



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

April 14, 2021

**Certified Mail – Return Receipt Requested**  
**Via Email:** [press@americandemocracylegalfund.org](mailto:press@americandemocracylegalfund.org)

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

RE: MURs 6955 and 6983

Dear Mr. Woodhouse:

This is in reference to the complaints you filed with the Federal Election Commission (the “Commission”) on August 10, 2015 and November 10, 2015, against former Governor John R. Kasich, Kasich for America and J. Matthew Yuskewich in his official capacity as treasurer (“KFA”), and New Day for America and J. Matthew Yuskewich in his official capacity as treasurer (“New Day”), alleging possible violations of provisions of the Federal Election Campaign Act of 1971, as amended (the “Act”). Based on the complaint, the Commission found that there was reason to believe that Kasich violated 52 U.S.C. §§ 30102(e)(1), 30116 and 30118 and 11 C.F.R. §§ 100.72 and 100.131; that KFA violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 110.72 and 100.131; and that New Day for America violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 110.72 and 100.131. The Commission then commenced an investigation.

Subsequently, on March 23, 2021, the Commission considered the General Counsel’s and the respondents’ briefs, but there were an insufficient number of votes to find probable cause to believe that respondents had violated the Act. Accordingly, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016. The Factual and Legal Analyses, which more fully explain the Commission’s reason to believe findings are enclosed for your information. A Statement of Reasons explaining the Commission’s decision will follow. The Act, allows a

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complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8).

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson  
Acting General Counsel

*Charles Kitcher by APW*

BY: Charles Kitcher  
Acting Associate General Counsel for  
Enforcement

Enclosure:  
Factual and Legal Analyses (2)

1 **FEDERAL ELECTION COMMISSION**

2  
3 **FACTUAL AND LEGAL ANALYSIS**

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5  
6 **RESPONDENTS:** John R. Kasich **MURs:** 6955 and 6983  
7 Kasich for America, Inc. and J. Matthew  
8 Yuskewich<sup>1</sup> in his capacity as treasurer  
9

10 **I. INTRODUCTION**

11  
12 These matters involve allegations that John R. Kasich, Kasich for America and  
13 J. Matthew Yuskewich in his official capacity as treasurer (the “Committee”) violated the  
14 Federal Election Campaign Act of 1971, as amended (the “Act”), when: (1) New Day For  
15 America and J. Matthew Yuskewich in his official capacity as treasurer (“New Day”), an  
16 independent expenditure-only political committee, paid for Kasich’s testing-the-waters activities  
17 with impermissible and excessive funds; (2) Kasich failed to timely file his Statement of  
18 Candidacy with the Commission; (3) Kasich and the Committee accepted in-kind contributions  
19 from New Day by coordinating its communications; and (4) Kasich established, controlled, and  
20 solicited soft money for New Day.

21 Based on the available information, the Commission finds reason to believe that:

22 (1) Kasich violated 52 U.S.C. §§ 30116(f) and 30118(a) and 11 C.F.R. §§ 100.72(a) and  
23 100.131(a); (2) the Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and  
24 11 C.F.R. §§ 100.72 and 100.131, in connection with accepting impermissible, excessive, and  
25 unreported contributions for testing-the-waters activities; (3) Kasich violated 52 U.S.C.  
26 § 30102(e)(1) by failing to timely file his Statement of Candidacy; (4) Kasich and the Committee  
27 accepted prohibited and excessive in-kind contributions in the form of coordinated

<sup>1</sup> After Kasich for America filed its responses in these matters, it filed an amended Statement of Organization changing its name to Kasich for America, Inc., and naming J. Matthew Yuskewich as its new treasurer.

1 communications, in violation of 52 U.S.C. §§ 30116 and 30118(a); and (5) Kasich and the  
2 Committee did not disclose those contributions in violation of 52 U.S.C. § 30104(b).

## 3 **II. FACTUAL BACKGROUND**

4 On July 21, 2015, Ohio Governor John Kasich publicly announced his candidacy for  
5 President of the United States and filed a Statement of Candidacy with the Commission on July  
6 23.<sup>2</sup> The Committee registered as Kasich's authorized committee for the presidential election on  
7 July 23.<sup>3</sup> As discussed in more detail below, in the months leading up to his announcement,  
8 Kasich travelled to a number of states on trips that appear to be unrelated to his role as governor  
9 of Ohio to discuss national policy issues. Some of these activities were conducted through and  
10 paid for by New Day, an organization established in April 2015.

### 11 **A. Kasich's Activities before Candidacy Announcement**

12 The Complaint in MUR 6983 alleges that, in the months before Kasich publicly  
13 announced his candidacy for president on July 21, 2015, Kasich "engage[d] in prototypical  
14 'testing-the-waters' activities, such as traveling around the country and meeting with voters to  
15 learn about their ideas."<sup>4</sup> The Complaint points to a video that Kasich made for New Day for  
16 America, in which Kasich said that "[w]e're going to start getting around the country more,  
17 meeting and talking with more people."<sup>5</sup> Kasich's travels included trips to South Carolina, New

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<sup>2</sup> MUR 6955 Committee Resp. at 3 (Oct. 8, 2015); John Kasich, Statement of Candidacy (July 23, 2015).

<sup>3</sup> MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Org. (July 23, 2015). On July 1, 2015, prior to its designation as Kasich's authorized committee, the Committee incorporated as an Ohio non-profit organization, and then registered with the IRS as a section 527 organization. MUR 6955 Committee Resp. at 2.

<sup>4</sup> MUR 6983 Supp. Compl. at 5, 7 (March 30, 2016).

<sup>5</sup> *Id.* (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015) (hosting New Day for America video)).

1 Hampshire, Michigan, and Washington, DC.<sup>6</sup> On these trips, Kasich advocated for a variety of  
2 nationwide policies, including a balanced budget amendment to the U.S. Constitution, and also  
3 reportedly engaged in fundraising.<sup>7</sup>

4 Kasich's own public statements indicate that he was considering a presidential run during  
5 this time. In a CNN interview, Kasich, when asked whether he was running for President,  
6 responded that he "[didn't] know yet," but described how he was evaluating a potential  
7 candidacy.<sup>8</sup> He explained:

8 I've taken a big step, for me, and created a political organization to  
9 accumulate more resources so I can travel more robustly and begin  
10 to think about infrastructure. And then once that's done, if I should  
11 be successful in raising . . . that seed money, then . . . the next step  
12 is to see if people like what I have to say. And then . . . find out  
13 around the country whether I can raise enough money to compete at  
14 least in the early states. If that works, then I'm likely to go forward.<sup>9</sup>

15 CNN further reported that "[a] source close to John Kasich said . . . that [he] is 'very likely' to  
16 run for President, but cautioned there would be nothing definitive for at least a few weeks."<sup>10</sup>

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<sup>6</sup> *Id.* at 2, 7-8 (citing Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO, June 28, 2015, <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517>); *id.* at 2 (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015); *id.* at 7-8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>).

<sup>7</sup> *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>).

<sup>8</sup> *Id.* (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>) (video embedded at link).

