



FEDERAL ELECTION COMMISSION
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Unknown Respondent(s), *et al.*) MURs 8017 and 8023
)

**STATEMENT OF REASONS OF COMMISSIONER
 SHANA M. BROUSSARD**

These matters arose from two Complaints alleging that, among other things, Unknown Respondent(s) (“Respondents”) violated the Federal Election Campaign Act of 1971, as amended, (the “Act”) and Commission regulations by failing to include disclaimers on mailers that expressly advocated for the defeat Joe O’Dea, a candidate for U.S. Senate in Colorado, and the election of his opponent, Ron Hanks.¹ The Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that Respondents violated 52 U.S.C. § 30104(b) or (c).² Nevertheless, on March 26, 2024, the Commission failed by a vote of 2-4 to find reason to believe that Respondents violated the Act or Commission regulations for failure to include a disclaimer on the mailers.³ I agreed with OGC’s recommendation, and I voted to find reason to believe that Respondents violated the Act and Commission regulations.⁴

In question between both Matters Under Review (“MURs”) are six mailers. Five out of six appear to meet the definition of public communication and expressly advocate for the election or defeat of a clearly identified federal candidate and, therefore, require disclaimers.⁵

The Act and Commission regulations require a disclaimer on certain types of communications identifying who paid for the communication and, where applicable, whether a communication was authorized by a candidate. Among other communications, disclaimers are required on all “public

¹ See Compl., MUR 8017 (June 15, 2022); Compl., MUR 8023 (July 1, 2022); First. Gen. Counsel’s Rpt. (“FGCR”) at 2, MURs 8017, 8023 (Unknown Respondent(s), *et al.*).

² FGCR at 20-21.

³ Certification (“Cert.”), MURs 8017 and 8023 (Unknown Respondent(s), *et al.*), Mar. 26, 2024.

⁴ *Id.*

⁵ FGCR at 2. One mailer labeled “voter guide” does not appear to expressly advocate. Compl., Exs.3-4, MUR 8017. Although its electoral portion is clear, in my view it does not encourage the election of one candidate over the other. Rather, it contrasts the stances O’Dea and Hanks on gun rights. *Id.*

communications” made by any person that expressly advocates for the election or defeat of a clearly identified federal candidate.⁶ The term “public communication” is defined as a communication by means of broadcast, cable, satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.⁷ “Mass mailing” means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”⁸

While the current record does not prove that each mailer meets the definition of “mass mailing” with certainty, that proof is not required to find reason to believe that the mailers lacked required disclaimers.⁹ All mailers were professionally produced and at least 200 copies were distributed through USPS Marketing Mail.¹⁰ It is likely that the mailers exceeded 500 in number because the turnout for the relevant election was 633,845.¹¹ Because the mailers appear to meet the definition of mass mailing and thus qualify as public communications, the mailers would require a disclaimer if they contain express advocacy.¹²

Express advocacy can be analyzed under two tests. First, a communication expressly advocates when it uses so-called “magic words” found in 11 C.F.R. § 100.22(a), such as “vote for the President” or “re-elect your Congressman.”¹³ Second, under 11 C.F.R. § 100.22(b), a communication expressly advocates if, “[w]hen taken as a whole and with limited reference to external events, such as proximity to the election, [the communication] could only be interpreted as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) the electoral portion is unmistakable and unambiguous; and (2) reasonable minds could not differ as to whether it encourages action to elect or defeat one or more clearly identified federal candidates.”¹⁴ None of the mailers include phrases identified or similar to those in 11 C.F.R. § 100.22(a); however, five of the six mailers meet the express advocacy definition in 11 C.F.R. § 100.22(b).

⁶ 52 U.S.C. § 30120(a), 11 C.F.R. § 110.11(a)-(c); *see* 11 C.F.R. § 100.17 (explaining that “clearly identified” means that “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or the ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’”); *see* FGCR at 6.

⁷ 11 C.F.R. § 100.26; *see* FGCR at 6.

⁸ *Id.* § 100.27; *see* FGCR at 6.

⁹ *See* F&LA at 5, MUR 7543 (Jefferson United, Inc.) (stating that a record may sufficiently indicate a mass mailing despite the Complaint failing to provide the specific number of mailings).

¹⁰ FGCR at 7; *see* USPS, *USPS Marketing Mail*, <https://pe.usps.com/businessmail101?ViewName=StandardMail> (last visited Apr. 5, 2024). To be sent via USPS Marketing Mail, at least 200 copies must be mailed. *Id.*

¹¹ Colorado Secretary of State, *Database of Historic Election Information*, <https://historicalelectiondata.coloradosos.gov/eng/> (search “2022” for “United States Senator” in “Republican Primary”).

¹² 11 C.F.R. § 110.11(a)(1).

¹³ *Id.* § 100.22(a).

¹⁴ *Id.* § 100.22(b).

