FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7912
Senate Leadership Fund, *et al.*	)	
	)	

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

This matter arose from a Complaint alleging that five independent expenditure-only political committees ("IEOPCs") all separately violated the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations during the 2018 and 2020 election cycles. Specifically, the Complaint claims that the five IEOPCs (collectively, the "Contributor Committees") engaged in a practice of financing other IEOPCs and one hybrid PAC (collectively, the "Recipient Committees"), and that, in doing so, they triggered a Commission requirement—which they failed to meet—to report one another as affiliated committees on their respective statements of organization and to classify their transactions as having taken place among affiliates on their receipt and disbursement reports.

Because we concluded that—even if the Commission's affiliation rules do apply to IEOPCs in the first instance—there was no clear notice to these Respondents or the regulated community at large, we voted to dismiss the allegations as a matter of prosecutorial discretion.

I. Legal and Factual Background

a. Commission Affiliation Regulations and IEOPCs

Under the Act and Commission regulations, all political committees must file a statement of organization that includes, among other things, "the name, address, relationship, and type of any connected organization or affiliated committee."[1] Political committees must also report receipts and disbursements, including transfers to and from affiliated committees.[2]

[1] 52 U.S.C. § 30103(b); *see also* 11 C.F.R. § 102.2(a).

[2] 52 U.S.C. § 30104(b)(2)(F) (requiring committees to disclose "transfers from affiliated committees"), (b)(4)(C) (requiring committees to disclose "transfers to affiliated committees"); *see also* 11 C.F.R. § 104.3.

These requirements are tied to the Act's anti-proliferation rule. Specifically, for purposes of the contribution limits[3] "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person … shall be considered to have been made by a single political committee."[4] Put differently, political committees established, financed, maintained, or controlled ("EFMC'd") by "the same person or group of persons," share a single contribution limit.[5] Regulations provide that the Commission may "examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated,"[6] and they list ten non-exhaustive factors for the Commission to consider in making this determination.[7]

These regulations, however, predate the emergence of IEOPCs and their legal cousins, hybrid PACs—two types of Commission-regulated committees that may accept unlimited contributions for independent expenditures. Such committees are an outgrowth of *Citizens United v. FEC*, in which the Supreme Court examined the constitutionality of the Act's burdens on independent political speech and held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[8] Applying this principle in *SpeechNow.org v. FEC*, the U.S. Court of Appeals for the D.C. Circuit held the Act's contribution limits "unconstitutional as applied to individuals' contributions to SpeechNow,"[9] a nonprofit association engaged in independent expenditures.

Thus, as a matter of constitutional imperative, the judiciary reauthorized what the Act had previously prohibited: unlimited contributions to IEOPCs and, later, to the non-contribution accounts of hybrid PACs.[10] Unsurprisingly, these decisions called into question whether and how other provisions of the Act and Commission regulations applied to these entities, and regulated actors wishing to use these vehicles for political participation sought guidance on their legal rights and obligations.

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3 *See* 52 U.S.C. § 30116(a)(1)–(2) (imposing dollar limits on contributions by any "person" or "multicandidate political committee").

4 52 U.S.C. § 30116(a)(5).

5 11 C.F.R. § 100.5(g)(3).

6 11 C.F.R. § 100.5(g)(4)(i).

7 11 C.F.R. § 100.5(g)(4)(ii)(A)–(J).

8 558 U.S. 310, 357 (2010). *See also*, *e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010) ("[T]he government has *no* anti-corruption interest in limiting independent expenditures.") (citing *Citizens United v. FEC*, 558 U.S. 310) (emphasis original); *EMILY's List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) ("[I]ndividual citizens may spend money without limit (apart from the limit on their own contributions to candidates or parties) in support of the election of particular candidates.").

9 599 F.3d 686, 689 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010).