<sup>9</sup> *Id.*

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

1 The same story indicated that Kasich said in late April that “If I can win, I’m likely to run.”<sup>11</sup>  
2 The report further stated that, as of May 2015, “sources close to Kasich have been sending out  
3 positive signals,” and that in late April, Kasich stated that “One good thing about thinking of  
4 running for President is that I get invited to stuff like this, where I can talk about what I care  
5 about.”<sup>12</sup>

6 On June 28, Politico published an article stating that Kasich’s “advisers” said Kasich  
7 would announce his candidacy on July 21.<sup>13</sup> The article attributes several other statements to  
8 Kasich’s advisers, including that Kasich “combines establishment appeal with a conservative  
9 record,” that qualifying for the Cleveland debate “will be tough, even with his announcement  
10 bump,” and that Kasich “will be positioned ‘in Jeb’s back right pocket’ — with establishment  
11 appeal, but slightly more conservative.”<sup>14</sup> The article also revealed the location and start time of  
12 Kasich’s July 21 announcement, the names of three of his strategists, and the schedule for his  
13 “announcement tour that includes Iowa, New Hampshire, South Carolina, and Michigan.”<sup>15</sup>

14 The Complaint states that Kasich, on one of his trips in April, appeared at the New  
15 Hampshire Republican Party’s “First in the Nation” Leadership summit and stated that  
16 “‘America regains its strength’ if it can tackle its immigration problem, balance the budget,  
17 lower the corporate tax rate, and invest in infrastructure.”<sup>16</sup> The Complaint further states that

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

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

<sup>13</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>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> MUR 6983 Supp. Compl. at 7-8.

1   Kasich “asked attendees at the end of his appearance to ‘think about me, would you . . . don’t  
2   commit too soon . . . let us all have a chance to breath and get out, and you know what I really  
3   look forward to, being out in your homes again, letting you get to know me and see me, that’s  
4   what it’s really all about, it’s why I love New Hampshire . . .”<sup>17</sup>

5           Kasich and the Committee assert that Kasich did not become a candidate before July 21,  
6   2015, “at th[e] moment” that he “unambiguously stated, for the first time” that he was running  
7   for President.<sup>18</sup> Pointing to the example activities in the Commission’s testing-the-waters  
8   regulations that indicate an individual has decided to become a candidate, Kasich and the  
9   Committee assert that Kasich “did not conduct or authorize any activities *that triggered*  
10   *candidacy*” before that date.<sup>19</sup> Notably, no response from Kasich or the Committee addresses  
11   *other* testing-the-waters activities (*i.e.*, those that Kasich argues did *not* trigger candidacy) or  
12   addresses how Kasich’s pre-candidacy testing-the-waters activities were funded, including  
13   whether New Day had paid for Kasich’s pre-candidacy travel or other testing-the-waters  
14   activities. Kasich and the Committee did not respond to the Supplemental Complaint.

15           **B.    New Day’s Activities before and around Registering as a Political Committee**

16           New Day was established as an Ohio non-profit corporation on April 14, 2015, and then  
17   registered with the IRS as a section 527 organization.<sup>20</sup>

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<sup>17</sup>    *Id.* at 8.

<sup>18</sup>    MUR 6955 Committee Resp. at 4-5.

<sup>19</sup>    MUR 6955 Committee Resp. at 4-5 (emphasis added) (citing 11 C.F.R. § 100.72(b)).

<sup>20</sup>    New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015).

1           When it was founded, New Day launched a website that featured Kasich's picture and  
2 biography, and a video of Kasich announcing the creation of New Day and discussing a variety  
3 of policy goals.<sup>21</sup> Kasich's complete statement in the video is as follows:

4           Hi, I'm John Kasich, and I believe it's time for a new day for  
5 America. You know, it's time to put aside the petty differences that  
6 divide us and rediscover the values that we all share which have  
7 made America great. Values like personal responsibility,  
8 community, respect, courage, and of course, faith. There's so much  
9 more that brings us together than that that divides us. When we  
10 remember that, we can come together and do what we all know  
11 needs to be done. We can balance our nation's budget. We can  
12 create jobs by cutting taxes and streamlining regulations and, of  
13 course, reforming our tax code. We can help our fellow Americans  
14 who live in the shadows move up and lead self-sufficient lives and  
15 get smart about making healthcare affordable. And help make the  
16 world a safer place by spreading freedom and prosperity. Those are  
17 some of my thoughts, but I would like to hear what yours are, too.  
18 And I'd like to talk to you about them. And that's why I'm  
19 announcing that we've created the New Day for America  
20 committee. We're going to start getting around the country more,  
21 meeting and talking with more people, and see if by coming together  
22 we can put in motion the solutions that will get this great idea called  
23 America working the right way again. I hope you'll visit our website  
24 at NewDayforAmerica.com. While there, I hope you'll sign up to  
25 join our team. You can find out more. Take a moment to share your  
26 thoughts. You know, we're all in this together, and together we can  
27 bring a new day for America.

28  
29           New Day's initial Mid-Year Disclosure Report to the IRS reported that New Day  
30 received \$11,130,730 and spent \$823,809 between its founding on April 20, 2015, and June 30,

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<sup>21</sup> MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but was embedded in a news article provided in the Supplemental Complaint. *See* MUR 6983 Supp. Compl. at 7 (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015)), [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html). In a CNN story dated May 17, 2015, Kasich referenced his creation of a "political organization" and described it as a "big step" in evaluating a potential presidential candidacy. *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

1 2015.<sup>22</sup> New Day's Year-End Report disclosed that it received an additional \$3,981,570 and  
2 spent \$7,842,778 between July 1 and December 31, 2015.<sup>23</sup> In its 2015 disclosure reports, New  
3 Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as large  
4 as \$1 million.<sup>24</sup> New Day also reported numerous disbursements both prior to and immediately  
5 after Kasich's July 21, 2015, announcement of his candidacy, for which the purpose was  
6 described as media consulting, phone banks, polling, airfare, travel, and travel expense  
7 reimbursements.<sup>25</sup>

8 On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media  
9 market.<sup>26</sup> New Day completed a form documenting two separate ad buys on July 8, with each  
10 listing "John Kasich for the Republican Presidential Primary" as the "name of the legally  
11 qualified candidate(s) the programming refers to"; the form for the WMUR ad buy also says the  
12 advertisement includes a "candidate (Republican) discussing his values/beliefs."<sup>27</sup>

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<sup>22</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015). New Day Independent Media Committee Incorporated reported receiving \$600,000, but making no disbursements during June 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Mid-Year Disclosure Report (July 30, 2015).

<sup>23</sup> New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report at 1. New Day Independent Media Committee Incorporated reported receiving \$1,948,100, but only making \$57,051 in disbursements between July and December 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Year-End Disclosure Report.

<sup>24</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report.

<sup>25</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report.

<sup>26</sup> MUR 6983 Supp. Compl. at 3.

<sup>27</sup> MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3.

1           The first advertisement, “Us,” which reportedly aired on July 8, begins with a succession  
2 of images and sound clips of several Democratic and Republican presidential candidates. It  
3 thereafter consists of the following script, much of which includes Kasich speaking directly to  
4 the camera.<sup>28</sup>

5           Female Announcer: Hey, what about us?

6  
7           Kasich: My dad carried mail on his back. They called him ‘John  
8 the Mailman,’ and they loved him, because he looked out for  
9 everyone in his neighborhood. I learned something from my father:  
10 Do the best to look for other people. We turned Ohio around. And  
11 we’ve created jobs and cut taxes and balanced our budgets. I spent  
12 18 years on the Armed Services Committee with some of the finest  
13 defense minds in the world. I was one of the chief architects of  
14 balancing the budget, it’s the first time we did it since man walked  
15 on the moon, we haven’t done it since. It can happen again.

16  
17           Female Announcer: John Kasich’s for us.

18           The advertisement does not include a “stand-by-your-ad disclaimer.” New Day asserts that the  
19 advertisement used footage from interviews with Kasich filmed prior to July 8, 2015, and that  
20 the stations categorized the ad buys as “Non-Candidate Issue Ads.”<sup>29</sup>

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<sup>28</sup> MUR 6955 Compl. at 3, n.14 (citing Dan Tuohy, *Kasich to air first major ad buy in NH*, NEW HAMPSHIRE UNION LEADER (July 8, 2015) & “Us,” New Day for America, [https://www.youtube.com/watch?v=Dg9Liwfs\\_tI](https://www.youtube.com/watch?v=Dg9Liwfs_tI)).

