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December 30, 2020

CONFIDENTIAL

VIA ELECTRONIC MAIL

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Mark Shonkwiler, Esq.
1050 First Street, NW
Washington, DC 20463

Re: MUR# 6955 and 6983, *American Democracy Legal Fund v. John R. Kasich, et al.*

Dear Mr. Shonkwiler:

John Kasich did in the Spring of 2015 what he is doing now: spreading his ideas for a better America. Whether those ideas involve balancing the budget, tax reform, or healthcare reform, Governor Kasich has never been shy about his beliefs or his opinions. Whether he is speaking at a forum in New Hampshire or at the Democratic Convention, he is finding every avenue to spread his vision for America very much like he did in the Spring of 2015. He is not, however, a candidate for President nor is he testing-the-waters for any such campaign.

The General Counsel's Brief (the "Brief") readily acknowledges that its investigation is incomplete and that the Respondents here have a pending motion to quash before the Commission that has never been ruled upon. Those facts, however, do not stop the Commission staff from making serious allegations and recommendations based almost exclusively on press

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speculation and the faulty premise that the Respondents did not comply with various requests for documents and information. The Brief makes much of the fact that Governor John R. Kasich, Kasich For America, and J. Matthew Yuskewich (“Kasich”) refused to provide copies of communications between Kasich and New Day or New Day’s agents. This statement is not true. The Responses to the Commission’s Subpoena, provided over a year ago on November 19, 2019, not only expressly states that Kasich is not in possession of any such documents, it also directly refers the Commission to individuals at New Day For America who might have such documents. In addition, Kasich advised the Commission that additional documents could be obtained under the Ohio Open Records law from the Governor’s office in Ohio, since Governor Kasich no longer has access to those records. It is our understanding that no such request was ever made. Kasich is not hiding anything from the Commission—the communications the Commission is seeking simply don’t exist, and the Commission has been aware of that fact for over a year.

Despite pending objections to the Subpoena and the *sua sponte* conversion of the objections to a Motion to Quash, Kasich produced over 7,000 pages of documents—the complete file from its accountants—spent hundreds of hours scouring official schedules from Governor John R. Kasich’s time as Governor of Ohio, and drafted written responses to extensive subpoena requests from the Commission. When Kasich asked to narrow the requests, the Commission requested that Kasich sit for a deposition—a situation no attorney would ever place his client in without a valid subpoena requiring that deposition. The Commission clearly could have issued a Subpoena requiring that deposition—it did not do so. It is disappointing that the Brief concludes that Kasich “refused to comply fully with the Commission’s subpoenas.” *See General Counsel’s Brief*, at 11:16-17. Nothing could be further from the truth.

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This baseless claim of lack of cooperation appears to be made to blame Kasich for the passage of the statute of limitations in this matter. Footnote 1 on page 2 of the brief squarely places that blame on Kasich. The Brief fails to acknowledge that Kasich had no obligation to sign any agreement tolling the statute of limitations. All of the key facts or events in this matter occurred more than five years ago, and any delay is attributable to the Commission which converted Kasich's Subpoena objections, *sua sponte*, to a motion to quash. Kasich should not be held responsible for the *sua sponte* actions of the Commission.

On November 25, 2020, the General Counsel's Brief concluded that that Commission should find probable cause that: 1) Kasich violated 52 U.S.C. §§ 30116(f), 30118(a) and 11 C.F.R. §§ 100.72(a) and 100.131(a) in connection with accepting impermissible, excessive, and unreported contributions from New Day for America for testing-the-waters activities; 2) that Governor Kasich violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy; 3) that Kasich accepted, [sic] prohibited and excessive in-kind contributions in the form of coordinated communications from New Day in violation of 52 U.S.C. §§ 30116 and 30118(a); and 4) that Kasich for America and J. Matthew Yuskewich in his official capacity did not disclose contributions from New Day for America in violation of 52 U.S.C. § 30104(b).

Kasich officially requests any and all additional information gathered by the Commission in the course of its investigation of this matter. *See* Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011).

To the allegations in the Brief, Kasich responds as follows:

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I. Introduction and Background.

