

BEFORE THE  
FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION COMMISSION  
SECRETARY

2015 AUG 13 AM 9:03

American Democracy Legal Fund  
455 Massachusetts Avenue NW  
Washington, DC 20001

MUR # 6955

Complainant,

v.

**SENSITIVE**

John R. Kasich  
P.O. Box 1344  
Columbus, OH, 43216

Kasich for America and Suzanne E. Marshall, Treasurer  
P.O. Box 1344  
Columbus, OH, 43216

New Day For America and J. Matthew Yuskewich, Treasurer  
4679 Winterset Drive  
Columbus, OH 43220

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2015 AUG 10 AM 10:30

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FEDERAL ELECTION  
COMMISSION

Respondents.

**COMPLAINT**

Complainant files this complaint under 52 U.S.C. § 30109(a)(1) against John R. Kasich; Kasich for America and Suzanne E. Marshall, Treasurer, in her official capacity; and New Day For America and J. Matthew Yuskewich, Treasurer, in his official capacity, for violating the Federal Election Campaign Act of 1971, as amended ("the Act") and Federal Election Commission regulations, as described below.

**A. FACTS**

On July 21, 2015, former Ohio Governor John R. Kasich announced his candidacy for President of the United States.<sup>1</sup> His announcement did not come as a surprise; on June 28, 2015, Kasich's advisers told the media that Mr. Kasich would be announcing his candidacy on July

<sup>1</sup> Sheryl Gay Stolberg, *John Kasich Enters 2016 Race, Hoping Centrist Appeal Sets Him Apart*, N.Y. Times (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/john-kasich-election-2016-presidential-race.html>.

21.<sup>2</sup> Mr. Kasich did not file his Statement of Candidacy with the FEC within 15 days of making his decision on June 28, 2015 (which would have been July 13, 2015). Instead, his Statement of Candidacy was filed on July 23, 2015.

New Day For America is an independent expenditure-only political organization organized under Internal Revenue Code Section 527 and registered with the Internal Revenue Service.<sup>3</sup> New Day For America's website<sup>4</sup> features Mr. Kasich's picture, his biography,<sup>5</sup> and a video of Mr. Kasich explaining why "we created the New Day For America Committee."<sup>6</sup> The video appears on New Day For America's donation page, which also contains text that reads, "New Day For America may accept unlimited contributions from individuals, corporations, and other organizations."<sup>7</sup> New Day For America filed a Statement of Organization with the FEC on July 23, 2015.<sup>8</sup> Weeks earlier, on July 8, 2015, New Day for America entered into an advertising contract with WCVB for \$58,400 worth of advertising time in the New Hampshire media market.<sup>9</sup> New Day For America completed a form documenting two separate ad buys on July 8, 2018. Each form listed "John Kasich for the Republican Presidential Primary" as the "name

<sup>2</sup> Mike Allen, *John Kasich to Announce Presidential Bid July 21*, Politico, June 28, 2015, available at <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517.html>.

<sup>3</sup> New Day For America, Political Organization Notice of Section 527 Status, Form 8871, available at [http://forms.irs.gov/app/pod/basicSearch/search?\\_eventId\\_displayForm=true&formId=80871&formtype=e8871&execution=e1s3](http://forms.irs.gov/app/pod/basicSearch/search?_eventId_displayForm=true&formId=80871&formtype=e8871&execution=e1s3).

<sup>4</sup> New Day For America, <https://newdayforamerica.com/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729205858/https://newdayforamerica.com/>].

<sup>5</sup> New Day For America, *Mission*, <https://newdayforamerica.com/mission/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210144/https://newdayforamerica.com/mission/>].

<sup>6</sup> *Id.*; New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

<sup>7</sup> New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

<sup>8</sup> See New Day For America, FEC Form 1 Statement of Organization, July 23, 2015, available at <http://docquery.fec.gov/pdf/003/201507230300013003/201507230300013003.pdf>.