<sup>29</sup> MUR 6955 New Day Resp. at 3. Although we do not know the exact date on which the footage was filmed, in a July 21, 2015, interview, Fred Davis, a strategist for New Day, stated that he filmed multiple advertisements featuring footage of Kasich that were paid for by New Day, and that he had worked with Kasich for about two months. *See* MUR 6983 Supp. Compl. at 4 (citing Interview by Mark Halperin and John Heileman with Fred Davis, *Why Fred Davis is Going to Miss John Kasich*, BLOOMBERG NEWS (July 21, 2015), <https://www.bloomberg.com/news/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>). New Day reported making disbursements to Davis’s firm, Strategic Perception, Inc., on June 5, 2015 (\$60,000) and June 26, 2015 (\$148,835). *See* New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

1           On July 23, 2015, two days after Kasich announced his candidacy and the same day on  
 2           which Kasich for America registered as Kasich’s authorized committee, New Day registered  
 3           with the Commission as an independent expenditure-only political committee (“IEOPC”).<sup>30</sup>  
 4           The Complaint also alleges that, on July 26 and August 5, New Day ran two additional  
 5           advertisements featuring Kasich. The July 26 advertisement, titled “Balancing the Budget,”<sup>31</sup>  
 6           begins with a succession of images and sound clips of several Democrat and Republican  
 7           presidential candidates and continues with the following script:

8                   Female Announcer: No one running for president has balanced the  
 9                   federal budget for us but John Kasich.

10                   Kasich: I spent ten years of my life fighting to balance the budget,  
 11                   not because it was about numbers, but it was about values. We don’t  
 12                   have a right to live beyond our means, and make sure that our  
 13                   children pay the debt.

14                   Female Announcer: John Kasich helped balance the federal budget,  
 15                   turned around the Ohio economy, and has 18 years’ experience on  
 16                   the Armed Services Committee. No one else comes close.

17                   Kasich: And I was willing to take beatings when I offered my own  
 18                   budget proposals for America because I believed in it. [Caption:  
 19                   reads: “John Kasich. President 2016.”] The most important thing  
 20                   in leadership is not what you say, it’s what you do.

21                   Female Announcer: John Kasich’s for us.

22                   

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 23                   <sup>30</sup>        See New Day for America, FEC Form 1 Statement of Org. (July 23, 2015).

24                   <sup>31</sup>        The Complaint in MUR 6955 refers to a “second” ad that aired on July 26, 2015, from WCVB-BOS in  
 25                   which Kasich “speak[s] about his qualifications to be President, citing a webpage from TVEyes.com. See MUR  
 26                   6955, Compl. at 3 (citing TVEyes, Inc., Media Monitoring Suite, WCVB July 26, 2015, [https://mms.tveyes.com/  
 transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20am&playclip=true](https://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20am&playclip=true)). It appears the same ad is  
 available through a database hosted by The New Republic, though The New Republic’s database dates the ad at July  
 21, 2015. See “Balancing the Budget,” available at [https://newrepublic.com/political-ad-database/john-kasich-  
 balancing-the-budget/Ny8yMS8xNTpCYWxhbmNpbmcdGhllEJlZGdldA](https://newrepublic.com/political-ad-database/john-kasich-balancing-the-budget/Ny8yMS8xNTpCYWxhbmNpbmcdGhllEJlZGdldA).

1           The script for the August 5 advertisement, “John Kasich is for Us – National Security,”<sup>32</sup>  
 2 is as follows:

3           Female Announcer: [over images of President Obama and Hillary  
 4 Clinton] Weakness, handwringing, inexperience. They’re looking  
 5 out for us?

6  
 7           Kasich: You know, I spent 18 years on the Armed Services  
 8 Committee with some of the finest defense minds in the world. I  
 9 learned how we get the services to work together. And I’ll never  
 10 forget my experience meeting with soldiers out in the desert.  
 11 There’s no substitute for experience. [Caption reads: “John  
 12 Kasich. President 2016.”]

13  
 14           **C.     Kasich for America’s Earliest Reported Activities**

15  
 16           As noted above, Kasich formally announced his presidential candidacy on July 21, 2015,  
 17 and filed a Statement of Candidacy on July 23.<sup>33</sup> Kasich for America also registered as Kasich’s  
 18 authorized committee for the presidential election on July 23.<sup>34</sup> The Committee’s first disclosure  
 19 report was the October 2015 Quarterly Report.<sup>35</sup> That report disclosed that the Committee began  
 20 receiving contributions for the 2016 presidential primary election on July 3, 2015, and that it  
 21 exceeded \$5,000 in contributions on July 13.<sup>36</sup> It also showed that the Committee’s first  
 22 disbursement occurred on July 10, 2015, eleven days before Kasich publicly announced his

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<sup>32</sup> MUR 6983 Compl. at 2 (Nov. 10, 2015). See “John Kasich is for Us – National Security,” *available at* [https://www.youtube.com/watch?v=JYDpIaO\\_kF4](https://www.youtube.com/watch?v=JYDpIaO_kF4). New Day filed an independent expenditure report for \$375,000 of “television advertising” in the New Hampshire market for August 4; this appears to have been for “John Kasich is for Us – National Security.” See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

<sup>33</sup> MUR 6955 Committee Resp. at 3; John Kasich, Statement of Candidacy (July 23, 2015).

<sup>34</sup> MUR 6955 Committee Resp. at 3; Kasich for America, Statement of Org. (July 23, 2015).

<sup>35</sup> 2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

<sup>36</sup> *Id.* at Schedule A-P (Itemized Receipts).

1 candidacy.<sup>37</sup> The report disclosed a small number of disbursements between July 10 and July 21,  
2 mostly for expenses related to travel to New Hampshire, though it is not clear from the face of  
3 the reports when that travel occurred. The Committee did not report receiving any in-kind  
4 contributions from New Day in this report, nor did it designate any disbursements as having been  
5 made for testing-the-waters expenses.

### 6 III. LEGAL ANALYSIS

#### 7 A. There is Reason to Believe that Kasich and the Committee Accepted 8 Impermissible and Excessive In-Kind Contributions from New Day and the 9 Committee Failed to Report Them 10

11 An individual becomes a candidate under the Act if: (a) such individual receives  
12 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her  
13 consent to another person to receive contributions or make expenditures on behalf of such  
14 individual and if such person has received such contributions or has made such expenditures in  
15 excess of \$5,000.<sup>38</sup>

16 The Commission has established testing-the-waters exemptions that permit an individual  
17 to test the feasibility of a campaign for federal office without becoming a candidate under the  
18 Act.<sup>39</sup> These exemptions exclude from the definitions of “contribution” and “expenditure” those  
19 funds received and payments made solely to determine whether an individual should become a  
20 candidate.<sup>40</sup> These regulations seek to draw a distinction between activities directed to

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<sup>37</sup> *Id.* at Schedule B-P (Itemized Disbursements).

<sup>38</sup> 52 U.S.C. § 30101(2).