Over five years ago, in its Initial Complaint, MUR #6955, American Democracy Legal Fund and Hillary Clinton advisor Brad Woodhouse (collectively “ADLF”) allege that Kasich For America violated the Federal Election Campaign Act of 1971 (the “Act”) by (1) failing to timely register with the Federal Election Commission (the “Commission”); (2) establishing an independent-expenditure only committee in violation of the Act and soliciting “soft” money for that committee; and (3) accepting an excessive, in-kind contribution from New Day For America. In addition, the Complaint alleges that New Day For America and J. Matthew Yuskewich, CPA, Treasurer, New Day For America, violated the Act by (1) failing to timely register with the Federal Election Commission (the “Commission”) and (2) making an excessive, in-kind contribution to Kasich For America and Governor John Kasich.¹

In its Second Complaint, MUR # 6983, also filed over five years ago, ADLF alleges once again that Kasich For America violated the Act by accepting an excessive, in-kind contribution from New Day For America. In addition, the Complaint alleges that New Day For America and J. Matthew Yuskewich, Treasurer, New Day For America made an excessive, in-kind contribution through a coordinated communication with Kasich For America and Governor John Kasich. The allegations in that Complaint are duplicative of, and similar to, the earlier, frivolous allegations brought for political gain by Mr. Woodhouse in MUR # 6955.

¹ A response to the allegations against New Day For America and J. Matthew Yuskewich, CPA, Treasurer, New Day For America, is outside the scope of this response, and a response to those allegations will be addressed in a separate response by them. Much of the General Counsel’s Brief deals with information solely in the possession of New Day For America.

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On March 30, 2016, ADLF then filed a Supplemental Complaint that was never received by Kasich until June 4, 2019.² The Supplemental Complaint addressed additional background information related to the previous filing and, for the first time, asserted that Governor Kasich used New Day For America to “test-the-waters” of a possible, future Presidential run. The facts at the basis of this Supplemental Complaint all occurred more than five years ago. As an initial matter, Kasich did no such thing. But because Kasich never received notice of, or a copy of, this Supplemental Complaint, Kasich never responded to the allegations contained in it until June 16, 2019.

On April 23, 2019, the Commission found reason to believe that Kasich violated various provisions of the Act. Kasich received a copy of that Factual and Legal Analysis on or about May 8, 2019. On June 16, 2019, Kasich responded to the Factual and Legal Analysis, and provided answers to numerous questions posed by the Commission.

On September 12, 2019, Kasich received a Subpoena from the Commission. On November 19, 2019, Kasich responded with over 7,000 pages of documents and detailed responses to the questions posed in the Subpoena.

On January 20, 2020, after the Commission determined that other individuals served with Commission Subpoenas were not in possession of responsive documents, the Commission demanded that Governor Kasich sit for a deposition by Commission staff. Kasich does not believe the Commission contacted any of the individuals Kasich suggested in its June 16, 2019 response, nor did the Commission seek information through the Ohio Open Records law.

² Because Kasich did not receive a copy of this Supplemental Complaint until June 4, 2019, the response to that inquiry was not due until 30 days from that date, which was the date Kasich received the full notification.

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Because the Commission failed to seek information from the individuals and entities Kasich previously suggested, and because the Commission's subpoena did not require Governor Kasich's deposition Counsel refused the Commission's request for Governor Kasich to sit for a deposition. The last Kasich heard from the Commission was in March 2020. Kasich's objections, which the Commission later converted to a motion to quash, has not been ruled upon by the Commission. Kasich then received the General Counsel's Brief the night before Thanksgiving.

II. All Claims in this Matter are Barred by the Statute of Limitations.

The Brief fails to mention the expiration of the statute of limitations in this proceeding until page 43. The statute of limitations has expired. Under 28 U.S.C. § 2462, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." The limitations period begins to run at the time the alleged offense was committed. *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996); *see also FEC v. Nat'l Republican Senatorial Comm.*, 877 F Supp. 15 (D.D.C. 1995).

A statute of limitations is important, and a quick look to the Courts confirms that the Commission cannot ignore it. A statute of limitation needs to be in place because "after the passage of time evidence has been lost, memories have faded, and witnesses have disappeared." *See id.* (citing *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C.Cir.1994) (internal citations omitted). Moreover, "the FEC administrative process is not an adjudication" which tolls the running of the statute of limitations. *See id.* at 19. Nor is the accrual of the statute delayed pending completion

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of the FEC's investigation. *Id.* at *20 ("If the Court adopted their suggestion, our ruling would encourage the FEC to drag out its own investigations by making the agency's conduct an essential element of the violation. This would obstruct not only the general prohibition about open ended penalties, but also FECA's goal of expeditious conflict resolution."). "[A] government agency may not extend its own limitations period indefinitely by failing either to begin or to complete its own investigation." *Id.* The Commission must abide by the statute of limitations.

