

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of:	)	
	)	
New Day for America and	)	MURs 6955 & 6983
J. Matthew Yuskewich in his official	)	
capacity as Treasurer	)	
	)	

**REPLY OF NEW DAY FOR AMERICA AND J. MATTHEW YUSKEWICH TO THE  
GENERAL COUNSEL’S BRIEF**

**INTRODUCTION**

The General Counsel’s Brief recommends that the Commission find probable cause to believe that New Day for America and J. Matthew Yuskewich, as Treasurer, (collectively “NDFA”) (1) violated 52 U.S.C. §§ 30116(f) and 30118(a) in making impermissible and excessive contributions to former Governor of Ohio John R. Kasich (“Governor Kasich”) to test the waters prior to his declaration of candidacy for president in 2015; (2) violated 52 U.S.C. §§ 30166 and 30118 in making excessive in-kind contributions in the form of coordinated communications; and (3) did not disclose these contributions in violation of 52 U.S.C. § 30104(b). There are numerous flaws with these recommendations:

1. As the General Counsel’s Brief recognizes, all of the conduct at issue occurred more than five years ago, so the Commission lacks the authority to enforce any alleged violations and further pursuing this matter would be moot and a waste of the Commission’s resources.
2. The Brief incorrectly concludes, mostly based upon speculative internet news articles, that Governor Kasich was testing the waters, but the direct evidence submitted to the Commission demonstrates he was, at least to NDFA’s understanding, not.
3. The Brief ignores that Governor Kasich did not become a candidate for president until mid-July and the speculative news articles it relies upon do not prove the contrary.
4. The purported coordinated communications were NDFA advertisements that included footage of Governor Kasich shot *before* he became a candidate for president and the evidence demonstrates that Governor Kasich had no involvement in decisions regarding

the content, intended audience, means or mode, the specific media outlet, or the time and frequency for any of these three advertisements.

For all these reasons, and those stated more fully below, the Commission should reject the General Counsel's recommendation to find probable cause of any violation of the Federal Election Campaign Act ("FECA") and close this long outstanding matter. Moreover, NDFA requests that the Commission provide any and all additional information it gathered 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).

### **FACTUAL AND PROCEDURAL BACKGROUND**

An initial complaint, MUR #6955, was filed against New Day for America and J. Matthew Yuskewich, as Treasurer, as well as John R. Kasich, Kasich for America, and Suzanne E. Marshall, as Treasurer, on August 10, 2015, asserting claims that NDFA failed to timely register with the FEC and that NDFA made an impermissible and excessive in-kind contribution in the form of a coordinated communication. The allegations center around the incorrect belief that Governor Kasich had become a candidate for President on June 28, 2015. But that allegation was based solely on an internet news article from June 28 claiming that Governor Kasich would announce his presidential bid on July 21, 2015 through general references to unidentified advisors. Based upon that faulty assertion, the complaint alleged that NDFA had not timely registered with the FEC as a political committee. The complaint also falsely alleged that NDFA had made an impermissible in-kind contribution through advertisements containing video footage of Governor Kasich that aired on July 8, 2015. NDFA served a response to this complaint on October 1, 2015 explaining that Governor Kasich had not become a candidate on June 28, 2015 and therefore it timely registered with the FEC and had not made any impermissible in-kind contributions.

A second complaint, MUR #6983, was filed on November 10, 2015 against the same individuals and entities asserting duplicative, or similar allegations relating to an August 5, 2015 advertisement by NDFA that the complaint alleged was also an impermissible in-kind contribution. NDFA served its response to that complaint on January 5, 2016, likewise denying the allegations and attaching evidence supporting its position. On March 30, 2016, the Commission received additional information from the complainant pertaining to the allegations in MUR #6983 (“Supplemental Information”). The Supplemental Information purportedly identified additional information relating to the advertisements that NDFA ran in New Hampshire on July 8 and for the first time asserted that NDFA had made impermissible expenditures for Governor Kasich to “test-the-waters.” However, NDFA never received proper notice of this Supplemental Information. The letter was directed and mailed to Stanley Trevor, not the undersigned counsel who is counsel of record for NDFA in these matters.