<sup>39</sup> *See* 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

<sup>40</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

1 evaluating the feasibility of one's candidacy and conduct signifying that a decision to become a  
2 candidate has been made.<sup>41</sup> However, only funds permissible under the Act may be used for  
3 testing-the-waters activities.<sup>42</sup>

4 Testing-the-waters activities for which only funds permissible under the Act may be used  
5 include, but are not limited to, payments for polling, telephone calls, and travel.<sup>43</sup> In advisory  
6 opinions, the Commission has stated that "travel throughout the country for speaking to political  
7 and non-political groups on a variety of public issues and meeting with opinion makers and  
8 others interested in public affairs for the purpose of determining whether potential political  
9 support exists for a national campaign" fits within testing-the-waters activities,<sup>44</sup> and that  
10 expenses for such activities should be allocated to the individual's potential candidacy.<sup>45</sup>  
11 Additionally, in MUR 5908 (Duncan Hunter), the Commission found reason to believe that a  
12 candidate's spending on travel to early primary states "to publicize his Presidential campaign,  
13 and/or gauge support for his campaign" before declaring his candidacy should have been  
14 reported as testing-the-waters or campaign expenses.<sup>46</sup>

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<sup>41</sup> See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

<sup>42</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>43</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

<sup>44</sup> AO 1981-32 at 2, 4; *see also id.* at 5 (stating that events "oriented to ascertaining whether there is an initial base of support adequate to launch a campaign effort" are testing-the-waters activities).

<sup>45</sup> See Advisory Op. 1985-40 (Republican Majority Fund) at 9.

<sup>46</sup> Factual and Legal Analysis at 4-7, MUR 5908 (Duncan Hunter). The Commission took no further action in this matter where the investigation revealed that the leadership committee's excessive contributions to the candidate were likely *de minimis*. See Statement of Reasons, Comm'rs Petersen, Hunter, McGahn, Walther & Weintraub at 2-3, *id.*

1           An individual who is testing the waters need not register or file disclosure reports with  
2 the Commission unless and until the individual subsequently decides to run for federal office.<sup>47</sup>  
3 However, an individual who tests the waters must keep financial records and, if he or she  
4 becomes a candidate, all funds received or payments made in connection with testing the waters  
5 become contributions and expenditures under the Act and must be reported as such in the first  
6 report filed by the candidate's principal campaign committee.<sup>48</sup>

7           The Complaint alleges that New Day, after its founding in April 2015, illegally paid for  
8 Kasich's testing-the-waters activities such as travel and "political advertising that allowed him to  
9 convey his policy prerogatives and solicit support for his nascent candidacy."<sup>49</sup> The Kasich  
10 response does not confirm or deny the allegation that New Day paid for Kasich's testing-the-  
11 waters activity. The Committee's initial report to the Commission shows that it received  
12 \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, but it does not  
13 specifically designate any of these entries as in-kind contributions made to Kasich for testing-  
14 the-waters activities, and the first reported disbursement occurred only 11 days prior to Kasich's  
15 announcement of his candidacy.<sup>50</sup> Nonetheless, New Day's IRS disclosure reports indicate that

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<sup>47</sup> *Id.*, see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09"). The testing-the-waters exemption is not available to individuals who have made a decision to become a candidate. 11 C.F.R. §§ 100.72(b), 100.131(b). See also AO 2015-09 at 5; Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

<sup>48</sup> 11 C.F.R. § 101.3.

<sup>49</sup> MUR 6983 Supp. Compl. at 5, 9; see also Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER, Apr. 20, 2015, available at [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html) (the creation of New Day "takes the Ohio Republican Party, which paid for Kasich's recent trips to the earl primary states of New Hampshire and South Carolina, off the hook for his travel expenses.").

<sup>50</sup> See Kasich for America October 2015 Quarterly Report (Oct. 15, 2015).

1 New Day made substantial disbursements for media consulting, phone banks, polling, airfare,  
2 travel, and travel expense reimbursements.<sup>51</sup>

3 The available information indicates that Kasich did spend funds to test the waters prior to  
4 declaring his candidacy in July 2015, and that New Day may have paid for at least a portion of  
5 those expenses. In the months before he announced his candidacy, Kasich began traveling the  
6 country to speak about his policy positions on nationwide issues such as balancing the budget,  
7 tax reform and healthcare. During this time, Kasich reportedly engaged in fundraising and made  
8 statements indicating that he was considering running for President.<sup>52</sup> For example, CNN  
9 reported that Kasich said in late April that “If I can win, I’m likely to run,”<sup>53</sup> and stated that  
10 “[o]ne good thing about thinking of running for President is that I get invited to stuff like this,  
11 where I can talk about what I care about.”<sup>54</sup> He explained:

12 I’ve taken a big step, for me, and created a political organization to  
13 accumulate more resources so I can travel more robustly and begin  
14 to think about infrastructure. And then once that’s done, if I should  
15 be successful in raising . . . that seed money, then . . . the next step  
16 is to see if people like what I have to say. And then . . . find out  
17 around the country whether I can raise enough money to compete at  
18 least in the early states. If that works, then I’m likely to go  
19 forward.<sup>55</sup>

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<sup>51</sup> New Day’s first FEC disclosure report, the 2015 Year-End Report, does not include any disbursements made prior to the date of Kasich’s announcement. *See* New Day Amend. 2015 Year-End Report (July 11, 2016).

<sup>52</sup> Section II.A, *supra*.

<sup>53</sup> Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

<sup>54</sup> *Id.*

<sup>55</sup> MUR 6983 Supp. Compl. at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

1 Further, Kasich's travel included stops in key early primary states, including South  
2 Carolina and New Hampshire, where, among other things, he held news conferences, addressed  
3 Republican caucuses, and spoke at the Republican Leadership Summit.<sup>56</sup>

4 Based on this information, it appears that Kasich was testing-the-waters. Kasich,  
5 however, never established a testing-the-waters account, and the Committee did not report any  
6 testing-the-waters activities once Kasich declared his candidacy. As a result, the Commission  
7 finds reason to believe that Kasich violated 11 C.F.R. §§ 100.72 and 100.131 and that the  
8 Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72 and 100.131.

9 Further, it appears that New Day, once it was formed in April 2015, may have paid for at  
10 least a portion of Kasich's testing-the-waters expenses. Kasich was the face of New Day and it  
11 appears that New Day was formed as a vehicle for Kasich to present his platform of ideas for the  
12 country's future. In Kasich's April 20, 2015, video message announcing the formation of New  
13 Day, Kasich stated, "Those are some of my thoughts, but I would like to hear what yours are too,  
14 and I'd like to talk to you about them. And that's why I'm announcing that we've created the  
15 New Day for America committee. We're going to start getting around the country more,  
16 meeting and talking with more people, and see if by coming together we can put in motion the  
17 solutions that will get this great idea called America working the right way again."<sup>57</sup>  
18 Furthermore, Kasich appears to acknowledge that a "political organization" that he had recently

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<sup>56</sup> See *supra*, Section II.A.

<sup>57</sup> Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 Presidential Run*, CLEVELAND.COM (Apr. 20, 2015), available at [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html).

1 formed — presumably New Day, as Kasich did not establish a testing-the-waters account — was  
2 used to engage in testing-the-waters activities.

3 Thus, it appears likely New Day funded Kasich’s travel, which was at least in part  
4 connected to his testing-the-waters activities.<sup>58</sup> Even if Kasich’s travel on behalf of New Day  
5 was partially unrelated to his testing-the-waters activities, he would have to allocate any  
6 expenses between New Day and his testing-the-waters activities. Because New Day is an  
7 IEOPC that accepted contributions from corporations and contributions in excess of the Act’s  
8 limits,<sup>59</sup> and because an “independent expenditure-only political committee may not make  
9 contributions to candidates ... including in-kind contributions,”<sup>60</sup> New Day may not make  
10 contributions to Kasich, including by making payments that are later required to be reported by  
11 the Committee as contributions for testing-the-waters activities.