Here, all of the alleged conduct occurred more than five years ago. The alleged violations relate to purported "testing the waters" activities that occurred from April to July 2015, footage of Governor Kasich that was filmed in the end of June 2015, and commercials that aired in July and August 2015. As has been stated numerous time, Kasich has no information regarding these allegations. Moreover, no alleged conduct occurred within the last five years, and this matter must be dismissed.

Equitable relief is not appropriate here, either. This matter has been pending for well over five years. The statute of limitations has run, and any further pursuit of it would be moot and a waste of the Commission's, and our client's, resources. It should be closed immediately.

III. No Adverse Inference Is Appropriate Here.

The General Counsel's Brief claims that Kasich failed to comply with the Subpoena, and, therefore, the Commission may draw an adverse inference regarding the requested information purportedly withheld. This not the case for three reasons.

First, Kasich was under no obligation to respond to the Subpoena. At the time the Commission served the Subpoena, it lacked a quorum, and thus lacked authority to serve and/or

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enforce the Subpoena.³ In addition, Kasich filed timely objections to the Subpoena. The Commission then took those objections and, *sua sponte*, converted them to a motion to quash. *See Brief*, at n. 1. No ruling has been made on the motion to quash, and Kasich was under no obligation to produce any documents.⁴ *See generally* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2465 (3d ed. 2008) (“If a motion to quash has been made under Rule 45(c), the witness may refuse to comply with the subpoena until that motion has been ruled upon.”). Kasich should be applauded for cooperating with the Commission in this matter.

The adverse inference rule does not apply where, as here, Kasich is under no obligation to produce evidence. *See, e.g., J.B. v. District of Columbia*, No. 17-cv-1298 (CRC/GMH), 2018 U.S. Dist. LEXIS 151992, at *58 (D.D.C. May 8, 2018) (refusing to apply the adverse inference rule because the defendant was under no obligation to produce the purportedly missing evidence); *Reed v. Freedom Mortg. Corp.*, 869 F.3d 543, 549 (7th Cir. 2017) (refusing to apply the adverse inference rule because the party for whom discovery was sought objected to the discovery).⁵ Indeed, applying the rule would render a motion to quash nugatory and impose positive obligations upon an entity being investigated to prove its innocence.

Second, an adverse inference is premature because the matter is in its investigative stages. An action has not been brought against Kasich, let alone reached the conclusion of the discovery

³ *See* Directive 10 FEC, *available at* https://www.fec.gov/resources/cmscontent/documents/directive_10.pdf (setting forth in Section L the Commission’s authority when lacking a quorum).

⁴ Despite being under no obligation to respond to the Subpoena, NDFA voluntarily produced documents to the Commission in a good faith effort to voluntarily cooperate.

⁵ The cited authority in the General Counsel Brief is distinguishable because those cases involved obligations to produce documents. *Int’l Union, United Auto., etc. v. NLRB*, 459 F.2d 1329, 1332 (D.C. Cir. 1972) (motion to revoke subpoena denied); *Atl. Richfield Co. v. United States Dep’t of Energy*, 769 F.2d 771, 778 (D.C. Cir. 1984) (granting motion to effectuate discovery).

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process. *See Ingram v. Pac. Gas & Elec. Co.*, 690 F. App'x 527, 530 (9th Cir. 2017) (“Since adverse inference instructions are provided to juries at the conclusion of a trial, the district court did not abuse its discretion by denying Ingram’s request for an adverse inference at the summary judgment stage of these proceedings.”); *Swindell Dressler Int’l Co. v. Travelers Cas. & Sur. Co.*, 827 F. Supp. 2d 498, 508 (W.D. Pa. 2011) (refusing to grant an adverse inference because the case was still in the discovery stages).

