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**BEFORE THE
FEDERAL ELECTION COMMISSION**

Jon Vogel, Executive Director
Democratic Congressional Campaign Committee
430 S. Capitol Street, S.W.
Washington, D.C. 20003.

SENSITIVE

Complainant,

MUR # 6311

v.

Americans for Prosperity
2111 Wilson Blvd. Suite 350
Arlington, VA 22201

Respondent.

COMPLAINT

The Democratic Congressional Campaign Committee files this complaint with the Federal Election Commission (the "FEC" or "Commission") under 2 U.S.C. § 437g(a)(1) (2010) against Americans for Prosperity ("Respondent") for numerous violations of the Federal Election Campaign Act ("FECA" or the "Act").

Respondent has made expenditures expressly advocating for the defeat of federal candidates through a series of television advertisements without filing the required independent expenditure reports or including the required disclaimers on its communications. Moreover, as

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PAID FOR BY THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE • 430 SOUTH CAPITOL ST. SE • WASHINGTON, DC 20003
(202) 863-1500 • WWW.DCCC.ORG • NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE

CONTRIBUTIONS OR GIFTS TO THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE ARE NOT TAX DEDUCTIBLE.

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constitute prohibited corporate contributions to a candidate or party committee. Finally, whether its expenditures were coordinated or not, Respondent has triggered political committee status but has failed to register with the FEC as of the filing of this complaint. Accordingly, unless Respondent files Form 1 with the FEC within ten days of these expenditures, it will have violated provisions of the Act including but not limited to 2 U.S.C. §§ 432, 433, 434(a), 434(c), as well as §§ 441b, and 441d and numerous Commission regulations discussed below.

A. FACTUAL BACKGROUND

Respondent is a non-profit corporation organized under IRC § 501(c)(4) and incorporated under the laws of the District of Columbia. While Respondent has reported electioneering communications to the FEC in the past, it has not registered as a political committee or reported any independent expenditures as of the time of the filing of this complaint.

Starting on or about June 9, 2010, Respondent began airing television advertisements in Nevada, Virginia, and North Dakota expressly advocating for the defeat of Representatives Dina Titus, Tom Perriello, and Earl Pomeroy, respectively.¹ Representative Titus represents Nevada's 3rd Congressional District in the U.S. House of Representatives, is running for re-election, and filed her current Statement of Candidacy on October 15, 2009. Representative Perriello represents Virginia's 5th Congressional District, is running for re-election, and filed his current Statement of Candidacy on February 3, 2009, as amended on March 10, 2009. Representative

¹ A CD containing copies of the advertisements is included herewith.



Pomeroy represents North Dakota, is running for re-election, and filed his current Statement of Candidacy on January 20, 2009.

Respondent's advertisement concerning Representative Titus begins by discussing her vote on "big government health care," presumably referring to her votes in support of health care reform. The ad concludes with the narrator making the following statement and identical text appearing on-screen:

"Dina Titus cast her vote... Tell her: Nevadans won't forget."

At the same time the following text appears on the screen next to an image of Rep. Titus:

"NovemberIsComing.com"

The advertisement also includes a written statement, "PAID FOR BY AMERICANS FOR PROSPERITY"; there is no other disclaimer information and no audio statement.

Respondent's advertisements targeting Representatives Perriello and Pomeroy are tailored to each candidate and their states, but are otherwise identical. On information and belief, each of these advertisements cost at least \$10,000, including production and airtime costs.

B. LEGAL ARGUMENT

Respondent made expenditure for advertisements, which pursuant to 11 C.F.R. §§ 100.22(a), "expressly advocate" for the defeat of federal candidates.

If Respondent did not coordinate the advertisements, they all constitute "independent expenditures" under 11 C.F.R. § 100.16. In that case, assuming that the costs of these communications were each \$10,000 or more, Respondent violated FEC regulations by not



reporting its independent expenditures within 48 hours,² identifying who made contributions to fund the independent expenditures,³ including the proper disclaimer on its independent expenditures,⁴ or certifying under penalty of perjury that the expenditures were, in fact, independent.⁵

If the Commission finds evidence that the advertisements were coordinated, then Respondent alternatively has made prohibited in-kind corporate contributions.

