



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
America Progress Now) MUR 7643
)

STATEMENT OF REASONS OF CHAIR JAMES E. “TREY” TRAINOR III

I. INTRODUCTION

This matter arose from a complaint filed by the Campaign Legal Center (“CLC”) alleging that the person(s) who established and operated a group called America Progress Now (“APN”) violated the Federal Election Campaign Act of 1971, as amended (“the Act”) by running ads on APN’s Facebook page expressly advocating the election of certain federal candidates without complete disclaimers, and failing to report the spending on the ads as independent expenditures. Contrary to CLC’s wild speculation, this case wasn’t about a “fake political group... exploit[ing] Facebook rules... and hid[ing] spending from the FEC.”¹ Rather, it was simply an unsophisticated individual trying to do the right thing but getting confused by the complex rules of federal campaign finance law. As such, I joined with my colleagues in supporting the recommendation of the Office of General Counsel (“OGC”) to dismiss the matter; however, the handling of this matter raises some troubling issues, as I explain below.

II. DISCUSSION

A. Complaint and Response

CLC alleged that APN ran Facebook ads that lacked adequate disclaimers. However, CLC knew that APN paid for the ads at issue because all the ads were accompanied by

¹ Campaign Legal Center, “Fake Political Group Exploits Facebook Rules and Hides Spending from the FEC,” (Sept. 12, 2019), available at: <https://campaignlegal.org/update/fake-political-group-exploits-facebook-rules-and-hides-spending-fec>. From the outset, CLC admitted that this complaint in this matter was really about “send[ing] a clear signal-both to political actors and to platforms like Facebook.” MUR 7643 (American Progress Now), Complaint at ¶3. In its press release touting the filing of the complaint, CLC took aim at Facebook’s policies, with which it disagrees, saying, “Facebook has made no indication that it will independently verify whether an entity has actually reported its digital ad expenditures to the FEC.” Campaign Legal Center, “Fake Political Group Exploits Facebook Rules and Hides Spending from the FEC,” (Sept. 12, 2019), available at: <https://campaignlegal.org/update/fake-political-group-exploits-facebook-rules-and-hides-spending-fec>. I question whether using the FEC enforcement process to pressure a private service provider to change its terms of service is appropriate. Moreover, CLC filed the complaint when the Commission lacked a quorum and therefore could not take action on the complaint, but nonetheless seems to blame the FEC for its failure to act. I am concerned that such disingenuousness unnecessarily undermines the public’s perception of the FEC.

Facebook-generated labels indicating that the ads were “Sponsored” and “Paid for by America Progress Now.”² And based on publicly available information, CLC also knew that the total amount spent by APN on the Facebook ads was \$7,665. Nevertheless, CLC called APN a “fake political group,” and even went so far as to suggest that APN might be “the work of a major party political operative promoting spoiler candidates in swing states, or of a foreign government seeking to exploit U.S. political divisions.”³

In fact, APN was established by an unsophisticated individual trying to show his support for several third-party candidates, but he got tripped by the myriad regulations governing online political speech. As he explained in response to the complaint:

Regarding the alleged failure to disclose, I have never spent money in any election related matter previously and assumed that Facebook’s “political disclaimer/disclosure” was all that was necessary. I was frankly surprised that Facebook even required a disclaimer given the very small amount of money I spent on advocating for candidates I wanted to show support for. I also assumed that I needed to establish an entity (nonprofit articles of incorporation in this case) in order to comply as best as possible with the social media platform’s political advertising rules, which I did in Arizona and is why the promotions disclosed the America Progress Now name (matching the Facebook page I had setup). The total amount spent supporting this small handful of candidates was only \$2,467.54, and for all of the candidates the total ‘per candidate’ amount spent was only a few hundred dollars. I consistently hear in the media about the hundreds of millions that are spent on our elections, virtually all of which supports only the two major parties, I failed to realize that a spend as small as this would require any type of reporting. I have provided a list of the supported candidates and the amounts spent for each of them below.⁴

There was no evidence to contradict anything in the response, and no evidence to support CLC’s salacious theories about the “unknown person or persons” behind APN.