<sup>9</sup> Contract Agreement between WCVB and New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

of the legally qualified candidate(s) the programming refers to.”<sup>10</sup> The form for the WMUR New Hampshire ad buy specified that the ad included a “candidate (Republican) discussing his values/beliefs.”<sup>11</sup>

Public reports indicate that the ad that New Day For America ran in New Hampshire on July 8, titled “Us,” featured Mr. Kasich speaking directly to the camera about his qualifications to be President.<sup>12</sup> The advertisement includes a “paid-for” box and oral disclaimer explaining that New Day For America paid for the advertisement. The advertisement does not include a “stand-by-your-ad” disclaimer from Mr. Kasich. On July 26, 2015, at 9:43 AM, New Day For America aired a second advertisement on WCVB-BOS (ABC) that features Mr. Kasich speaking directly to the camera about his qualifications to be President.<sup>13</sup> That ad also includes a “paid-for” box explaining that New Day For America paid for the advertisement and does not include a “stand-by-your-ad” disclaimer from Mr. Kasich.

## **B. LEGAL ARGUMENT**

### **1. Mr. Kasich failed to timely register with the FEC as required by the Act.**

Once a person becomes a candidate for federal office, he or she has 15 days to register and report as such with the FEC.<sup>14</sup> Candidates register using a “Statement of Candidacy” on

<sup>10</sup> New Day For America, NAB Form PB-18 Issues, WCVB - Needham, MA, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20\(14363796165133\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20(14363796165133).pdf); New Day For America, NAB Form PB-18 Issues, WMUR New Hampshire, July 8, 2015, [https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20\(14363829161397\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20(14363829161397).pdf). The National Association of Broadcasters has issued Broadcast Agreement Forms that are designed to serve as an actual contract for the sale of political broadcast time. [http://www.nab.org/xert/2011Emails/Legal/NABPB\\_17\\_Forms.pdf](http://www.nab.org/xert/2011Emails/Legal/NABPB_17_Forms.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> Dan Tuohy, *Kasich to air first major ad buy in NH*, New Hampshire Union Leader (July 8, 2015), <http://www.unionleader.com/article/20150708/NEWS0605/150709332#>. The ad is also available on YouTube. New Day For America, *Us*, YouTube (July 8, 2015), [https://www.youtube.com/watch?v=Dg9Liwfs\\_tI](https://www.youtube.com/watch?v=Dg9Liwfs_tI).

<sup>13</sup> See TVEyes, Inc., Media Monitoring Suite, WCVB 7/26/2015 9:43:07 AM, available at <http://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20AM&playclip=true>.

<sup>14</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

FEC Form 2.<sup>15</sup> Under the Act, a “candidate” means an individual who seeks nomination for election, or election, to federal office.<sup>16</sup> An individual becomes a candidate whenever he or she has received contributions aggregating in excess of \$5,000 or made expenditures aggregating in excess of \$5,000.<sup>17</sup>

Commission regulations allow individuals to “test the waters” before they decide to become a candidate for federal office.<sup>18</sup> An individual who “tests the waters” does not have to register or report as a candidate unless or until he or she decides to become a candidate.<sup>19</sup> Under this exemption, a potential candidate must conduct activity “solely for the purpose” of “determining whether [the] individual should become a candidate.”<sup>20</sup> Activities that are permissible under this exemption include conducting a poll, making telephone calls, and traveling.<sup>21</sup>

The regulations are clear that the “testing the waters” exemption does not apply to individuals who have decided to become candidates.<sup>22</sup> There are specific activities that indicate that an individual has decided to become a candidate, including that the individual: (1) uses general public political advertising to publicize his or her intention to campaign for Federal office; (2) raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) makes or authorizes written or oral statements that refer to him

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<sup>15</sup> FEC Form 2, Statement of Candidacy, FEC, *available at* <http://www.fec.gov/pdf/forms/fecfrm2.pdf>.

<sup>16</sup> 52 U.S.C. § 30101(2).

<sup>17</sup> *Id.*; 11 C.F.R. § 100.3(a).

<sup>18</sup> *See generally* 11 C.F.R. §§ 100.72, 100.131.

<sup>19</sup> *Id.* § 100.72(a) (exempting “[f]unds received solely for the purpose of determining whether an individual should become a candidate” from the definition of contribution); *id.* at § 100.131(a) (exempting “[p]ayments made solely for the purpose of determining whether an individual should become a candidate” from the definition of expenditure).

<sup>20</sup> *Id.* § 100.72, .131.

<sup>21</sup> *Id.* § 100.72(a), 100.131(a).