Third, the Commission is turning the burden of proof on its head. The Commission bears the burden of proof and an adverse inference based upon silence cannot be used to satisfy a party’s burden of proof. *See Urooj v. Holder*, 734 F.3d 1075, 1978 (9th Cir. 2013); *Joostberns v. UPS*, 166 F. App'x 783, 798 (6th Cir. 2006). In summary, it would be illogical to apply an adverse inference when a matter is still in the investigative stage, a party has rightly objected to the discovery, and the party does not hold any burden of proof. Thus, the Commission may not rely on an adverse inference to satisfy its burden of proof here.

IV. Kasich Did Not Engage in “Testing-the-Waters” Activities

The Brief finds probable cause that Kasich violated the Act by accepting impermissible and excessive in-kind contributions for what the ADLF complaints deemed “Governor Kasich’s testing-the-waters activities.” The Brief assumes Governor Kasich engaged in testing-the-waters activities. Kasich did not engage in testing-the-waters activities.

FEC regulations define “testing-the-waters” as any activity “undertaken to determine whether the individual should become a candidate.” 11 C.F.R. 100.72. Those activities include conducting a poll, telephone calls, or travel if the activity was done for the purposes of determining whether an individual should become a candidate. *See* 11 C.F.R. 100.72; 100.131.

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The Brief concludes simply that Governor Kasich was testing the waters. Once the Factual and Legal Analysis reached that conclusion, it simply found Governor Kasich to have violated the Act. The facts are different than those laid out in the Brief.

Governor Kasich's activities with New Day are consistent with the activities he has been engaging in for over 30 years—and engages in today. From traveling the country in support of a balanced budget to appearing at the Democratic Convention in support of Joe Biden, Governor Kasich has always attempted to get his message out to the public. During that extended time period, he has consistently traveled around the country to share and discuss his ideas—ideas involving balancing the budget, tax reform, and healthcare. Those moments have drawn national attention, applause from critics and supporters, and—sometimes—the ire of his own Republican Party and the support of the Democratic Party. In fact, in a moment that spoke to Governor Kasich's efforts to change the national conversation, he attended a national policy conference and angered potential donors with his position on Medicaid expansion in 2014.⁶ Governor Kasich has always been involved in the national policy discussion, and he will, and always will, attempt to draw focus to the issues that he thinks will have the most impact. His involvement in discussions around issues of national importance was not an effort to determine whether he should run for President—his involvement was an effort to start a conversation about his vision to improve the country based on the successes he achieved in Ohio. In fact, Governor Kasich has continued those policy discussions even now, and he recently did so at President-elect Joe

⁶ Alex Isenstadt, Operation Replace Jeb, available at: <https://www.politico.com/story/2015/06/john-kasich-replace-jeb-bush-2016-candidate-119191#ixzz3fXN7TwoF>

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Biden's request. The chatter from the media, and the questions, continue about a possible presidential run, but this chatter does not make these actions testing-the-waters activities.

That chatter continues despite Governor Kasich expressly saying he's not running for President.⁷ This article, from May 31, 2019, details a CNN interview in which Governor Kasich states, "I've never gotten involved in a political race I didn't think I could win, and right now there's no path." *See id.* Governor Kasich didn't need to travel, take a poll, or make phone calls to reach that conclusion—he simply used the expertise and experience he has gained from years as a successful politician to reach a conclusion. He could be right, he could be wrong, but this activity certainly cannot be deemed testing-the-waters by the Commission even though CNN, once again, speculated on Governor Kasich running for President.

But here, in the same article that quotes Governor Kasich denying that he is running for President, a Kasich advisor stated that Kasich "is still leaving the door open." The problem here is that the advisor, John Weaver, did not say that. Instead those were the words of the author. And even if this advisor had said so, it is beyond comprehension why the words of an advisor would be more credible when they expressly contradict the words of Governor Kasich himself. Since this article says that Kasich "is still leaving the door open," is Governor Kasich now testing the waters? That is simply not a reasonable conclusion under the Act or this Commission's precedent, and this erroneous conclusion contradicts Governor Kasich's own

⁷ Alison Durkee, John Kasich Throws in the Towel, Admits It's Trump's Party Now, Vanity Fair, available at: <https://www.vanityfair.com/news/2019/05/john-kasich-throws-in-the-towel-2020-trump-primary>

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assertions.⁸ But the Brief argues that the words of this advisor now mean that Governor Kasich is testing the waters and must open an exploratory committee with the Commission. This interpretation advanced by the Brief distorts the meaning of the Act.