² MUR 7643 (America Progress Now), First General Counsel’s Report at 4.

³ Campaign Legal Center, “Fake Political Group Exploits Facebook Rules and Hides Spending from the FEC,” (Sept. 12, 2019), available at: <https://campaignlegal.org/update/fake-political-group-exploits-facebook-rules-and-hides-spending-fec>. In subsequent public statements, CLC described America Progress Now as “shady,” <https://campaignlegal.org/cases-actions/clc-v-fec-delay-suit-america-progress-now>, and a “fake Facebook advertiser,” <https://campaignlegal.org/cases-actions/clc-v-fec-delay-suit-america-progress-now>.

⁴ MUR 7643 (America Progress Now), Response at 1-2. The Respondent went on to say, “I again offer my sincerest apology for any potential errors in failing to disclose. Given the apparent obstacles and unknowns of participating in the election process in this manner (of which I am learning some of now), it is highly unlikely I will ever participate in it again. I feel terrible for having been so ignorant to the process. My primary concern is correcting any potential failures to disclose to ensure proper compliance. Is there someone I can speak with at the commission to ensure this gets done correctly and quickly?” *Id.*

B. Complaint Processing

The FEC's enforcement process begins with an evaluation of the matter using objective criteria approved by the Commission under its enforcement priority system ("EPS"). The EPS is designed to treat all cases alike under a pre-established set of criteria, and to prioritize the use of Commission resources.⁵ Cases not warranting the further use of Commission resources are recommended for dismissal, on the grounds of prosecutorial discretion.⁶ Applying the pre-approved criteria to the information set forth in the complaint and response in this matter, OGC concluded this case was eligible for an EPS dismissal. The FEC has regularly dismissed similar cases under the same procedure.⁷ However, in this matter, OGC expended additional resources to prepare a more detailed First General Counsel's Report and Factual & Legal Analysis to support its dismissal recommendation. Upon examining the record in this matter,⁸ one might question if OGC's handling of this matter prior to the initial stage of the enforcement process was influenced by the complainant's identity (and specifically, its well-known aggressive tactics).⁹

⁵ See MUR 5156 (Mark Morton, et. al.), Statement of Commissioner Scott E. Thomas at 5 ("The Commission should depend on procedures that result in consistent results for comparable violations. Inconsistency and variance from established practice, particularly for relatively insignificant cases, expends time and resources that could be better spent debating and resolving more pressing issues.").

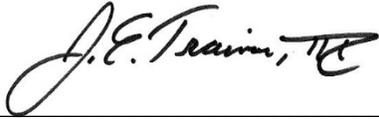
⁶ See FEC Enforcement Manual at 11, available at: https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf

⁷ See MURs 7538 (Unknown); 7533 (Unknown); 7385 (Unknown Respondent); 7419 (Bill Nelson for Senate); 7289 (Take Back the Tenth); 7069 (Ron Hedlund); 7045/7047 (Canovi for Congress); 6905 (MayDay PAC); 6546 (Michael J. Fox); 7159 (Trump Make American Great Again); 6378 (Jones Outdoor Advertising); 5938 (Concerned Clergy, Inc.); 5658 (Sarpy Elephant Club, Inc.); 5630 (Request Foods, Inc.); 5619 (Tenafly Democratic Campaign 2004); see also MURs 7555 (Kootenai County Republican Central Committee, et. al.); 7552 (Scholten4Iowa Campaign Committee); 7518 (Campaign to Elect Josh McCall); 7517 (Mast for Congress); 7509 (Tim Ryan for Congress); 7504 (Elissa Sloktin for Congress); 7489 (Diehl for U.S. Senate); 7485 (Steve Chabot For Congress); 7475 (Jennifer Zimmerman for Congress); 7459 (Citizens for Turner); 7400 (Jim Francis for Congress); 7396 (Beth Lindstrom for U.S. Senate); 7377 (Wolf 2018); 7307 (Fred Costello); 7198 (Ron Johnson for Senate); 7186 (Kathy Szeliga); 7162 (Mica for Congress); 7065 (Joe Montes for Congress); 7012 (Mike Sweeny 4 Congress); 6839 (Wooten for Congress); 6831 (Tom McArthur for Congress).