12 Therefore, the Commission finds reason to believe that Kasich and the Committee  
13 violated 52 U.S.C. §§ 30116(f) and 30118(a) by accepting, and the Committee violated  
14 52 U.S.C. § 30104(b) by failing to report, excessive and prohibited in-kind contributions for  
15 testing-the-waters activities from New Day.

16 **B. There Is Reason to Believe Kasich Filed His Statement of Candidacy Late**

17  
18 Once an individual meets the \$5,000 threshold for contributions received or expenditures  
19 made, the candidate has fifteen days to designate a principal campaign committee by filing a  
20 Statement of Candidacy with the Commission.<sup>61</sup> The principal campaign committee must file a

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<sup>58</sup> *Cf.* MUR 6932 (Clinton).

<sup>59</sup> *See, e.g.*, 2015 Amend. Year-End Report of New Day for America at 15, 19.

<sup>60</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy).

<sup>61</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

1 Statement of Organization within ten days of its designation<sup>62</sup> and must file disclosure reports  
2 with the Commission in accordance with 52 U.S.C. §§ 30104(a) and (b).<sup>63</sup>

3 Commission regulations set forth a non-exhaustive list of activities that indicate that an  
4 individual is no longer testing the waters and has decided to become a candidate. Such indicia  
5 include: (1) using general public political advertising to publicize his or her intention to  
6 campaign for federal office; (2) raising funds in excess of what could reasonably be expected to  
7 be used for exploratory activities or undertaking activity designed to amass campaign funds that  
8 would be spent after he or she becomes a candidate; (3) making or authorizing written or oral  
9 statements that refer to him or her as a candidate for a particular office; (4) conducting activities  
10 in close proximity to the election or over a protracted period of time; and (5) taking action to  
11 qualify for the ballot under state law.<sup>64</sup>

12 1. Kasich Appears To Have Made a Decision To Become A Candidate at  
13 Least as Early as June 28, 2015  
14

15 As noted above, the Commission, in deciding whether an individual is no longer testing  
16 the waters and has made a decision to run for federal office, assesses an individual's objectively  
17 deliberate actions to discern whether and when an individual decided to become a candidate.<sup>65</sup>  
18 The Commission has stated that “[a] non-conditional statement” by an individual (either directly  
19 or through an adviser) that he or she “‘will’ announce his or her candidacy on a given date

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<sup>62</sup> See 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

<sup>63</sup> See, e.g., Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Brunning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

<sup>64</sup> 11 C.F.R. §§ 100.72(b), 100.131(b)

<sup>65</sup> AO 2015-09 at 6.

1 unambiguously indicates that the individual has decided to become a candidate.”<sup>66</sup> The fact that  
2 the public announcement postdates the individual’s statement of intent “do[es] not eradicate the  
3 registration and reporting requirements that have been triggered” by the decision.<sup>67</sup>

4 Applying these criteria here, the purported statements by Kasich “advisers” in the June 28  
5 Politico article provide reason to believe that Kasich had decided to run for president at least as  
6 early as June 28, 2015, when the advisors reportedly stated that Kasich would be announcing his  
7 candidacy approximately three weeks later. The June 28 Politico article reports that Kasich’s  
8 “advisers” stated that Kasich “will jump into the crowded Republican presidential field on July  
9 21 at the student union at his alma mater, The Ohio State University, in Columbus.” The article  
10 also reports that Kasich’s advisers provided information about Kasich’s plans for positioning  
11 himself as a candidate, as well as his travel plans following his public announcement.  
12 Respondents contest that Kasich’s advisers provided specific information about Kasich’s  
13 purported planned announcement or subsequent campaign plans, asserting that the journalist  
14 simply “conceive[d]” of this information.<sup>68</sup> These statements, however, use direct quotes from  
15 the purported advisers and, compellingly, the information regarding Kasich’s planned  
16 announcement was accurate — Kasich did in fact announce his presidential candidacy on July  
17 21, 2015, at The Ohio State University. As a result, there is ample support for the Commission  
18 to find reason to believe that Kasich may have already decided to become a candidate at least as  
19 early as June 28, when the Politico article was published.<sup>69</sup>

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<sup>66</sup> *Id.* (emphasis in original).

<sup>67</sup> *Id.* (citing Factual and Legal Analysis at 8, MUR 5363 (Alfred C. Sharpton)).

<sup>68</sup> MUR 6955 Committee Resp. at 4.

<sup>69</sup> AO 2015-09 at 6.

1                   2.       Kasich Appears To Have Raised or Spent In Excess of \$5,000

2                   Given the amount of travel apparently undertaken by Kasich — nearly two dozen trips  
 3 out of Ohio on non-state business between January and July 2015 to meet with potential donors,  
 4 participate in forums, and speak at various events — expenses likely exceeded \$5,000 well  
 5 before the formal announcement of Kasich’s candidacy on July 21. Further, Kasich may have  
 6 accepted an in-kind contribution from New Day on the date that New Day incurred expenses to  
 7 film the footage, and that in-kind contribution may have been more than \$5,000. Depending on  
 8 the date that Kasich decided to become a candidate (which appears to have been June 28 at the  
 9 latest), these expenses may have triggered candidacy under the Act. Accordingly, the  
 10 Commission finds reason to believe that Kasich violated 52 U.S.C. § 30102(e)(1) by failing to  
 11 timely file his Statement of Candidacy.

12                   **D.       There Is Reason to Believe the New Day Advertisements Were Coordinated**  
 13                   **Communications**

14                   The Act defines a “contribution” to include “any gift . . . or anything of value made by  
 15 any person for the purpose of influencing any election for Federal office.”<sup>70</sup> IEOPCs are  
 16 prohibited from making contributions to candidates and their authorized committees,<sup>71</sup> and it is  
 17 unlawful for candidates, political committees, and their officers and employees to knowingly accept  
 18 an excessive or prohibited contribution.<sup>72</sup>

19                   A “coordinated expenditure” — which is an expenditure made by any person “in  
 20 cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, a

<sup>70</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

<sup>71</sup> See 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

<sup>72</sup> 52 U.S.C. §§ 30116(f), 30118(a)

1 candidate's authorized committee, or the agents of either — is also a contribution to the  
2 candidate.<sup>73</sup> A “coordinated communication” is one form of coordinated expenditure.<sup>74</sup> Thus,  
3 “[a]n independent expenditure-only political committee may not make contributions to  
4 candidates or political party committees, including in-kind contributions such as coordinated  
5 communications.”<sup>75</sup>

6 Commission regulations provide a three-prong test to determine if a communication is a  
7 “coordinated communication.”<sup>76</sup> First, a person other than the federal candidate or the  
8 candidate's authorized committee must pay for all or part of the communication.<sup>77</sup> Second, the  
9 communication must satisfy at least one content standard.<sup>78</sup> Third, the communication must  
10 satisfy at least one conduct standard.<sup>79</sup>

11 The Complaint alleges that the three New Day advertisements featuring Kasich (“Us,”  
12 “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New  
13 Day Ads”) are coordinated communications and thus, because New Day accepts soft money,  
14 they are prohibited in-kind contributions to the Committee.<sup>80</sup> The Committee argues that there  
15 was no coordinated communication because the footage used in the video appearing on New

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<sup>73</sup> 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

<sup>74</sup> *See* 11 C.F.R. § 109.21(b).

<sup>75</sup> Advisory Op. 2017-10.

<sup>76</sup> 11 C.F.R. § 109.21(a).

<sup>77</sup> *Id.* § 109.21(a)(1).

<sup>78</sup> *Id.* § 109.21(a)(2), (c).

<sup>79</sup> *Id.* § 109.21(a)(3), (d).