Newspaper articles that quote named or unnamed advisors are simply not reliable when it comes to the activities of Governor Kasich, or any other politician. Who knows the motivation of that political advisor? Perhaps she is trying to push a candidate into a position or an announcement of a candidacy? Perhaps he is trying to earn a spot in the politician's inner circle? Perhaps she is just trying to sound important? Motivation can be difficult to ascertain, so it is much more important to look at the contemporaneous articles, documents, and statements from the Governor himself. An examination of the Brief confirms his statements never state he is running for President. As Governor Kasich explained, he formed New Day For America to promote successful policies implemented in Ohio, collect facts on policies from other states, and advocate for a balanced budget to spur economic growth. The contemporaneous briefing material, which was never intended to be seen by the public but was provided to the Commission over a year ago, confirms that mission because the purpose of the Governor's travel to various states such as South Carolina, Michigan, and California—not all known as early primary destinations—was: "To discuss Ohio's successes, your background and beliefs through various earned media events and meetings." The Governor of one of the most important states traveling the country to inform other states of the success he achieved in his own state is not testing-the-

⁸ As the Commission may recall, this article is nearly identical to the article that prompted the initial complaint and serves as the basis for Governor Kasich becoming a candidate before his announcement on July 21, 2015. This article from June 28, 2015 will be addressed herein.

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waters activity. If this activity is testing-the-waters, how can any Governor tell his or her success story? And the Act does not contain any provision that deems this activity illegal just because John Kasich later became a candidate for President.

In addition, Governor Kasich never authorized or conducted any polling or made any phone calls regarding his potential status as a presidential candidate. Every document in Kasich's possession regarding any polling conducted by Kasich has been produced—all bank statements, all correspondence, and all invoices. Nothing in those documents supports the conclusions in the Brief. In fact, had Governor Kasich engaged in testing-the-waters activities, he may not have entered the race considering his low support around the country based on polls once he entered the race. He might have heard the people of South Carolina preferred Donald Trump or Ben Carson. He didn't conduct these activities, and his time working with New Day For America was not for testing-the-waters. Instead, his goal was to promote the success of the turnaround in Ohio and to discuss issues of great public importance including the need for a balanced budget, creating jobs, reforming the tax code, and arguing for Medicaid reform. As a sitting Governor of one of the most important states in the country, Governor Kasich used New Day For America, and other entities including the Ohio Republican Party and Balanced Budget Forever, to share the successes he accomplished.

Contemporaneous news articles support this conclusion. An April 20, 2015 article, published almost 6 years ago, in the Cleveland Plain Dealer titled *John Kasich begins raising money to test the waters for a 2016 presidential run*⁹ expressly states that New Day was not

⁹ Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Ap. 20, 2015), available at https://www.cleveland.com/open/2015/04/ohio_gov_john_kasich_begins_ra.html

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formed as an exploratory committee. Importantly, the article states that “Kasich’s 527 is not an official statement of candidacy. It’s also not a formal federal exploratory committee, which potential White House hopefuls such as retired neurosurgeon Ben Carson have established.”¹⁰ Thus, contrary to the allegations in the ADLF Complaint, New Day For America was not formed to test the waters. Instead, as described herein, and in contemporaneous documentation, it was formed to spread the successes in Ohio and impact the trajectory of states across the country.

The Complaints, the Factual and Legal Analysis, and the Brief next turn to a CNN article by Gloria Borger and Brian Rokus. The article, dated May 17, 2015, is titled, “*John Kasich ‘very likely’ to run in 2016.*”¹¹ The article describes trips to South Carolina and New Hampshire and the fact that Governor Kasich is “making media appearances” to support a conclusion that Governor Kasich is revving up for a Presidential run. *See id.* But the article fails to mention that none of these trips were paid for by New Day For America. Instead, they were paid for by the Ohio Republican Party because Governor Kasich was taking the trips to spread his message of success in Ohio, and the party supported him because it advanced the goals of the Ohio Republican Party. Other trips, including at least one to South Carolina, were paid for by a group called Balanced Budget Forever. The sole mission of that group was to advocate for a balanced budget amendment. These trips had nothing to do with Governor Kasich running for President, thinking about running for President, or testing-the-waters to run

¹⁰ *Id.*

¹¹ Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <https://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/index.html>.