⁸ I joined the Commission on June 5, 2020, and therefore was not privy to internal Commission deliberations in this matter before that date.

⁹ CLC filed the complaint in this matter on September 12, 2019, knowing the Commission lacked a quorum (without a quorum the Commission lacks the statutory authority to act on a complaint). Then, on February 27, 2020, CLC sued the Commission under 52 USC § 30109(a)(8), publicly characterizing the action as a suit against the FEC for "failing to enforce transparency laws for paid election advertising on Facebook," even though the Commission still lacked a quorum (without a quorum the Commission lacks the statutory authority to authorize a defense of itself in a case brought under section 30109(a)(8)). See <https://campaignlegal.org/document/clc-v-federal-election-commission-delay-suit-america-progress-now-clc-lawsuit>. And to complete the trifecta, on February 27, 2020, while the Commission still lacked a quorum, CLC filed suit, asking a court to order the FEC to conform within 30 days by acting on Plaintiff's administrative complaint, and failing that, to authorize CLC to commence a civil action against America Progress Now. Only thereafter did OGC make its recommendation to the Commission in this matter.

I voted to approve OGC's recommendation to dismiss this matter,¹⁰ but in my opinion, the correct disposition of this matter would have been an EPS dismissal.¹¹ However, I am glad my colleagues nonetheless joined with me in voting to authorize the agency's defense in CLC's pending litigation against the Commission.¹²



James E. "Trey" Trainor III
Chairman

7/28/2020

Date

¹⁰ OGC's recommendation included sending the Respondent in this matter a "cautionary letter explaining their obligations to include appropriate disclaimers." MUR 7643 (America Progress Now), FGCR at 9. A "caution letter" is not contemplated by the Act, Commission regulations, or the Commission's Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process. 72 Fed. Reg. 12545, 12545 (Mar. 16, 2006) ("At the initial stage of the enforcement process, the Commission may find 'reason to believe' ("RTB"), dismiss the matter, dismiss the matter with an admonishment, or find 'no reason to believe' ("no RTB").), and accordingly I have reservations about OGC's recommendation to send caution letters generally. And to the extent a caution letter is intended to punish the respondent or promote compliance (I am unclear as to OGC's rationale for recommending a caution letter), I see no reason to send one in this matter specifically. *See* n. 4, *supra*. Moreover, I am troubled that as a result of the Respondent's interaction with the FEC, he has expressed his disinclination to continue exercising his First Amendment right to engage in political speech. MUR 7643 (America Progress Now), Response at 2 ("Given the apparent obstacles and unknowns of participating in the election process in this manner (of which I am learning some of now), it is highly unlikely I will ever participate in it again. I feel terrible for having been so ignorant to the process."). A person shouldn't need to have to hire a lawyer to speak. *See generally* MURs 5957 & 6031 (The Committee to Elect Sekhon to Congress & Hagan Senate Committee, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn) (discussing "a troubling disparity in campaign finance law... rote enforcement of hyper-technical rules having an unfair impact on inexperienced political participants").

¹¹ The FEC regularly disposes of matters like this as EPS dismissals, *see* n. 8, *supra*, and makes the complaint and response part of the public record, along with the EPS dismissal report, when the matter is closed, so the public can see the basis of the Commission's decision.

¹² On July 16, 2020, after the Commission voted to dismiss the complaint, CLC dismissed the action without further comment.