Finally, as Respondent's expenditures on the advertisements must have exceeded \$1,000, it is also required to register with the Commission as a political committee under 2 U.S.C. § 431(4)(A) and abide by all of the statutory requirements and regulations that apply to political committees. Respondent has failed to do so as of this filing.

1. Respondent's Advertisements Constitute Express Advocacy

The advertisements constitute express advocacy under 11 C.F.R. § 100.22(a). Section 100.22(a) defines "expressly advocating" to include any communication that "uses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' ...or ...'defeat' accompanied by a picture of one or more candidates(s), ... or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable

² See 11 C.F.R. § 109.10(b)

³ See *id.* § 109.10(e)(1).

⁴ See *id.* §§ 109.11, 110.11(a)(2).

⁵ See *id.* § 109.10(e)(2).



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meaning than to urge the election or defeat of one or more clearly identified candidates ...⁶ As a preliminary matter, there can be no question that Respondent's advertisements "clearly identify" federal candidates. In the advertisements, the words "[people from candidate's state] won't forget ... NovemberIsComing.com" appear along side the candidates' images and under the candidates' first and last names. In this context, the quoted language constitutes a campaign slogan or words that "can have no other reasonable meaning than to urge" the defeat of the named candidate. The phrase "November Is Coming," can only be a reference to the general election, and thus, in the case of the Perriello ad for example, the call to "Tell him: Virginians won't forget," at the general election, can only mean vote against him or defeat him at the polls. The same is true for the analogous language in all of the advertisements.

2. Respondent Failed to Comply with the Reporting, Disclaimer, and Certification Regulations Governing Independent Expenditures

Under Commission regulations, an "independent expenditure" is defined as an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that was not coordinated with a candidate or a political party.⁷ As Respondent's advertisements expressly advocate for the defeat of federal candidates, as discussed above, and assuming they were not coordinated, they constitute "independent expenditures" and Respondent was obligated to comply with the Commission's applicable regulations.

Persons other than political committees are required to file a report with the Commission in reporting periods during which the amount of money they have spent on independent

⁶ *Id.* § 100.22(a) (emphasis added).

⁷ *See id.* § 100.16.



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expenditures exceeds \$250.⁸ These reports must include the person's name, mailing address, occupation, and employer; the identification of to whom the expenditure was made; the amount, date, and purpose of each expenditure; a statement indicating whether the expenditure was in support or opposition to a federal candidate; and a list of each person who made a contribution in excess of \$200 for the purpose of furthering the independent expenditure.⁹ Additionally, when entities make independent expenditures in a calendar year in the amount of \$10,000 or more in the aggregate, and it is 20 or more days prior to an election, they are required to file an independent expenditure report with the FEC within 48 hours.¹⁰ As of this writing, Respondent has completely failed to comply with these regulations. It has not reported its independent expenditures to the Commission and is withholding important information from the public.

Respondent also failed to include the proper disclaimer on its independent expenditures. Section 110.11(a)(2) requires television advertisements that expressly advocate for the election or defeat of a clearly identified candidate to include a proper disclaimer, including the name of the individual or entity that paid for the communication, a statement indicating whether or not the communication was authorized by any candidate or candidate's committee, and if not authorized by a candidate or candidate's committee, the individual's or entity's address, telephone number, or web address.¹¹ For television advertisements, 2 U.S.C. § 441d(d)(2) also requires

⁸ See *id.* § 109.10(b).

⁹ See *id.* § 109.10(e).

¹⁰ See *id.* § 109.10(c).

¹¹ See *id.* § 110.11(b).