<sup>22</sup> *Id.* § 100.72(b).



or her as a candidate for particular office; (4) conducts activities in close proximity to the election or over a protracted period of time; and (5) has taken action to qualify for the ballot under state law.<sup>23</sup> This list is not exhaustive and other activities may indicate that an individual has decided to become a candidate for federal office.<sup>24</sup>

For example, when a candidate moves “beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities” to amass support for a campaign, his or her activity may trigger candidacy.<sup>25</sup> “Once an individual becomes a candidate, equivocal statements of intent or a future ‘official announcement’ do not eradicate the registration and reporting requirements that have been triggered.”<sup>26</sup> Additionally, public statements that the press links to an individual’s “advisers” regarding the individual’s decision may, when taken with other statements made by the candidate, be indicative of whether the individual has made a decision to become a candidate.<sup>27</sup>

Mr. Kasich became a candidate on or before June 28, 2015, when his advisers told the media that he was planning to announce his candidacy on July 21, 2015.<sup>28</sup> Further confirming that Mr. Kasich had decided to run for President long before July 21, his own allied Super PAC, New Day For America, even produced advertisements in which Mr. Kasich discussed his qualifications to be President on July 8, 2015.<sup>29</sup> As part of that media buy, New Day For

<sup>23</sup> *Id.* §§ 100.72(b), 100.131(b).

<sup>24</sup> *Id.* §§ 100.72(b), 100.131(b).

<sup>25</sup> FEC Adv. Op. 1981-32 (Askew).

<sup>26</sup> FEC Matter Under Review 5363 (Sharpton), Factual and Legal Analysis at 10..

<sup>27</sup> *See* FEC Matter Under Review 5934 (Thompson), First General Counsel’s Report. The FEC General Counsel’s office cited numerous statements by Senator Thompson as well as a statement of an adviser of Senator Fred Thompson as indicia that the Senator had decided to run for president. A majority of the FEC’s Commissioners ultimately disagreed with the General Counsel’s office on whether Senator Thompson had triggered candidacy. *See* FEC Matter Under Review 5934 (Thompson), Statement of Vice Chairman Petersen and Comm’rs Hunter, McGahn, and Weintraub.

<sup>28</sup> Mike Allen, *John Kasich to Announce Presidential Bid July 21*, Politico, June 28, 2015, available at <http://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517.html>.

<sup>29</sup> *See* Dan Tuohy, *Kasich to air first major ad buy in NH*, New Hampshire Union Leader (July 8, 2015), <http://www.unionleader.com/article/20150708/NEWS0605/150709332#>; Contract Agreement between WCVB and

America filed two PB-18 forms on July 8, 2015 referring to Mr. Kasich as a candidate for President.<sup>30</sup> To meet the 15-day deadline required under 52 U.S.C. § 30102(e)(1), Mr. Kasich should have filed his Statement of Candidacy by July 13, 2015. Instead, he filed on July 23, 2015. Thus, Mr. Kasich failed to timely file his registration in violation of 52 U.S.C. § 30102(e)(1).

**2. New Day For America is a Super PAC and failed to timely register with the FEC as required under the Act.**

Under the Act, a “political committee” is any committee, club, association, or other group of persons which receives contributions aggregating more than \$1,000 per year or makes more than \$1,000 in expenditures in a calendar year.<sup>31</sup> A political committee has ten days to register and report as such with the FEC.<sup>32</sup> New Day For America bought at least \$58,400 worth of advertising to support Mr. Kasich’s candidacy on July 8, 2015.<sup>33</sup> After that purchase, New Day For America had until July 18, 2015 to register with the FEC. However, the organization did not file its Statement of Organization with the FEC until July 23, 2015. Failing to register as a political committee within ten days of spending more than \$1,000 is a violation of 52 U.S.C. § 30103(a).

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New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

<sup>30</sup> New Day For America, NAB Form PB-18 Issues, WCVB - Needham, MA, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20\(14363796165133\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20NAB%20(14363796165133).pdf); New Day For America, NAB Form PB-18 Issues, WMUR New Hampshire, July 8, 2015, [https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20\(14363829161397\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2015/Non-Candidate%20Issue%20Ads/New%20Day%20for%20America/7.8.15%20New%20Day%20for%20America%201359053%20NAB%20(14363829161397).pdf).