Over three years after NDFA served its responses to the MURs, on April 23, 2019, the Commission found reason to believe that NDFA violated 52 U.S.C. § § 30104(b), 30116 and 30118(a) by making and failing to report impermissible and excessive in-kind contributions, and 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers on three television advertisements. It subsequently provided notice to NDFA, which was received by counsel on or about May 8, 2019, and enclosed its Factual and Legal Analysis (“F&LA”). It was only following receipt of the F&LA that NDFA became aware of the Supplemental Information. Along with the F&LA, the Commission also requested that NDFA provide detailed answers to five questions, many with multiple subparts.

On June 14, 2019, NDFA filed its response to the Commission’s F&LA, including responding to the allegations contained in the Supplemental Information and the questions posed

by the Commission. In particular, NDFA provided information and documents relating to trips that Governor Kasich took outside of Ohio that were paid for by NDFA from November 2014 through July 2015, the reasons for the founding of NDFA, Governor Kasich's involvement in the filming of the NDFA advertisements, and the firewall policy put into place between NDFA and Governor Kasich and Kasich for America. *See* NDFA Response to FL&A at Section V.

Again, NDFA heard nothing for several months. On September 25, 2019, the Commission served a subpoena on NDFA through counsel in connection with MURs 6955 and 6983. On September 30, 2019, NDFA timely filed a motion to quash the Subpoena for three reasons: (1) the questions and document requests were extremely overbroad and many sought information or documents outside the scope of the allegations in the MURs; (2) the questions and document requests were duplicative of information and documents already provided by NDFA to the Commission or otherwise in the Commission's possession; and (3) the Subpoena was issued during a period when the Commission lacked a quorum, thereby depriving the Commission of the authority to issue the Subpoena. In particular, on the third point, NDFA pointed out:

This Chairman was not authorized to issue this Subpoena. Pursuant to 11 C.F.R. § 111.12(a), "The Commission may authorize its Chairman or Vice Chairman to issue subpoenas requiring the attendance and testimony of any person by deposition and to issue subpoenas duces tecum for the production of documentary or other tangible evidence in connection with a deposition or otherwise." During the period when this Subpoena was issued, the Commission only had three Commissioners. Consequently, because the Commission is not able to meet and authorize any action without the presence of 'four voting members,' this Subpoena is invalid.

To date, the Commission still has not ruled upon the motion to quash.

Yet, despite not having an enforceable subpoena requiring a response, and without conceding the point, NDFA was cooperative and voluntarily produced numerous records to the Commission on November 14, 2019. The production included many background documents relating to NDFA's contributions and expenditures during the relevant time period, travel

schedules, and other documents responsive to the Subpoena. NDFA continued to communicate with counsel for the Commission in March 2020 over the Subpoena, but rightfully objected to producing additional documents that might be responsive to the Subpoena until the Commission ruled upon the motion to quash. In particular, NDFA responded on March 19, 2020 requesting that counsel provide evidence that service of the subpoena had been approved by four Commissioners.<sup>1</sup> That letter further indicated while NDFA had been cooperative thus far, it was reluctant to continue incurring costs in responding to the Subpoena when it did not even have a ruling on its motion to quash, which could ultimately quash the subpoena, or narrow it in some capacity.<sup>2</sup>

Following its communications about the Subpoena in March 2020, NDFA heard nothing substantively further about these matters until receiving the General Counsel's Brief the day before Thanksgiving. On December 4, 2020, counsel agreed to an extension until December 30, 2020 for NDFA to submit its reply to the General Counsel's Brief.

## **ARGUMENT**

### **I. As the General Counsel's Brief Recognizes, Any Claims Against NDFA Are Barred by the Applicable Five Year Statute of Limitations.**

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.” This default statute of limitations has been held to apply to the Federal Election Campaign Act, and the limitations period begins to run at the time the alleged offense was committed. *FEC v. Williams*,

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<sup>1</sup> See 3/19/20 letter from R. Tucker.