<sup>80</sup> MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

1 Day’s website and in the New Day advertisements was filmed before Kasich became a  
2 candidate, and thus was not made “in cooperation, consultation or concert with” a candidate.<sup>81</sup>

3 Here, each of the three New Day advertisements — “Us,” “Balancing the Budget,” and  
4 “John Kasich is for Us – National Security” — appear to be coordinated communications. First,  
5 the ads were paid for by a third party, thereby satisfying the first prong of the coordination  
6 analysis. Second, all three ads satisfy the content standard as “public communications”<sup>82</sup> that  
7 contain express advocacy or its functional equivalent.<sup>83</sup>

8 For purposes of the content standard of the coordinated communications test, a  
9 communication that is the functional equivalent of express advocacy means a communication  
10 that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a  
11 clearly identified Federal candidate.”<sup>84</sup>

12 “Us,” which aired in New Hampshire on July 8 (before Kasich’s July 21 announcement  
13 event but after the June 28 Politico article), begins with a reference to the 2016 presidential  
14 primary and general elections by presenting a succession of images and sound clips of several  
15 Democratic and Republican presidential candidates. A narrator then asks “Hey, what about us?”  
16 The ad thereafter features Kasich discussing his accomplishments, as well as his qualifications  
17 and experience “creat[ing] jobs,” “cut[ting] taxes,” “balanc[ing] our budgets,” and serving on the  
18 Armed Services Committee (“John Kasich looked out for America”), before concluding, “John

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<sup>81</sup> MUR 6955 Committee Resp. at 7.

<sup>82</sup> “Public communication” includes “a communication by means of any broadcast, cable, or satellite communication . . .” 11 C.F.R. § 100.26.

<sup>83</sup> *Id.* § 109.21(c)(3), (5); § 100.22.

<sup>84</sup> *Id.* § 109.21(c)(5).

1   Kasich’s for us.” The tagline “John Kasich’s for us” in context — that is, paired with a recitation  
2   of Kasich’s political experience, contrasting other primary candidates, and the absence of an  
3   identifiable issue beyond the qualifications of Kasich himself — can have “no reasonable  
4   interpretation other than as an appeal to vote” for Kasich.<sup>85</sup>

5           “Balancing the Budget” aired on July 26, 2015, five days after Kasich’s announcement  
6   event on July 21, and three days after New Day’s registration with the Commission as an IEOPC  
7   on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for  
8   president has balanced the federal budget for us but John Kasich”), discusses his experience  
9   balancing the budget and serving on the Armed Services Committee, compares him favorably to  
10   other candidates for President (“No one else comes close”), includes the caption “John Kasich.  
11   President 2016,” before concluding, “John Kasich’s for us.”<sup>86</sup> The caption is akin to the phrases  
12   enumerated in section 100.22(a) (such as “Bill McKay in ‘94”) and in context can have no other  
13   reasonable meaning than to urge Kasich’s election. The ad thus contains express advocacy.

14           Likewise, the “John Kasich is for Us – National Security” advertisement discusses  
15   Kasich’s qualifications for office in the context of the upcoming election, contrasting them with  
16   the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as  
17   President Obama, before closing with an image of Kasich over the caption “John Kasich.  
18   President 2016.” The caption is akin to the phrases enumerated in section 100.22(a) (such as

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<sup>85</sup>    See *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007).

<sup>86</sup>    See 11 C.F.R. § 100.22(a).

1 “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s  
2 election.<sup>87</sup> The ad thus contains express advocacy.

3 Third, the conduct prong of the coordination test is satisfied if: (1) the communication  
4 was created, produced, or distributed at the request or suggestion of a candidate, campaign, or  
5 political party committee, or the payor suggests the communication and the candidate, campaign  
6 or political party committee assents to the suggestion (the “request or suggestion” standard); (2)  
7 the candidate, campaign, or political party committee was materially involved in decisions  
8 regarding the communication (the “material involvement” standard); or (3) the communication  
9 was created, produced, or distributed after one or more substantial discussions between the payor  
10 and the candidate, campaign, or a political party committee involving information that is material  
11 to the communication (the “substantial discussion” standard).<sup>88</sup>

12 It appears that all three New Day Ads may satisfy the “material involvement” standard.  
13 Kasich’s apparent relationship with New Day provides reason to believe he was either materially  
14 involved in decisions regarding the communications, or that his conduct satisfies the request or  
15 suggestion, or substantial discussion standards of the Commission’s regulations. As the public  
16 face of New Day, Kasich appears to have been heavily involved with the origination of New  
17 Day, as evidenced by his presence on the group’s website and in the video announcing its

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<sup>87</sup> See 11 C.F.R. § 100.22(a); *see also* Factual and Legal Analysis at 13, MUR 5024R (Tom Kean, Jr.) (Apr. 13, 2005) (an advertisement featuring a candidate wearing a campaign button identifying him as a candidate (“Tom Kean Jr. for Congress”) followed by the word “NEVER” can have no other reasonable meaning than to urge the candidate’s defeat). New Day appears to have filed an independent expenditure report for “John Kasich is for Us – National Security.” See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

<sup>88</sup> 11 C.F.R. § 109.21(d)(1)-(3). The conduct prong may also be satisfied in other ways, such as if the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication. *See id.* at § 109.21(d)(4).

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1 creation, as well as by Kasich and Fred Davis's descriptions of Kasich's interactions with New  
2 Day in advance of Kasich's public announcement of his candidacy.

3           Based on the available information, the Commission finds reason to believe that Kasich  
4 and the Committee accepted excessive and prohibited contributions in the form of coordinated  
5 communications in violation of 52 U.S.C. §§ 30116 and 30118(a), and failed to disclose those  
6 contributions in violation of 52 U.S.C. § 30104(b).



1 23.<sup>1</sup> The Committee registered as Kasich's authorized committee for the presidential election on  
 2 July 23.<sup>2</sup> As discussed in more detail below, in the months leading up to his announcement,  
 3 Kasich travelled to a number of states on trips that appear to be unrelated to his role as governor  
 4 of Ohio to discuss national policy issues. Some of these activities were conducted through and  
 5 paid for by New Day, an organization established in April 2015.

6 **A. Kasich's Activities before Candidacy Announcement**

7 The Complaint in MUR 6983 alleges that, in the months before Kasich publicly  
 8 announced his candidacy for president on July 21, 2015, Kasich "engage[d] in prototypical  
 9 'testing-the-waters' activities, such as traveling around the country and meeting with voters to  
 10 learn about their ideas."<sup>3</sup> The Complaint points to a video that Kasich made for New Day for  
 11 America, in which Kasich said that "[w]e're going to start getting around the country more,  
 12 meeting and talking with more people."<sup>4</sup> Kasich's travels included trips to South Carolina, New  
 13 Hampshire, Michigan, and Washington, DC.<sup>5</sup> On these trips, Kasich advocated for a variety of

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1 John Kasich, Statement of Candidacy (July 23, 2015).

2 Kasich for America, Statement of Org. (July 23, 2015).

3 MUR 6983 Supp. Compl. at 5, 7 (March 30, 2016).

4 *Id.* (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015) (hosting New Day for America video)).

5 *Id.* at 2, 7-8 (citing Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO, June 28, 2015, <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517>); *id.* at 2 (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015); *id.* at 7-8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>)).