10 As the U.S. District Court for the District of Columbia explained in *Carey v. FEC*, this same reasoning applies to the non-contribution accounts of hybrid PACs, which may also accept unlimited contributions for independent expenditures. 791 F. Supp. 2d 121, 131–32 (D.D.C. 2011). References herein to "hybrid PACs" refer to such entities in the context relevant here: their non-contribution accounts permitted to accept unlimited contributions.

b. Commission Guidance on IEOPCs, Hybrid PACs, and Affiliation

Shortly after *SpeechNow.org*, in Advisory Opinion 2010-09 (Club for Growth), a nonprofit organization sought Commission guidance on its plan to establish, administer, and pay the solicitation costs of a new IEOPC. There was no dispute that the costs paid by the Club for Growth would constitute contributions to the IEOPC for registration and reporting purposes. Anticipating that the Commission might require disclosure of the relationship between the two entities, the request noted that "the FEC may wish for the IEOPC to identify the Club for Growth as a connected organization for disclosure purposes – to show its tie to the Club."[11] The Commission confirmed that the Club could establish the IEOPC, and that the IEOPC could accept unlimited contributions. But in doing so, the advisory opinion did not state that there was any obligation to identify the Club as a connected organization or to list other committees EFMC'd by the Club as affiliated committees.

The Commission recognized that its conclusion in the Club for Growth advisory opinion "implicates issues that will be the subject of forthcoming rulemakings in light of the *Citizens United*, *EMILY's List*, and *SpeechNow* decisions," and that "[t]he results of that rulemaking may require the Commission to update its registration and reporting forms to facilitate public disclosure."[12] The Commission made this same recognition in Advisory Opinion 2010-11 (Commonsense Ten), addressing the ability of a nonconnected committee to accept unlimited contributions from corporations, labor unions, individuals, and political committees to fund its independent expenditures.[13]

But to date, we have not provided such guidance, at least not as it relates to the violations alleged here. No Commission rulemaking has addressed affiliation reporting in the IEOPC context, nor have our forms been updated in a manner relevant to this matter.[14] And we have provided similarly little clarity for hybrid PACs and their non-contribution accounts. [15]

Consequently, for more than decade, IEOPCs and hybrid PACs have continued to participate in the political process without clear rules for the road. Rather, these committees have operated under the penumbras and emanations of Commission regulations, as well as accreted

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[11] Advisory Opinion Request at 5 (May 21, 2010), Advisory Op. 2010-09 (Club for Growth).

[12] Advisory Op. 2010-09 (Club for Growth) at 2 n.1.

[13] Advisory Op. 2010-11 (Commonsense Ten) at *3 n.4.

[14] The Commission recently updated the Statement of Organization form to allow filers to self-identify as an IEOPC or hybrid PAC, but did not change the affiliation reporting instructions. *See* Press Release, Federal Election Commission, *FEC approves advisory opinion, revised Statement of Organization form, and Audit Division recommendations* (Mar. 10, 2022), *available at* https://www.fec.gov/updates/fec-approves-advisory-opinion-revised-statement-of-organization-form-and-audit-division-recommendations.

[15] *Accord* Press Release, Federal Election Commission, *FEC statement on* Carey v. FEC*: Reporting guidance for political committees that maintain a non-contribution account* (Oct. 5, 2011), *available at* https://www.fec.gov/updates/fec-statement-on-carey-fec (stating that "[t]he Commission intends to initiate a rulemaking, and to amend its reporting forms accordingly, to address the *Carey* opinion and stipulated judgment").

practices, without any direction otherwise from the Commission. Conventions can vary widely in how IEOPCs and hybrid PACs do or do not note connected organizations or affiliated committees, and the Commission has never before sought to enforce a uniform standard.

c. The Complaint, Responses, and OGC's Recommendations

Although its scope is broad, the Complaint's factual claims are largely uncontested. The Complaint alleges—and Commission reports confirm—that five Contributor Committees[16] each contributed significant funds to various Recipient Committees[17] in one or more election cycles in which the Recipient Committees subsequently made independent expenditures.[18] According to Commission filings, across all the Respondents, the Contributor Committees contributed between 58 and 100 percent of their respective Recipient Committees' total contributions for the relevant election cycles.[19] Some (but not all) of the Recipient Committees returned varying amounts of money to the Contributor Committees after the relevant elections.[20] At no point did any Contributor Committee or its corresponding Recipient Committees report the others as an affiliated committee on a statement of organization.[21] Nor do Respondents appear to have identified the transactions where they passed funds to or from one another as transactions between affiliated committees.[22]