<sup>2</sup> *Id.*

104 F.3d 237 (9th Cir. 1996); *see also* *FEC v. Nat'l Republican Senatorial Comm.*, 877 F Supp. 15 (D.D.C. 1995).

Moreover, “the FEC administrative process is not an adjudication” which tolls the running of the statute of limitations. *Nat'l Republican Comm.*, 877 F. Supp. at 19. Nor is the accrual of the statute delayed pending completion 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.*

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. No alleged conduct occurred within the last five years. Indeed, the General Counsel’s Brief does not dispute these points, and, after spending dozens of pages outlining how there is probable cause to support alleged violations of the Act, recognizes that the Commission lacks authority to enforce any such purported violations. GC Brief at 35.

Rather, the General Counsel’s Brief claims that the Commission still has the ability to seek equitable relief. GC Brief at 36. But the Brief is unclear on what equitable relief could be sought or how it would not be moot. This matter has been pending for well over five years. The statute of limitations has run out, and any further pursuit of it would be moot and a waste of the Commission’s resources. And it would be contrary to the goals of the Act to seek expeditious resolution. This matter should be closed immediately.

## II. No Adverse Inference Is Appropriate Here.

The General Counsel's Brief claims that NDFA 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, NDFA 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 enforce the Subpoena.<sup>3</sup> Further, NDFA moved to quash the subpoena based on the Commission's lack of authority and the overbreadth of the Subpoena, and that motion remains pending. As no ruling has been made, NDFA is under no obligation to respond to the Subpoena.<sup>4</sup> *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.").

The adverse inference rule does not apply where, as here, an entity 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).<sup>5</sup>

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<sup>3</sup> *See* Directive 10 FEC, *available at* [https://www.fec.gov/resources/cmscontent/documents/directive\\_10.pdf](https://www.fec.gov/resources/cmscontent/documents/directive_10.pdf) (setting forth in Section L the Commission's authority when lacking a quorum).

<sup>4</sup> 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.

<sup>5</sup> 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).

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 NDFA, let alone reached the conclusion of the discovery 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 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.

### **III. The Legal Analysis in the General Counsel’s Brief Demonstrates There Is No Probable Cause to Believe NDFA Has Committed Any Violation of the FECA.**

Even assuming the statute of limitations had not expired, and this matter wasn’t moot, the General Counsel’s Brief demonstrates an utter lack of probable cause to find a violation of the FECA. For the most part, the Brief relies upon unsubstantiated, hearsay news articles, some of which do not even quote Governor Kasich or anyone from NDFA directly. This evidence is insufficient to make a finding of probable cause that NDFA violated the FECA.



**A. There Is No Probable Cause to Find that NDFA Paid for Any Testing-the-Waters Activities.**

The General Counsel's Brief suggests there is probable cause to believe that NDFA violated 52 U.S.C. §§ 30116(f) and 30118(a) in making impermissible and excessive contributions for Governor Kasich's testing-the-waters activities. However, its conclusion is based upon the faulty premise asserted initially in the Supplemental Information, and repeated in the General Counsel's Brief, that Governor Kasich was "testing-the-waters" through his efforts with NDFA. At least to NDFA's knowledge, he was not.

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; *see also* FEC, Federal Election Campaign Guide: Congressional Candidates and Committees 1 (June 2014).<sup>6</sup> There are certain activities listed in the regulations that are considered *de facto* testing-the-water activities including 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.

First, the General Counsel's Brief references expenditures to American Viewpoint Inc. made in June 2015 for "polling." GC Brief at 22. Yet the Brief fails to provide any further facts relating to this polling. And it recognizes that Governor Kasich did not report any payments for polling prior to the announcement of his candidacy. *Id.* Absent more, mere speculation about an expenditure for polling alone, without evidence linking that polling to evaluating whether Governor Kasich should become a candidate for president does not meet the probable cause standard.