1 nationwide policies, including a balanced budget amendment to the U.S. Constitution, and also  
2 reportedly engaged in fundraising.<sup>6</sup>

3 Kasich's own public statements indicate that he was considering a presidential run during  
4 this time. In a CNN interview, Kasich, when asked whether he was running for President,  
5 responded that he "[didn't] know yet," but described how he was evaluating a potential  
6 candidacy.<sup>7</sup> He explained:

7 I've taken a big step, for me, and created a political organization to  
8 accumulate more resources so I can travel more robustly and begin  
9 to think about infrastructure. And then once that's done, if I should  
10 be successful in raising . . . that seed money, then . . . the next step  
11 is to see if people like what I have to say. And then . . . find out  
12 around the country whether I can raise enough money to compete at  
13 least in the early states. If that works, then I'm likely to go forward.<sup>8</sup>

14 CNN further reported that "[a] source close to John Kasich said . . . that [he] is 'very likely' to  
15 run for President, but cautioned there would be nothing definitive for at least a few weeks."<sup>9</sup> The  
16 same story indicated that Kasich said in late April that "If I can win, I'm likely to run."<sup>10</sup> The  
17 report further stated that, as of May 2015, "sources close to Kasich have been sending out  
18 positive signals," and that in late April, Kasich stated that "One good thing about thinking of

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<sup>6</sup> *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>; New Hampshire Republican Leadership Summit, Day 2, C-SPAN, <https://www.c-span.org/video/?325374-1/hampshire-republican-leadership-summit-day-2>).

<sup>7</sup> *Id.* (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>) (video embedded at link).

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

<sup>9</sup> *Id.*

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

1 running for President is that I get invited to stuff like this, where I can talk about what I care  
2 about.”<sup>11</sup>

3 On June 28, 2015, Politico published an article stating that Kasich’s “advisers” said  
4 Kasich would announce his candidacy on July 21.<sup>12</sup> The article attributes several other  
5 statements to Kasich’s advisers, including that Kasich “combines establishment appeal with a  
6 conservative record,” that qualifying for the Cleveland debate “will be tough, even with his  
7 announcement bump,” and that Kasich “will be positioned ‘in Jeb’s back right pocket’ — with  
8 establishment appeal, but slightly more conservative.”<sup>13</sup> The article also revealed the location  
9 and start time of Kasich’s July 21 announcement, the names of three of his strategists, and the  
10 schedule for his “announcement tour that includes Iowa, New Hampshire, South Carolina, and  
11 Michigan.”<sup>14</sup>

12 The Complaint states that Kasich, on one of his trips in April, appeared at the New  
13 Hampshire Republican Party’s “First in the Nation” Leadership summit and stated that  
14 “‘America regains its strength’ if it can tackle its immigration problem, balance the budget,  
15 lower the corporate tax rate, and invest in infrastructure.”<sup>15</sup> The Complaint further states that  
16 Kasich “asked attendees at the end of his appearance to ‘think about me, would you . . . don’t  
17 commit too soon . . . let us all have a chance to breath and get out, and you know what I really

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

<sup>12</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>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> MUR 6983 Supp. Compl. at 7-8 (Mar. 30, 2016).

1 look forward to, being out in your homes again, letting you get to know me and see me, that's  
 2 what it's really all about, it's why I love New Hampshire . . ."16

3 **B. New Day's Activities before and around Registering as a Political Committee**

4 New Day was established as an Ohio non-profit corporation on April 14, 2015, and then  
 5 registered with the IRS as a section 527 organization.<sup>17</sup> Matthew Carle, Executive Director of  
 6 New Day, avers that once it registered with the IRS, it discussed issues of general public  
 7 importance, made non-candidate related expenditures, did not support or oppose any candidate  
 8 for federal office, and disclosed all expenditures and contributions to the IRS.<sup>18</sup>

9 When it was founded, New Day launched a website that featured Kasich's picture and  
 10 biography, and a video of Kasich announcing the creation of New Day and discussing a variety  
 11 of policy goals.<sup>19</sup> Kasich's complete statement in the video is as follows:

12 Hi, I'm John Kasich, and I believe it's time for a new day for  
 13 America. You know, it's time to put aside the petty differences that  
 14 divide us and rediscover the values that we all share which have  
 15 made America great. Values like personal responsibility,  
 16 community, respect, courage, and of course, faith. There's so much  
 17 more that brings us together than that that divides us. When we  
 18 remember that, we can come together and do what we all know  
 19 needs to be done. We can balance our nation's budget. We can

<sup>16</sup> *Id.* at 8.

<sup>17</sup> MUR 6955 New Day Resp. at 2, citing Decl. of Matthew J. Carle ¶¶ 2, 4 (Oct. 2, 2015).

<sup>18</sup> MUR 6955 New Day Resp., Carle Decl. ¶¶ 5-6. The IRS Political Organization database contains reports for both New Day for America (EIN No. 47-3715808) and a separate New Day Independent Media Committee Incorporated (EIN No. 47-4140945) operating from the same address. *Compare* New Day for America, IRS Form 8871 (Apr. 20, 2015) *with* New Day Independent Media Committee Incorporated, IRS Form 8871 (June 29, 2015).

<sup>19</sup> MUR 6955 Compl. at 2 (Aug. 13, 2015). The video no longer appears on New Day's website, but was embedded in a news article provided in the Supplemental Complaint. *See* MUR 6983 Supp. Compl. at 7 (citing Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015)), [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html). In a CNN story dated May 17, 2015, Kasich referenced his creation of a "political organization" and described it as a "big step" in evaluating a potential presidential candidacy. *Id.* at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich 'very likely' to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

1 create jobs by cutting taxes and streamlining regulations and, of  
2 course, reforming our tax code. We can help our fellow Americans  
3 who live in the shadows move up and lead self-sufficient lives and  
4 get smart about making healthcare affordable. And help make the  
5 world a safer place by spreading freedom and prosperity. Those are  
6 some of my thoughts, but I would like to hear what yours are, too.  
7 And I'd like to talk to you about them. And that's why I'm  
8 announcing that we've created the New Day for America  
9 committee. We're going to start getting around the country more,  
10 meeting and talking with more people, and see if by coming together  
11 we can put in motion the solutions that will get this great idea called  
12 America working the right way again. I hope you'll visit our website  
13 at NewDayforAmerica.com. While there, I hope you'll sign up to  
14 join our team. You can find out more. Take a moment to share your  
15 thoughts. You know, we're all in this together, and together we can  
16 bring a new day for America.

17  
18 New Day's initial Mid-Year Disclosure Report to the IRS reported that New Day  
19 received \$11,130,730 and spent \$823,809 between its founding on April 20, 2015, and June 30,  
20 2015.<sup>20</sup> New Day's Year-End Report disclosed that it received an additional \$3,981,570 and  
21 spent \$7,842,778 between July 1 and December 31, 2015.<sup>21</sup> In its 2015 disclosure reports, New  
22 Day disclosed that it routinely accepted donations that exceeded \$5,000, including some as large  
23 as \$1 million.<sup>22</sup> New Day also reported numerous disbursements both prior to and immediately  
24 after Kasich's July 21, 2015, announcement of his candidacy, for which the purpose was  
25 described as media consulting, phone banks, polling, airfare, travel, and travel expense

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<sup>20</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report at 1 (July 30, 2015). New Day Independent Media Committee Incorporated reported receiving \$600,000, but making no disbursements during June 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Mid-Year Disclosure Report (July 30, 2015).

<sup>21</sup> New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report at 1. New Day Independent Media Committee Incorporated reported receiving \$1,948,100, but only making \$57,051 in disbursements between July and December 2015. New Day Independent Media Committee Incorporated, IRS 2015 Form 8872 Year-End Disclosure Report.

<sup>22</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year-End Disclosure Report.