The Respondents who replied to the Complaint do not dispute the underlying facts, but nonetheless deny violating the Act or Commission regulations.[23] They argue that the affiliation concept is inapplicable to them because the affiliation regulations—which predate IEOPCs and hybrid PACs—exist to prevent circumvention of contribution limits, and such limits do not apply to IEOPCs or to hybrid PACs' non-contribution accounts.[24] They further note that there is no informational harm to the public because the committees complied with the requirement to report

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16 The Contributor Committees are Senate Leadership Fund, SMP, Congressional Leadership Fund, Hold them Accountable (f/k/a LMG PAC), and Future 45. Complaint at 4–5 (July 15, 2021), MUR 7912 (Senate Leadership Fund, *et al.*).

17 The Recipient Committees are Peachtree PAC, Plains PAC, Keep Kentucky Great, The Maine Way PAC, Faith and Power PAC, American Crossroads, DefendArizona, Mountain Families PAC, Sunflower State, Carolina Blue, Texas Forever, Highway 31, Red and Gold, Illinois Conservatives PAC, American Future Fund PAC, Lone Star Values PAC, Liberty SC, and Truth Still Matters PAC. Complaint at 4–5 (July 15, 2021), MUR 7912 (Senate Leadership Fund, *et al.*).

18 First General Counsel's Report at 2–23 (Nov. 15, 2022), MUR 7912 (Senate Leadership Fund, *et al.*).

19 *Id.* at 5–7; 11–12; 16; 20; 21.

20 *Id.* at 9–10; 14; 17; 20; 22.

21 *See, e.g.*, *id.* at 7–22.

22 *See, e.g., id.*.

23 *See id*. at 10–22.

24 *E.g.*, *id.* at 3; 10; 15; 18; 19; 21; 22.

all of their receipts and disbursements, even if they did not categorize them as to or from an "affiliated committee."[25]

Respondents further contend that—in the decade that IEOPCs and hybrid PACs have served as vehicles for political engagement—the Commission has neither addressed affiliation nor affirmatively required affiliation reporting by such entities, despite issuing advisory opinions and other guidance touching on the issue.[26] Finally, various Respondents also dispute the EFMC factors based on their particular circumstances,[27] contend that any violation would have been technical or *de minimis* at most,[28] and note that some Recipient Committees have terminated.[29]

Based upon its analysis of Respondents' disclosure reports[30] and "the degree to which some Contributor Committees funded Recipient Committees,"[31] OGC recommended that the Commission find reason to believe that three Contributor Committees and eight Recipient Committees violated the Act and Commission regulations by failing to report affiliated committees on their statements of organization and by failing to properly report receipts and disbursements.[32] OGC recommended that the Commission dismiss the allegations against the remaining Respondents as an exercise of prosecutorial discretion.[33]

II. Legal Analysis and Prosecutorial Discretion

Weighing the allegations, the history of Commission regulations and guidance, past enforcement practice, and the prudential considerations, we voted to dismiss this matter as an exercise of prosecutorial discretion. In assessing whether to exercise such discretion under *Heckler v. Chaney*, we must "not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies,"[34] among other factors. For the reasons below, we concluded that those considerations weighed in favor of dismissal.

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25 *Id.* at 10, 15, 18, 19.

26 *Id.* at 10, 15, 18, 21.

27 *Id.* at 3, 14–15, 19, 22.

28 *Id.* at 10, 15, 18, 19, 22.

29 *Id.* at 15, 19.

30 *See id.* at 10–22.

31 *Id.* at 30.

32 *Id.* at 3 & n.2.

33 *Id.* at 3–4.