<sup>31</sup> 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5.

<sup>32</sup> 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1.

<sup>33</sup> Contract Agreement between WCVB and New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

**3. Mr. Kasich has established an independent expenditure-only committee in violation of the Act. He is soliciting soft money in violation of the Act.**

The Act prohibits federal candidates and their agents from establishing, directing, controlling, or soliciting money for an entity that raises money outside of the federal contribution limits such as an independent expenditure-only committee.<sup>34</sup> When the Commission is considering whether a candidate has “established” an independent expenditure-only committee, the Commission focuses principally on whether the candidate “directly or through his agent, had an active or significant role in the formation of the entity.”<sup>35</sup> When considering whether a candidate “finances” or “maintains” an independent expenditure-only committee, the Commission considers a number of factors, including whether the candidate, directly or through his agent, provides funds or goods in a significant amount to the committee, or causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the committee.<sup>36</sup> Finally, when determining whether a candidate “controls” an independent expenditure-only committee, the Commission will consider factors such as (1) whether the candidate has the authority or ability to direct or participate in the governance of the entity; (2) whether the candidate has the authority to hire, appoint, demote, or otherwise control the officers or decision-makers of the committee; and (3) whether the candidate has a common or overlapping membership with the committee that indicates a formal or ongoing relationship between the candidate and the entity.<sup>37</sup>

A federal candidate is also prohibited from soliciting, raising, and spending funds in excess of the contribution limits through an independent expenditure-only committee.<sup>38</sup> To

<sup>34</sup> 52 U.S.C. § 30125(e)(1); *see also* FEC Advisory Opinion 2011-21 (Lee).

<sup>35</sup> 11 C.F.R. § 300.2(c)(2)(ix).

<sup>36</sup> *Id.* § 300.2(c)(2).

<sup>37</sup> 11 C.F.R. § 300.2.

<sup>38</sup> 52 U.S.C. § 30125(e)(1).

solicit is “to ask, request, or recommend, explicitly or implicitly, that another person make a contribution.”<sup>39</sup>

Mr. Kasich, a federal candidate for President, appears in a video on New Day For America’s donation page.<sup>40</sup> In that video, Mr. Kasich, speaking directly to camera, says:

Hi, I’m John Kasich, and I believe it’s time for a new day for America. . . . I’d like to talk to you . . . . And that’s why I’m announcing that **we created** the New Day For America Committee. We’re going to starting getting around the country more, meeting and talking with more people, and see if by coming together we can put in motion the solutions that will get this great idea called America working the right way again. I hope you’ll visit **our website** at NewDayForAmerica.com. While there, I hope you’ll sign up to join our team.<sup>41</sup>

Thus, on video, Mr. Kasich includes himself among the establishers of New Day For America.

New Day For America raises money outside of federal contribution limits. Its donation page reads, “New Day For America may accept unlimited contributions from individuals, corporations, and other organizations. Your contribution is not subject to contribution limits, but it will be disclosed to the IRS or FEC.”<sup>42</sup> Because New Day For America raises money outside of federal contribution limits, Mr. Kasich has violated 52 U.S.C. § 30125(e)(1) in establishing New Day For America. Additionally, because the video in which Mr. Kasich takes credit for establishing New Day For America appears on the organization’s donation page, a reasonable donor would conclude that Mr. Kasich has implicitly solicited funds for New Day For America.<sup>43</sup>

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<sup>39</sup> 11 C.F.R. § 300.2(m).

<sup>40</sup> *Id.*

<sup>41</sup> New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>] (emphasis added). The video also appears on the website’s “Mission” page. New Day For America, *Mission*, <https://newdayforamerica.com/mission/> (last visited July 29, 2015) [<https://web.archive.org/web/20150729210144/https://newdayforamerica.com/mission/>] (emphasis added).

<sup>42</sup> New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited July 29, 2015), [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

<sup>43</sup> *Cf.* 11 C.F.R. § 300.2(m)(1)(iii) (A communication is a solicitation if it “identifies a Web address where the Web page displayed is specifically dedicated to facilitating the making of a contribution or donation, or automatically

The donation page asks for unlimited contributions; therefore, Mr. Kasich has violated 52 U.S.C. § 30125(e)(1) by soliciting soft money.