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for President. They were simply efforts to spread the success story of Ohio or, in the case of Balanced Budget Forever, promote an issue that has been central to Governor Kasich's ideology for decades. These trips, nestled among trips to Arizona, Utah, and South Dakota, were not for testing-the-waters—while fine states, there is no evidence that Arizona, Utah, or South Dakota had much of a say in the next Republican nominee for President.

But if the news articles and contemporaneous documentation are not convincing, it is also important to listen to what Governor Kasich said at the time. Turning to the CNN article relied upon by ADLF and the Brief, Gloria Borger twice prods Governor Kasich about whether he is running for President. First, she directly asks him if he is testing-the-waters. Governor Kasich responds, “not really,” and then essentially jokes that his traveling around will garner him more attention to tell the Ohio story. Ms. Borger then asks him if he is going to run for President. Governor Kasich responds, “I don't know.”¹² He continued, “It's a process that—you know—I have really not spent an enormous amount of time studying internally.” He then immediately pivoted to talking about the success he achieved in Ohio. In fact, the only certain statement Governor Kasich makes in the article or in the attached interview is that his goal is to “tell the people what's happened in Ohio. . . I think people need to hear about the way we think out there, what we do. . . [Ohio] is a formula for the country.”¹³ Promoting his own state on national television does not implicate the Act. But then, after hearing a denial directly from the Governor, the article then turns to anonymous sources who claim that John Kasich is “very

¹² *Id.*

¹³ *Id.*

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likely” to run.¹⁴ But even that anonymous source said that nothing was for certain.¹⁵ Again, this activity does not implicate the Act.

Finally, the complaints and the Brief rely upon a June 28, 2015 Politico article claiming that Governor Kasich was going to announce his candidacy on July 21, 2015.¹⁶ The chatter in that article followed the format of the Vanity Fair article mentioned herein, but with even less specificity. As the Vanity Fair article explained, John Kasich is not running for President, but, a now disclosed advisor, says the door is still open. Such generalized statements do not implicate the Act, and they never have. If they did, former Vice President Joe Biden has been running since at least January—or possibly 2015 when the Borger CNN article notes that Joe Biden was spending time visiting South Carolina—activity the Brief automatically deems testing-the-waters activities. Moreover, according to an article in the Delaware New Journal, not only was the former Vice President “expected to announce in the coming weeks,” he had extensive discussions with family and friends regarding his entry into the race.¹⁷ The title of this article? Metadata reveals the original article was titled, “Delaware’s Joe Biden: Announcement on Presidential Run Coming Soon.” And, just like Governor Kasich, Joe Biden did announce he was running for President. Was this activity testing-the-waters? Under the interpretation advocated by the ADLF and the Brief, it was. Under any reasonable reading of the Act, it was

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO (June 28, 2015), available at <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517>.

¹⁷ Scott Goss. Delaware News Journal. Original Title: Delaware’s Joe Biden: Announcement on Presidential Run Coming Soon. Available at: <https://www.delawareonline.com/story/news/politics/2019/01/04/joe-biden-decision-presidential-run-could-come-soon/2462970002/>

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not, and should not be, testing-the-waters activities. Nothing that Governor Kasich did is different than the actions of any other candidate for President of the United States, now or 5 years ago.

For these reasons, the allegations that Governor Kasich was testing-the-waters through New Day, or otherwise, are without merit.

III. Governor Kasich Did Not Become a Candidate on June 28, 2015

Governor Kasich did not become a candidate for President of the United States on June 28, 2015. The lynchpin of the Brief's allegation revolves around one news article: On June 28, 2015, Governor Kasich became a candidate for President of the United States when Politico published an article on the Internet entitled, "John Kasich to Announce Presidential Bid July 21." All of the trips previously discussed simply work their way back from this one piece in Politico. Specifically, the Brief's allegation is based on the title and first sentence of that article, "Ohio Gov. John Kasich will jump into the crowded Republican presidential field on July 21 at the student union at his alma mater, The Ohio State University, in Columbus, advisers tell POLITICO."¹⁸ Neither Governor Kasich nor any specific adviser is quoted in the article as saying Governor Kasich will announce a Presidential bid on July 21. Instead, the ADLF's Complaint and the Brief is based entirely on a statement conceived and written by a news reporter.