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"the following audio statement: ' _____ is responsible for the content of this advertising'". A similar written statement must appear at the end of the advertisement.¹² Respondent's disclaimer does not satisfy these requirements. While there is a statement on the communications stating "PAID FOR BY AMERICANS FOR PROSPERITY," it does not include language indicating whether or not it was authorized by a candidate or candidate's committee and the required "stand by your ad" voice over is not present. Accordingly, Respondent's disclaimers are inadequate and in violation of 11 C.F.R. § 110.11.

Commission regulations further require that all reports of independent expenditures contain a certification, under penalty of perjury, that the expenditure was not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's committee, a political party committee, or an agent of any of the above.¹³ In that Respondent has not filed any independent expenditure reports with the Commission whatsoever, it has also failed to satisfy this certification requirement and committed a further violation of the Commission's regulations.

3. Possible Prohibited Corporate In-Kind Contributions

As Respondent's advertisements do not contain a statement that they were "not authorized" by any candidate or candidate's committee, and because Respondent has not filed the necessary reports certifying the actual independence of its expenditures, it is impossible to

¹² See *id.* § 110.11(c)(4).

¹³ See *id.* § 109.10(e)(2).



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determine that the communications were in fact independent expenditures, and not coordinated in-kind contributions under 11 C.F.R. § 109.21. Corporations are prohibited from making any contributions to candidates or political committees under 2 U.S.C. § 441b. Given Respondent's notable failure to even claim independence, the Commission should investigate whether it has violated this important provision of the Act.

4. Respondent Failed to Register as a Political Committee and Abide by the Regulations Governing Political Committees

The Act requires groups of persons that make expenditures in excess of \$1,000 in a calendar year to register with the Commission as "political committees" within ten days of crossing the threshold.¹⁴ The Act requires that the registration include the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurers of the committee; and a listing of all banks accounts and depositories used by the committee.¹⁵

As described above, the funds that Respondent spent on their television advertisements constitute "expenditures." Respondent doubtlessly spent more than \$1,000 in order to write, produce, create, and air their television advertisements, not to mention the other expenditures that Respondent must have made in connection with their website and other activities. It also appears that Respondent's major purpose is to influence the election of federal candidates. For

¹⁴ See 2 U.S.C. § 431(4)(A); 11 C.F.R. § 102.1(d).

¹⁵ See 2 U.S.C. §§ 433(a), (b).



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example, in the "About" section of Respondent's website, which details the purpose of the group, it states: "You can send a clear message to our elected officials by signing the November is Coming petition. You can tell them that if they vote for big government programs or any other freedom-killing legislation, you will vote NO on them in November." Respondent's only stated goal is to influence federal elections. As held by the U.S. Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC*, such an entity that makes independent expenditures in excess of \$1,000 constitutes a "political committee" under the Act.¹⁶ Accordingly, Respondent violated the Act by failing to register with the Commission as required by 2 U.S.C. § 431(4)(A), failing to provide the Commission and the public with any of the information required by 2 U.S.C. §§ 433(a) and (b), and at the time of this writing, failing to satisfy the reporting requirements of 2 U.S.C. § 434(a)(1) and the Commission's relevant regulations.

C. REQUESTED ACTION

The currently available evidence shows that Respondent violated the Federal Election Campaign Act by funding advertisements that expressly advocate the defeat of a federal candidate but not complying with the Commission's registration, reporting and disclaimer requirements. These are serious violations that go to the heart of the Act. We respectfully request that the Commission investigate these violations, enjoin Respondent from further violations, and assign the maximum fines permitted by law.

¹⁶ 599 F.3d 686 (D. D.C. 2010).



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Sincerely,

Jon Vogel, Executive Director
Democratic Congressional Campaign
Committee
430 S. Capitol Street, S.W.
Washington, D.C. 20003,

SUBSCRIBED AND SWORN to before me this 11th day of June, 2010.

Notary Public

My Commission Expires:

CLAUDETTE B. HENRY
Notary Public District of Columbia

My Commission Expires: July 14, 2013