and ended long before Kokesh lost the Libertarian Party primary at the party convention in May 2020—were made to support those advocacy efforts.[42]

Meanwhile, OGC contended that the payments were contributions made by Ver for the purpose of supporting Kokesh's presidential campaign. To support this argument, OGC relied on two pieces of information: first, a Tweet sent by Ver on May 11, 2018, which called on readers to "help us crowd fund a peaceful, responsible dissolution of the entire federal government via @adamkokesh" and included a link to Kokesh's campaign page;[43] and second, Fisher's deposition testimony, wherein she contended that Ver's payments were for made to Kokesh "to run a national campaign to increase visibility of cryptocurrency" and that "[h]ow [Kokesh] did that was his presidential campaign … he was double dipping."[44]

In the recitation of relevant law and Commission precedent preceding its RTB recommendation, OGC correctly recognized that Ver's intent—and not Kokesh's ultimate use of the funds—is the foundation upon which an RTB finding must rest. And yet, in its analysis, OGC glossed over a key statement in Fisher's testimony—that is, her understanding that Ver intended the payments be used "for [Kokesh] to run a national campaign to increase visibility of cryptocurrency"—and instead focuses on her belief that Kokesh was ultimately using the money to fund his presidential campaign. But as we have explained, how Kokesh used the funds is not relevant to the inquiry of whether, from Ver's perspective, the payments were "contributions." Nor does Fischer appear to have any personal knowledge permitting her to testify credibly as to Ver's intentions. Moreover, her testimony cuts both ways; her characterization of Kokesh as "double dipping" supports Ver's argument that he intended the funds be deployed to support issue advocacy, rather than a political campaign. If the Commission were to find RTB on these facts, we would be creating bad precedent and potentially laying the groundwork for politically motivated or frivolous complaints.[45] Additionally, Ver's direct refutation through counsel and his explanation that the payments were made to support Kokesh's advocacy efforts, rather than his political activity, is supported by the fact that the payments began approximately a year before Kokesh became a candidate and ended nearly a year and a half before the Libertarian Party convention in May 2020.[46]

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[42] *Id.* at 2–4.

[43] Second Gen. Counsel's Rpt. at 31.

[44] *Id.* at 31–32.

[45] A plausible example would be a complaint that accuses a candidate's employer of making illegal corporate in-kind contributions because the candidate chose to use a duly earned end-of-year bonus paid to them by their employer to fund their campaign.

[46] Brian Doherty, *Libertarian Party to Choose Its Presidential Ticket in Virtual Vote Over Memorial Day Weekend*, REASON (May 9, 2020), *available at* https://reason.com/2020/05/09/libertarian-party-to-choose-its-presidential-ticket-in-virtual-vote-over-memorial-day-weekend/?amp.

What is left, then, is Ver's May 11, 2018 Tweet advocating the "peaceful, responsible dissolution of the entire federal government" and linking to Kokesh's campaign website. OGC believed that this Tweet, along with the fact that Ver continued making the payments for another six months after it was sent, makes it "unlikely that Ver was not aware of how Kokesh intended to use the funds, and for what purposes."[47] This is too thin a reed to bear the burden of proof, as it is Ver's intent—not Kokesh's intent or Ver's speculation about what that intent might be—that matters. At bottom, the information before us—the timing of the payments, Ver's direct refutation of Fisher's claims and his history of advocacy, and the weakness of the countervailing evidence—indicates that Ver intended the payments be used to fund his and Kokesh's shared and longstanding interest in libertarian issue advocacy, rather than Kokesh's political campaign.

III. CONCLUSION

Although we supported OGC's initial recommendation that we find reason to believe violations of the Act may have occurred in this Matter, we did not believe further efforts to pursue enforcement were warranted, for the reasons set forth above. We voted accordingly, and offer this Statement as a public explanation of our rationale.

January 18, 2023
Date

Sean J. Cooksey
Vice Chairman

January 18, 2023
Date

Allen J. Dickerson
Commissioner

January 18, 2023
Date

James E. "Trey" Trainor, III
Commissioner

[47] Second Gen. Counsel's Rpt. at 31.