Importantly, neither Kasich For America nor Governor John Kasich informed Mr. Allen that Governor Kasich would announce his candidacy for President of the United States on July 21, 2015. *Id.* at ¶ 8. In addition, no agent of Governor Kasich was employed to make these statements.

¹⁸ 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#ixzz3mt27BS9c>.

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On June 28, 2015, Kasich For America had not been incorporated and had no employees. *Id.* at ¶ 9. Moreover, Kasich For America had no one in charge until July 16, when it hired a campaign manager, it didn't even set up a press email address until July 14, and it didn't have a scheduling account until July 16. In fact, volunteers signed the contract for a security team to control traffic for a potential announcement late in the day on July 13—this documentation was provided to the Commission in June 2019 and directly refutes the articles contention that the announcement was in place on June 28. Nothing Governor Kasich or Kasich for America did—other than this article—indicated he was a candidate any earlier than then a July 13-16 window.

In reality, Governor Kasich did not become a candidate for federal office before July 21, 2015 under the Act and the Code of Federal Regulations. Pursuant to 11 C.F.R. 100.72(b), an individual becomes a candidate when:

“(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office. (2) The individual 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) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office. (4) The individual conducts activities in close proximity to the election or over a protracted period of time. (5) The individual has taken action to qualify for the ballot under State law.”

ADLF's Complaint and the Brief do not provide any evidence for any of the above factors other than citing an internet news article from June 28, 2015.

Before July 21, 2015, Governor Kasich did not conduct or authorize any activities that triggered his candidacy for President of the United States. He did not conduct activities over a protracted period of time, make or authorize any public statements declaring his candidacy, or take action to qualify for the ballot under state law. *See* Hansen Decl. at ¶¶ 14 and 15, provided

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previously. In addition, as Kasich For America's FEC filings showed, Kasich For America did not raise excess funds prior to July 21, 2015—two early adopters made contributions on July 3. No one else made a contribution for another 10 days. And the lion's share of contributions started, as expected, on July 21. The contributions came in on July 21, 2015 because Governor Kasich unambiguously stated, for the first time, "I am here to ask you for your prayers, for your support, for your efforts, because I have decided to run for President of the United States." *See* Governor John R. Kasich, Announcement of Candidacy for President of the United States, The Ohio State University (July 21, 2015). At this moment, Governor Kasich became a candidate in accordance with the Act. No evidence supports the ADLF's or the Brief's position that he became a candidate for President at any point prior to this date.

The Commission has never determined that an individual has become a candidate for President of the United States based on anonymous information by an alleged advisor in a news article. Moreover, the Vanity Fair article mentioned herein would not amount to a declaration of candidacy, even though it has even more detail than the article in 2015. Specifically, the Commission has found that even when confronted with a direct comment by a named advisor stating that a potential candidate "has made up his mind," the Commission determined that this statement did not amount to a statement of candidacy. *See* Complaint, Matter Under Review 5934; *see also* Statement of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub, MUR 5934. The ADLF and the Brief do not, and cannot, cite to a single advisory opinion, matter under review, statute, or regulation that finds that a reporter's written interpretation of an anonymous source amounts to a statement of an individual's candidacy, especially here when

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the organization did not yet exist and the potential candidate did not satisfy any prong of 11 C.F.R. 100.72(b). As such, Governor Kasich did not become a candidate for President until July 21, 2015.

IV. Kasich For America Timely Registered With the Commission

The ADLF and the Brief allege that Kasich For America failed to timely register with the Commission, but Kasich For America timely filed FEC Form 1 on July 23, 2015. According to the Regulations, “Each principal campaign committee shall file a Statement of Organization in accordance with 11 CFR 102.2 no later than 10 days after designation pursuant to 11 CFR 101.1.” *See* 11 C.F.R. 102.1. Kasich For America was not designated as Governor Kasich’s principal campaign committee until after he declared his candidacy for President of the United States on July 21, 2015. Thus, the earliest Kasich For America would have had to register as a principal campaign committee under the Act would have been 10 days after Governor Kasich declared his candidacy for President. Kasich For America would timely meet even that earliest of deadlines by completing such registration on July 23, 2015.