Second, the General Counsel's Brief refers to the payments NDFA made for Governor Kasich's travel in 2015. The Brief blankly asserts that "Kasich's New Day-funded travel in 2015

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<sup>6</sup> Available at <http://fec.gov/pdf/candgui.pdf>.

was directed to an evaluation of the feasibility of his candidacy.” GC Brief at 22. Yet it provides nothing to back-up that statement. Indeed, many prominent individuals, including politicians, travel around the country to share and discuss ideas about how to better the country without being labelled as “testing-the-waters” for a federal office. It is not just traveling and discussing ideas but doing so for the purposes of evaluating whether to run for office that is the benchmark. And reliance on hearsay news articles simply claiming Governor Kasich was testing-the-waters or considering running for president does not meet the probable cause standard either. *See* GC Brief at 22-23.

Rather, the evidence submitted to this Commission demonstrates that Governor Kasich’s activities with NDFA were to help promote the successful policies implemented in Ohio and to discuss how the nation could benefit from similar policies as well as other issues of national importance, not to determine if he should be a candidate for president. *See* 6.11.19 Carle Decl. ¶ 2, attached to NDFA’s Response to the F&LA. Any travel paid for by NDFA was to promote NDFA’s objectives, not for Governor Kasich to “test-the waters”. *Id.* at ¶ 3.

The General Counsel’s Brief cites to nothing contradicting this evidence. Indeed, the General Counsel’s Brief refers to a speech Governor Kasich gave at the New Hampshire Republican Party’s First in the Nation Leadership summit in April 2015. Yet that trip was not even paid for by NDFA. *Id.* at ¶ 4; *see also* GC Brief at 7 (listing trips paid for by NDFA and not including this travel).

NDFA had no knowledge of Governor Kasich’s intention to “test-the-waters” and certainly did not pay for such activities. 6.11.19 Carle Decl. at ¶ 5. Rather, NDFA’s affiliation with Governor Kasich prior to him declaring his candidacy for president on July 21, 2015 was to have Governor Kasich help promote the interests of NDFA to raise awareness about the success of the

turnaround in Ohio and to discuss issues of great public importance including the need for a balanced budget, creating jobs, and reforming the tax code. *Id.* at ¶ 6.

The evidence relied upon in the complaints and in the General Counsel's Brief is from speculative internet news articles and is not to the contrary. First, the General Counsel's Brief relies upon an April 20, 2015 article in the Cleveland Plain Dealer titled *John Kasich begins raising money to test the waters for a 2016 presidential run*.<sup>7</sup> GC Brief at 21 n.67. The article was written on the same day that NDFA registered as a 527 tax-exempt political organization and merely speculates about NDFA's purpose on the day it was created. Nowhere in the article does it quote Governor Kasich, or anyone affiliated with him, as saying that he is testing-the-waters or thinking about running for president. Nor does it state that NDFA was formed for such a purpose. To the contrary, 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."<sup>8</sup> Thus, contrary to the assertions in the General Counsel's Brief, this article supports the fact that NDFA's formation was not an official statement of Governor Kasich's candidacy, nor was it established as a federal exploratory committee designed for testing-the-waters, like other candidates had done.

Second, the complaints and the General Counsel's Brief rely upon a May 17, 2015 CNN article by Gloria Borger and Brian Rokus that has an ostensible attention-grabbing headline: "*John Kasich 'very likely' to run in 2016*."<sup>9</sup> GC Brief at 8-9, 23, 26. The article appears to be

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<sup>7</sup> 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](https://www.cleveland.com/open/2015/04/ohio_gov_john_kasich_begins_ra.html)

<sup>8</sup> *Id.*

<sup>9</sup> 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>.

based upon an interview with Governor Kasich by Ms. Borger. A link to the video can be accessed from the article. Nowhere in that interview does Governor Kasich indicate he is running for president or expressly state that he is considering running.