**4. New Day For America made, and Mr. Kasich accepted, an in-kind contribution in the form of a coordinated communication. That contribution was illegal and exceeded contribution limits in violation of the Act.**

Under 52 U.S.C. § 30116(a)(7)(B)(i), “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” An expenditure for a public communication will be considered an in-kind contribution to a campaign if it is (1) paid for by an entity other than the campaign; (2) meets certain content standards, including by being an electioneering communication, by republishing in whole or in part a campaign’s materials, by expressly advocating the election or defeat of a clearly identified federal candidate, or by identifying a federal candidate within a designated time period; and (3) meets certain conduct standards regarding the coordination between who paid for the ad and the campaign or an agent of the campaign.<sup>44</sup> As discussed above, a federal candidate is prohibited from soliciting, raising, and spending funds in excess of the contribution limits through an independent expenditure-only committee.<sup>45</sup>

New Day For America has paid for at least two advertisements in which Mr. Kasich appears directly on camera to discuss his qualifications for President.<sup>46</sup> Because these

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redirects the Internet user to such a page or exclusively displays a link to such a page.”); FEC Matter Under Review 5711 (Senator Barbara Boxer et al.) Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Steven T. Walther at 5 (Sept. 20, 2007), available at <http://eqs.fec.gov/eqsdocsMUR/000063AB.pdf> (holding that while it was not an illegal solicitation for federal candidates to appear on the home page -- which did not solicit contributions -- of the website of an organization that on a separate web page solicited soft money, “had the federal officeholders approved, authorized, or agreed or consented to the use of their names or likenesses . . . on the contribution page, we would be presented with a far different matter.”).

<sup>44</sup> See 11 C.F.R. §§ 109.20(b), 109.21.

<sup>45</sup> 52 U.S.C. § 30125(e)(1).

<sup>46</sup> See TVEyes, Inc., Media Monitoring Suite, WCVB 7/26/2015 9:43:07 AM, available at <http://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20AM&playclip=true;>

advertisements were paid for by New Day For America, they meet the paid-for prong of the coordinated communications test.<sup>47</sup>

A public communication meets the content prong if it expressly advocates the election or defeat of a clearly identified candidate for Federal office<sup>48</sup> or if it is “the functional equivalent of express advocacy.”<sup>49</sup> “Expressly advocating” includes communications that “in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as . . . advertisements . . . which say ‘Nixon’s the One.’”<sup>50</sup> “Expressly advocating” also includes messages that

When taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.<sup>51</sup>

A public communication is the functional equivalent of express advocacy “if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”<sup>52</sup>

These videos expressly advocate the election of a clearly identified candidate, Mr. Kasich, for President. In the July 26 ad, Mr. Kasich contrasts himself with other clearly identified candidates for President. The voiceover says, “No one running for President has balanced the federal budget for us but John Kasich,” before Mr. Kasich discusses his experience

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Dan Tuohy, *Kasich to air first major ad buy in NH*, New Hampshire Union Leader (July 8, 2015), <http://www.unionleader.com/article/20150708/NEWS0605/150709332#>. The ad is also available on YouTube. New Day For America, *Us*, YouTube (July 8, 2015), [https://www.youtube.com/watch?v=Dg9Liwfs\\_tI](https://www.youtube.com/watch?v=Dg9Liwfs_tI).

<sup>47</sup> See 11 C.F.R. § 109.21(a)(1).

<sup>48</sup> *Id.* § 109.21(c)(3).

<sup>49</sup> *Id.* § 109.21(c)(5).

<sup>50</sup> *Id.* § 100.22(a).

<sup>51</sup> *Id.* § 100.22(b).