The Brief also lends to the odd conclusions that Kasich For America incurred a registration obligation with the Commission on June 28, 2015—before Kasich For America even existed. Kasich For America was not formed until July 1, 2015, and it would be an absurd outcome for an entity that didn’t exist to incur a filing obligation.

This claim should be dismissed without further action.

V. The New Day Advertisements Were Not Coordinated Communications.

ADLF and the Brief allege that Kasich For America accepted in-kind contributions from New Day For America through purported coordinated communications on behalf of Governor Kasich’s candidacy for President in violation of 52 U.S.C. § 30116(a)(7)(B)(i). Specifically,

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ADLF's Complaint refers to advertisements that included video footage that was shot of Governor Kasich *before* he announced his candidacy for President on July 21, 2015. Governor Kasich never filmed an advertisements with New Day For America—they were interviews that later, without Governor Kasich's knowledge or involvement—became advertisements. ADLF makes no factual allegation that the video footage used in the advertisements was shot after July 21, 2015, when Governor Kasich announced his candidacy for President of the United States. Nor does the Complaint make any allegations that Governor Kasich was in any way involved in the decisions regarding the use of this prior interview footage for creation of any commercial.

First and foremost, Kasich For America had a stringent firewall policy in place. That policy was provided to the Commission in 2019. The Brief now poo-poos that Firewall Policy, but ignoring the policy simply disregards the regulations that provide a safe harbor in the face of a firewall policy. There is no evidence in the Brief that any information was shared in violation of the policy for Kasich or New Day For America—in fact, Kasich has informed the Commission that no communications exist in violation of the policy. The Commission cannot simply ignore its own regulations, as the Brief proposes.

Moreover, Governor Kasich did not participate in any film sessions, or conduct any interviews, at the request of New Day For America after he became a candidate for President of the United States on July 21, 2015. Kasich For America and Governor Kasich were not involved in any decisions regarding the content, intended audience, timing, media outlet, media market, media purchase, or duration of any New Day For America advertisements. That the commercials contained portions of prior footage of interviews with Governor Kasich does not in any way evidence any involvement by the Governor or his campaign or by any person at the request of the

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Governor. Any editing of the pre-candidacy footage was not done “in cooperation, consultation or concert” with Governor Kasich. As such, the Complaint fails to contain any factual allegations that these expenditures were “in cooperation, consultation or concert, with . . . a candidate” ADLF’s blanket assertion that Governor Kasich was “materially involved” simply because prior video footage of him was used without specific facts identifying his material involvement in the creation of these specific commercials as defined in 11 C.F.R. § 109.21(d)(2) falls well short of demonstrating any violation.

The Brief seems to argue that any candidate that participates in an interview is subject to a potential violation of in-kind contribution regulations. The Brief is incorrect. Governor Kasich’s responses to the questions in the interview used in the advertisements related to general issues of national importance. 11 CFR § 109.21(f) provides a safe harbor for a candidate’s response to an inquiry about his or her positions on legislative or policy issues that does not satisfy the conduct standards in section 9(d).

It cannot be stressed enough that neither Governor Kasich nor Kasich for America had any role in the decisions regarding the content, intended audience, means or mode, the specific media outlet, or the air time and frequency of airing any of these advertisements. The advertisements were not supported by Governor Kasich, they were not promoted by Governor Kasich—in fact, Kasich later condemned ads issued by New Day For America because he felt uncomfortable with their content.¹⁹ He simply sat for an interview—which the Commission has never deemed to be a violation of the Act. Governor Kasich had no role in creating, producing or distributing the

¹⁹ Lisa Hagen, Kasich ‘not comfortable’ with ad from Super PAC Supporting Him, available at: <https://thehill.com/blogs/ballot-box/presidential-races/270368-kasich-not-comfortable-with-ad-from-super-pac-supporting>

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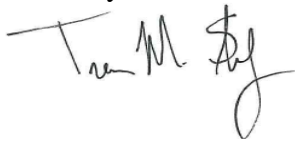
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advertisements, nor was he involved in any decisions regarding them. This complaint should be dismissed.

VI. Conclusion

For the foregoing reasons, Kasich believes the complaints should be dismissed.

Sincerely,

A handwritten signature in black ink, appearing to read "Trevor M. Stanley". The signature is written in a cursive, flowing style with a large initial "T" and a stylized "S" at the end.

Trevor M. Stanley