In MUR 8017, two of the three mailers expressly advocate for the defeat of John O’Dea and the election of Ron Hanks. In these mailers, the electoral portion is unmistakable and unambiguous. One of the two mailers states that Hanks “won the top line designation for U.S. Senate” and the other is labeled as a “voter guide.”¹⁵ On the second element, reasonable minds could not differ that the mailers encourage the election or defeat of a clearly identified federal candidate and not some other action. Both of the mailers state that Hanks was “endorsed by the Colorado Republican Party” and “won . . . the endorsement of the Colorado Republican Party.”¹⁶ An endorsement of a federal candidate, as in these mailers, is express advocacy.¹⁷ These two mailers fit the definition of express advocacy because their electoral portions are unmistakable and unambiguous, and reasonable minds could not differ as to what the mailers urge: the election of Ron Hanks and the defeat of Joe O’Dea.

In MUR 8023, all three mailers expressly advocate for the defeat of Joe O’Dea and the election of Ron Hanks. Here, the electoral portion is also unmistakable and unambiguous. The mailers appear to have been sent within thirty days before the Republican primary election.¹⁸ Each mailer clearly identifies O’Dea as a federal candidate: the first states that O’Dea “wants to run against[] Michael Bennet,” the second refers to O’Dea as a “Bennet challenger,” and the third states that Bennet is “the same senator [O’Dea] now wants to defeat.”¹⁹

Moreover, just like the two mailers discussed above, reasonable minds could not differ as to whether these mailers suggest the election or defeat of a clearly identified federal candidate. The explanation and justification for 11 C.F.R. § 100.22(b) states that “communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy . . . if, in context, they have no other reasonable meaning than to encourage action to elect or defeat the candidate in question.”²⁰ Communications commenting on a candidate’s “character, qualifications or accomplishments” still constitute express advocacy under 11 C.F.R. § 100.22(b) absent a “call to action” (*i.e.*, verbs that encourage reader/viewer/listener to take electoral action as defined in 11 C.F.R. § 100.22(a)).²¹ Each mailer in MUR 8023 includes phrases such as, “Joe O’Dea is NOT who

¹⁵ Compl., Exs. 2, 5, MUR 8017.

¹⁶ *Id.*, Exs. 1, 2, 5.

¹⁷ *See, e.g.*, F&LA at 6-7, MUR 6861 (Williams, *et al.*) (finding that a yard sign saying respondent “has endorsed” candidate is express advocacy); First Gen. Counsel’s Rpt. at 6 n.5 (stating that endorsements “by definition expressly advocate”) & Cert. at ¶ 1 (Feb. 8, 2008), MUR 5522 (Wisconsin Right to Life, Inc.); Gen. Counsel’s F&LA at 2 (finding that a sign stating candidate was “endorsed by Christian Voice” constituted express advocacy) & Cert. ¶ 2 (Nov. 27, 1984) MUR 1711 (Christian Voice Moral Government Fund).

¹⁸ *See* Compl. at 1, MUR 8023 (characterizing the mailers as ‘electioneering communication’ and citing to 11 C.F.R. § 100.29, which defines an electioneering communication as a communication that, among other things, is distributed within thirty days of a primary election or sixty days of a general election).

¹⁹ Compl. at 3, MUR 8023.

²⁰ Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (“Express Advocacy E&J”).

²¹ *Id.* The Commission found that character attacks on John Kerry and George Bush’s character were “unmistakable, unambiguous and suggestion of only one meaning” and had no other reasonable meaning besides to encourage defeat of the candidates in the upcoming election. *See* Conciliation Agreement at IV.25-28, MUR 5511/5525 (Swift Boat Veterans) (concluding phrases like “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command” were express advocacy);

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he says he is,” and states that O’Dea “says he’s a Republican,” “Claims Wants to ‘Cut Wasteful Spending,’” “Claims He’s A Conservative,” or “Claims He Supports The Second Amendment.”²² These statements attack O’Dea’s character. When considered in the context of the clear electoral portion discussed above, the only reasonable interpretation of these statements is encouraging action to defeat O’Dea.

Not only is it consistent to with the Commission’s stated intent in promulgating 11 C.F.R. § 100.22(b)²³ to find that this language constitutes express advocacy, but it is also consistent with Commission precedent. In MUR 7545, the Commission found that, under 11 C.F.R. § 100.22(b), certain mailers constituted express advocacy when they identified a federal candidate, were sent shortly before a primary election, and included statements on the candidate’s character, such as, “bad business deals,” “problem personal finances,” “conflicts with law enforcement & courts,” and “SHOULDN’T CHARACTER AND HONESTY MATTER.”²⁴ In that matter, the mailers lacked a specific “call to action,” but the Commission found express advocacy regardless.²⁵ Thus, the mailers at issue should also be considered express advocacy under 11 C.F.R. § 100.22(b) because they clearly identify a federal candidate, were sent within thirty days of a primary election, and comment on O’Dea’s character.

For these reasons, all but one mailer in MURs 8017 and 8023 appear to be public communications that expressly advocate for the election or defeat of a clearly identified federal candidate. Accordingly, because the mailers lacked disclaimers, I voted to find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11.

May 1, 2024

 Date



 Shana M. Broussard
 Commissioner

 Conciliation Agreement at IV.27-28, MUR 5487 (Progress for American Voter Fund); Conciliation Agreement at IV.29, MUR 5440 (The Media Fund).

²² Compl. at 4, MUR 8023.

²³ Express Advocacy E&J, 60 Fed. Reg. at 35,295.

²⁴ F&LA at 8-9, MUR 7543 (Jefferson United, Inc.).

²⁵ *Id.*