<sup>52</sup> *Id.* § 109.21(c)(5).

on budget issues. Reasonable minds could not differ that the July 26 ad encourages viewers to vote for Mr. Kasich for President.<sup>53</sup> In “Us,” Mr. Kasich speaks after images and sound clips of other clearly identified candidates for President and a voiceover that says, “Hey, what about us?”<sup>54</sup> In an echo of the regulation’s example of express advocacy, “Nixon’s the One,”<sup>55</sup> the ad ends with the voiceover, “John Kasich’s for us.”<sup>56</sup> For the same reasons, these videos are also the functional equivalent of express advocacy.<sup>57</sup> Because these videos expressly advocate (or are the functional equivalent of expressly advocating) the election of a clearly identified federal candidate, they meet the content prong of a coordinated communication.<sup>58</sup>

Finally, a communication meets the conduct prong of the coordinated communication test if the candidate was “materially involved” in its creation.<sup>59</sup> In these videos, Mr. Kasich appears directly on camera and appears to be reading lines scripted specifically for these advertisements. The FEC has said that “[g]iven the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication.”<sup>60</sup> Thus, Mr. Kasich was materially involved in creating both of these advertisements, and they meet the conduct prong under 11 C.F.R. § 109.21(d)(2).

Because both advertisements meet the paid-for, content, and conduct prongs under 11 C.F.R. § 109.21, they are both coordinated communications and must be treated as in-kind contributions to Mr. Kasich’s campaign.<sup>61</sup> As discussed above, New Day For America is

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<sup>53</sup> *See id.*

<sup>54</sup> *See* New Day For America, *Us*, YouTube (July 8, 2015), [https://www.youtube.com/watch?v=Dg9Liwfs\\_tI](https://www.youtube.com/watch?v=Dg9Liwfs_tI).

<sup>55</sup> 11 C.F.R. § 100.22(a).

<sup>56</sup> New Day For America, *Us*, YouTube (July 8, 2015), [https://www.youtube.com/watch?v=Dg9Liwfs\\_tI](https://www.youtube.com/watch?v=Dg9Liwfs_tI).

<sup>57</sup> *See* 11 C.F.R. § 109.21(c)(5).

<sup>58</sup> *See id.* § 109.21(c)(3).

<sup>59</sup> *Id.* § 109.21(d)(2).

<sup>60</sup> FED Adv. Op. 2004-1 (Bush/Kerr) at 4 (quoting FEC Adv. Op. 2003-25 (Weinzapfel) at 6).

<sup>61</sup> *See id.* § 109.21(b).



prohibited from making contributions to Mr. Kasich's campaign because it raises soft money.<sup>62</sup> Because New Day For America is prohibited from contributing to Mr. Kasich's campaign, it is also prohibited from making coordinated communications.<sup>63</sup> Even if New Day For America were permitted to make contributions to Mr. Kasich's campaign, these coordinated contributions well exceed the \$2,700 limit on contributions to federal candidates under 52 U.S.C. § 30116(a)(1). New Day For America paid \$58,400 for just one of its multiple ad buys in New Hampshire on July 8, 2015.<sup>64</sup> Thus, Mr. Kasich violated 52 U.S.C. 30125(e)(1) by receiving illegal and excessive contributions, and New Day For America violated 52 U.S.C. 30116(a)(1) by making such contributions.

### **C. REQUESTED ACTION**

As shown, Mr. Kasich and Kasich for America and Suzanne E. Marshall, Treasurer violated the Act by failing to timely register as a candidate within 15 days of Mr. Kasich's decision to run for President. New Day For America and J. Matthew Yuskewich, Treasurer violated the Act by failing to register as a political committee within ten days of spending more than \$1,000. Mr. Kasich violated the Act by establishing New Day For America, an independent-expenditure only committee, and by soliciting soft money for New Day For America. Mr. Kasich and New Day For America violated the Act by accepting and making an illegal and excessive in-kind contribution in the form of a coordinated communication. We respectfully request that the Commission investigate these violations and that Respondents be enjoined from further violations and fined the maximum amount permitted by law.

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<sup>62</sup> See 52 U.S.C. § 30125(e)(1).

<sup>63</sup> 11 C.F.R. § 109.22.

<sup>64</sup> Contract Agreement between WCVB and New Day For America, July 8, 2015, [https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20\(14363795488829\).pdf](https://stations.fcc.gov/collect/files/65684/Political%20File/2015/Non-Candidate%20Issue%20Ads/NEW%20DAY%20FOR%20AMERICA/NEW%20DAY%20FOR%20AMERICA%201359129%20(14363795488829).pdf).

Sincerely,



SUBSCRIBED AND SWORN to before me this 3<sup>RD</sup> day of July, 2015.



Notary Public

My Commission Expires:

JAN 14, 2020