To the contrary, in response to Ms. Borger's direct question of whether Governor Kasich was going to run for president, he directly responded: "I don't know yet."<sup>10</sup> The article likewise does not include any quote from Governor Kasich that he was running for president or testing-the-waters. Rather, it merely references an undisclosed "source close to John Kasich" stating that he is "very likely" to run.<sup>11</sup> But that same source, according to the article, also cautioned that it was not definitive.<sup>12</sup> The article also relies upon a purported statement made by Governor Kasich in front of an audience at the New America Foundation's annual conference. But the complaints provide no link to any audio or video verifying this statement, nor does the article. In addition, in another interview linked in this same article titled "*Gov. Kasich: I'm worried about America*," Governor Kasich is asked by Ms. Borger directly whether this is a way to test the presidential waters and he responded: "Not really." He goes on to state that he does not know if he is going to run but that he is leaving all options on the table. Rather, he explains that his goal is to "tell the people what's happened in Ohio."<sup>13</sup>

Finally, the complaints and the General Counsel's Brief rely upon a June 28, 2015 Politico article claiming that Governor Kasich was going to announce his candidacy on July 21, 2015.<sup>14</sup> GC Brief at 9 n.23. But the article attributes this information to undisclosed advisers and the Commission has never held that such generalizations can be used to conclude that an individual

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<sup>10</sup> *Id.*

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 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>.

has formally declared their candidacy. *See* Complaint, MUR #5934; *see also* Statement of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub. MUR #5934 (a direct comment by a named advisor stating that the potential candidate “has made up his mind” did not amount to a statement of candidacy). As the declaration from Matt Carle, the former Executive Director for NDFA, stated in response to MUR #6955, NDFA did not inform the author that Governor Kasich would announce his candidacy on July 21 nor was it aware at that time whether Governor Kasich would declare his candidacy for President. 10.1.15 Carle Decl. ¶¶ 9-11, attached to NDFA’s Response to MUR #6955.

Finally, the General Counsel’s Brief refers to a video of Governor Kasich that appeared on the NDFA website and an interview of Governor Kasich that was filmed in late June 2015. But nowhere in the website video does Governor Kasich indicate he is running for president or that the purpose of NDFA was for him to evaluate whether he should run. Rather, as the quotes in the General Counsel’s Brief demonstrate, they were general statements about how Governor Kasich wanted to hear from the American public about how we could collectively address many of the nation’s problems. While perhaps reflecting the statements of a politician, those statements are far from evidence of an intent to run for president.

Similarly, as the Declaration of Matt Carle stated, Governor Kasich’s sole role in the interview was to answer some general questions about his opinions on important national issues. 6.11.19 Carle Decl. at ¶ 7. It is certainly not uncommon for a politician and Governor of one of the country’s most important states to voice his opinion about issue of national importance. That alone cannot justify a conclusion that Governor Kasich was running for president. Indeed, even today, Governor Kasich continues to voice his opinions on issues of national importance, often

appearing for interviews on various news outlets, and appearing at the Democratic National Convention, even though he is not currently running for president.

For these reasons, the allegations that Governor Kasich was testing-the-waters through NDFA and therefore that NDFA's activities violated 52 U.S.C. §§ 30116(f) and 30118(a) are without merit and fail to meet the probable cause threshold.

**B. The NDFA Advertisements Were Not Coordinated Communications.**

The second theme of the complaints and the General Counsel's Brief is that NDFA impermissibly provided excessive in-kind contributions in the form of coordinated communications with Governor Kasich and/or Kasich for America. The purported coordinated communications are several television advertisements that aired on July 8, 2015, July 26, 2015, and August 5, 2015. In order to constitute an impermissible coordinated communication, it must (1) be paid for by a person other than the federal candidate or the candidate's authorized committee, (2) satisfy at least one content standard, and (3) satisfy at least one conduct standard. 11 C.F.R. § 109.21(a). There are two major flaws with these allegations.<sup>15</sup>