34 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

First, the Complaint asks the Commission to apply a legal rule that it has neither clearly articulated nor previously enforced against IEOPCs or hybrid PACs. Indeed, the fairest reading of the Commission's guidance and past practice suggests that the affiliation regulations *do not* apply to IEOPCs and hybrid PACs. As discussed earlier, the Act and Commission regulations require "committees" to report affiliated entities and transactions with the same. But this requirement predates the judiciary's recognition that independent expenditures do not raise the risk of corruption and that, accordingly, IEOPCs and hybrid PACs may accept unlimited contributions for independent expenditures. Those judicial decisions removed the justification for applying affiliation rules to these committees, and neither Congress nor the Commission has acted to fill the void. This is perhaps unsurprising—after all, without a government interest in the contribution limits themselves, there is likewise no government interest in preventing circumvention of those limits.

Second, even if the affiliation rules applied to Respondents as alleged here, the lack of Commission guidance (and lack of enforcement against similar regulated actors) deprived Respondents of fair notice that they were obligated to report in this manner. Indeed, although it has had opportunities to comment upon the application of the affiliation reporting rules to IEOPCs and hybrid PACs in the advisory-opinion and rulemaking contexts, the Commission has not done so. Nor has it required this sort of reporting from similarly situated respondents in any prior enforcement matter. Quite the contrary: a review of filings with the Commission indicates that few committees are reporting in the manner that OGC maintains Respondents are required to here. We decline to deploy our enforcement power in a context where the Commission itself has contributed to ambiguity about the applicability of our own regulations. To do so would be rulemaking-by-enforcement and inconsistent with foundational notions of due process and fair notice.[35]

Third, the practical difficulties of objectively determining if and when any recipient committee becomes "affiliated" with a contributor committee further counsel in favor of discretionary dismissal. The affiliation standard is already sufficiently thorny and ambiguous to yield potentially inconsistent results. This lack of a clear, policeable line is exacerbated in the context of the enforcement recommendation before us, which seems to turn *entirely* on the amount of information available about each committee.[36] The risk of inconsistent and arbitrary

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[35] *See*, *e.g.*, Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman at 2–3 & n.3, 13 (Apr. 1, 2016), MURs 6485, 6487, 6488, 6711, & 6930 (W Spann LLC, *et al.*); Statement of Reasons of Chairman Petersen and Commissioners Hunter and McGahn at 2 & n.4 (Jan. 13, 2010), MUR 6206 (BASF Corp., *et al.*) (declining "to engage in rulemaking via MUR;" collecting MURs); Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 6 (Apr. 1, 2021), MUR 7243 (CITGO Petroleum Corp., *et al.*) ("A fundamental value of due process is fair notice. If the regulated community cannot look to our regulations for clear guidance as to what it may and may not do, then this agency is failing in its mission and undermining the rule of law.").

[36] *See, e.g.*, First General Counsel's Report at 35–36 (Nov. 15, 2022), MUR 7912 (Senate Leadership Fund, *et al.*) ("While it is possible that additional information about the remaining Recipient Committees' contacts with the relevant Contributor Committees would satisfy other factors in the EFMC analysis, in light of the minimal information currently available about these Respondents, we recommend that the Commission exercise ifs prosecutorial discretion to dismiss.").

enforcement of a novel theory of law is yet another reason for the Commission to demur in favor of discretionary dismissal.

Finally, we consider the public interest in enforcement and the prudential risks to the Commission. The public's informational interest is already served by the requirement that committees report receipts and disbursements, and there is no argument that Respondents failed to follow that requirement here. Moreover, pursuing the violations alleged here has the potential to provoke costly constitutional litigation and—given *Citizens United*, *SpeechNow.org*, and their progeny—substantial risk of failure.

Accordingly, for the foregoing reasons, we voted to dismiss this matter as an exercise of our prosecutorial discretion under *Heckler v. Chaney*.[37]

Sean J. Cooksey
Vice Chairman

March 1, 2023
Date

Allen Dickerson
Commissioner

March 1, 2023
Date

James E. "Trey" Trainor, III
Commissioner

March 1, 2023
Date

[37] 470 U.S. 821.