First, Governor Kasich had not announced his presidential bid until July 21, 2015, so the July 8 advertisement could not have been an expenditure "in cooperation, consultation or concert, with . . . *a candidate* . . . ." (52 U.S.C. § 30116(a)(7)(B)) when Governor Kasich was not yet a candidate. As discussed above, the claim that Governor Kasich became a candidate on June 28, 2015 through citation to an internet news article quoting unidentified advisors is faulty and contrary to prior decisions of the Commission. Moreover, the video footage of Governor Kasich was filmed in late June 2015, also *before* he was a candidate. So, the advertisements that included

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<sup>15</sup> In addition, at least the first two advertisements likely fail to meet the content prong as well, as neither expressly advocate for the election or defeat of a clearly identified candidate. *See* 11 CFR § 100.29(c)(3). And neither of them use anything like the phrases that have been suggested to constitute express advocacy in 11 CFR § 100.22.

certain footage from that interview could not have been made in cooperation, consultation or concert with a candidate.

Second, the advertisements fail to meet the required conduct standard. As the General Counsel's Brief recognizes, the conduct standard is satisfied if (1) the communication was created, produced, or distributed at the request or suggestion of a candidate, campaign, or political committee, or the payor suggests the communication and the candidate, campaign or political party committee assent to the suggestion; (2) the candidate, campaign, or political party committee was materially involved in decisions regarding the communication; or (3) the communication was created, produced, or distributed after one or more substantial discussions between the payor and the candidate, campaign or a political party committee involving information that is material to the communication. GC Brief at 34.

But the evidence before the Commission demonstrates 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 time and frequency for any of these three advertisements. *See* 1.5.16 Carle Decl. at ¶ 11, attached to New Day's Response to MUR #6983. Governor Kasich's sole role relating to these advertisements was participating in an interview in late June 2015, prior to him becoming a candidate to answer some general questions about his opinions on important national issues that was subsequently used in the advertisements along with other "B" roll footage. 6.11.19 Carle Decl. at ¶ 7. Governor Kasich had no role in creating, producing or distributing the advertisements, nor was he involved in any decisions regarding them. *Id.* at ¶ 8. Thus, there is no evidence that Governor Kasich or his campaign requested this interview or for these advertisements to be produced, that he was materially involved in the decisions relating to them, or that he had any substantial discussion about them.

The Advisory Opinion cited in the General Counsel’s Brief is not to the contrary. GC Brief at 34 n.114. In that opinion, the request explicitly assumed that the Senator would review a final script in advance for appropriateness.<sup>16</sup> Here, the evidence demonstrates that “Governor Kasich had no role in creating, producing, or distributing the advertisements, nor was he involved in any decisions regarding them.” 6.11.19 Carle Decl. ¶ 8. There is no evidence he reviewed or requested to review any scripts.

If Governor Kasich’s mere participation in an interview without more constitutes “material involvement,” then nearly every candidate for federal office could potentially violate the FECA every time they give an interview. That certainly is not and cannot be the law. Governor Kasich’s other unrelated involvement with promoting the objectives of NDFA to tell the success story of Ohio is irrelevant and a red herring. It has nothing to do with his lack of involvement with the creation, production, or distribution of these advertisements. *See* 11 C.F.R. § 109.21(d). The General Counsel’s Brief points to no evidence to the contrary.

In addition, 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). And again, Governor Kasich was not even a candidate when he gave the interview.

For all these reasons, the General Counsel’s Brief fails to establish probable cause that NDFA provided in-kind contributions in the form of coordinated communications with Governor Kasich and/or Kasich for America.

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<sup>16</sup> Advisory Opinion 2003-25 at pg. 6; *see also* Advisory Opinion 2004-01 (stated in the request was that agents of the President would review the final script in advance of the appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President’s position and any content that distract from or distorts the endorsement message the President wished to convey).



## **CONCLUSION**

For all the reasons stated above, the General Counsel's recommendations to find probable cause to believe that NDFA committed a violation of the FECA should be rejected both as moot and on the merits.

Respectfully submitted,

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