1 reimbursements.<sup>23</sup> New Day's responses to the Complaints denied that Kasich was a candidate  
2 before July 21, 2015, but did not address whether New Day had paid for Kasich's travel or other  
3 testing-the-waters activities.<sup>24</sup>

4 On July 8, New Day purchased \$58,400 of television air time in a New Hampshire media  
5 market.<sup>25</sup> New Day completed a form documenting two separate ad buys on July 8, with each  
6 listing "John Kasich for the Republican Presidential Primary" as the "name of the legally  
7 qualified candidate(s) the programming refers to"; the form for the WMUR ad buy also says the  
8 advertisement includes a "candidate (Republican) discussing his values/beliefs."<sup>26</sup>

9 The first advertisement, "Us," which reportedly aired on July 8, begins with a succession  
10 of images and sound clips of several Democratic and Republican presidential candidates. It  
11 thereafter consists of the following script, much of which includes Kasich speaking directly to  
12 the camera:<sup>27</sup>

13 Female Announcer: Hey, what about us?  
14

15 Kasich: My dad carried mail on his back. They called him 'John  
16 the Mailman,' and they loved him, because he looked out for  
17 everyone in his neighborhood. I learned something from my father:  
18 Do the best to look for other people. We turned Ohio around. And  
19 we've created jobs and cut taxes and balanced our budgets. I spent  
20 18 years on the Armed Services Committee with some of the finest  
21 defense minds in the world. I was one of the chief architects of

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<sup>23</sup> New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report; New Day for America, IRS 2015 Form 8872 Year End Disclosure Report.

<sup>24</sup> MUR 6955 New Day Resp. at 2.

<sup>25</sup> MUR 6983 Supp. Compl. at 3.

<sup>26</sup> MUR 6955 Compl. at 2-3; MUR 6983 Supp. Compl. at 3.

<sup>27</sup> MUR 6955 Compl. at 3 (citing Dan Tuohy, *Kasich to air first major ad buy in NH*, NEW HAMPSHIRE UNION LEADER (July 8, 2015) & "Us," New Day for America, [https://www.youtube.com/watch?v=Dg9Liwfs\\_tl](https://www.youtube.com/watch?v=Dg9Liwfs_tl)).

1 balancing the budget, it's the first time we did it since man walked  
 2 on the moon, we haven't done it since. It can happen again.

3  
 4 Female Announcer: John Kasich's for us.

5  
 6 The advertisement does not include a "stand-by-your-ad disclaimer." New Day asserts that the  
 7 advertisement used footage from interviews with Kasich filmed prior to July 8, 2015, and that  
 8 the stations categorized the ad buys as "Non-Candidate Issue Ads."<sup>28</sup>

9 On July 23, 2015, two days after Kasich announced his candidacy and the same day on  
 10 which Kasich for America registered as Kasich's authorized committee, New Day registered  
 11 with the Commission as an independent expenditure-only political committee ("IEOPC").<sup>29</sup>

12 The Complaint also alleges that on July 26 and August 5, New Day ran two additional  
 13 advertisements featuring Kasich. The July 26 advertisement, titled "Balancing the Budget,"<sup>30</sup>  
 14 begins with a succession of images and sound clips of several Democrat and Republican  
 15 presidential candidates and continues with the following script:

16 Female Announcer: No one running for president has balanced the  
 17 federal budget for us but John Kasich.  
 18

<sup>28</sup> MUR 6955 New Day Resp. at 3. Although we do not know the exact date on which the footage was filmed, in a July 21, 2015, interview, Fred Davis, a strategist for New Day, stated that he filmed multiple advertisements featuring footage of Kasich that were paid for by New Day, and that he had worked with Kasich for about two months. See MUR 6983 Supp. Compl. at 4 (citing Interview by Mark Halperin and John Heileman with Fred Davis, *Why Fred Davis is Going to Miss John Kasich*, BLOOMBERG NEWS (July 21, 2015), <https://www.bloomberg.com/news/videos/2015-07-21/why-fred-davis-is-going-to-miss-john-kasich>). New Day reported making disbursements to Davis's firm, Strategic Perception, Inc., on June 5, 2015 (\$60,000) and June 26, 2015 (\$148,835). See New Day for America, IRS 2015 Form 8872 Mid-Year Disclosure Report.

<sup>29</sup> See New Day for America, FEC Form 1 Statement of Org. (July 23, 2015).

<sup>30</sup> The Complaint in MUR 6955 refers to a "second" ad that aired on July 26, 2015, from WCVB-BOS in which Kasich "speak[s] about his qualifications to be President, citing a webpage from TVEyes.com. See MUR 6955, Compl. at 3 (citing TVEyes, Inc., Media Monitoring Suite, WCVB (July 26, 2015), <https://mms.tveyes.com/transcript.asp?StationID=919&DateTime=7/26/2015%209:43:07%20am&playclip=true>). It appears the same ad is available through a database hosted by The New Republic, though The New Republic's database dates the ad at July 21, 2015. See "Balancing the Budget," available at <https://newrepublic.com/political-ad-database/john-kasich-balancing-the-budget/Ny8yMS8xNTpCYWxhbmNpbmcmdGhllEJ1ZGldA>.

1 Kasich: I spent ten years of my life fighting to balance the budget,  
2 not because it was about numbers, but it was about values. We don't  
3 have a right to live beyond our means, and make sure that our  
4 children pay the debt.  
5

6 Female Announcer: John Kasich helped balance the federal budget,  
7 turned around the Ohio economy, and has 18 years' experience on  
8 the Armed Services Committee. No one else comes close.  
9

10 Kasich: And I was willing to take beatings when I offered my own  
11 budget proposals for America because I believed in it. [Caption:  
12 reads: "John Kasich. President 2016."] The most important thing  
13 in leadership is not what you say, it's what you do.  
14

15 Female Announcer: John Kasich's for us.  
16

17 The script for the August 5 advertisement, "John Kasich is for Us – National Security,"<sup>31</sup>

18 is as follows:

19 Female Announcer: [over images of President Obama and Hillary  
20 Clinton] Weakness, handwringing, inexperience. They're looking  
21 out for us?  
22

23 Kasich: You know, I spent 18 years on the Armed Services  
24 Committee with some of the finest defense minds in the world. I  
25 learned how we get the services to work together. And I'll never  
26 forget my experience meeting with soldiers out in the desert.  
27 There's no substitute for experience. [Caption reads: "John  
28 Kasich. President 2016."]

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<sup>31</sup> MUR 6983 Compl. at 2 (Nov. 10, 2015). See "John Kasich is for Us – National Security," available at [https://www.youtube.com/watch?v=JYDplaO\\_kF4](https://www.youtube.com/watch?v=JYDplaO_kF4). New Day filed an independent expenditure report for \$375,000 of "television advertising" in the New Hampshire market for August 4; this appears to have been for "John Kasich is for Us – National Security." See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

1           **C.     Kasich for America’s Earliest Reported Activities**

2           As noted above, Kasich formally announced his presidential candidacy on July 21, 2015,  
3 and filed a Statement of Candidacy on July 23.<sup>32</sup> Kasich for America also registered as Kasich’s  
4 authorized committee for the presidential election on July 23.<sup>33</sup> The Committee’s first disclosure  
5 report was the October 2015 Quarterly Report.<sup>34</sup> That report disclosed that the Committee began  
6 receiving contributions for the 2016 presidential primary election on July 3, 2015, and that it  
7 exceeded \$5,000 in contributions on July 13.<sup>35</sup> It also showed that the Committee’s first  
8 disbursement occurred on July 10, 2015, eleven days before Kasich publicly announced his  
9 candidacy.<sup>36</sup> The report disclosed a small number of disbursements between July 10 and July 21,  
10 mostly for expenses related to travel to New Hampshire, though it is not clear from the face of  
11 the reports when that travel occurred. The Committee did not report receiving any in-kind  
12 contributions from New Day in this report, nor did it designate any disbursements as having been  
13 made for testing-the-waters expenses.

14           **III.    LEGAL ANALYSIS**

15           **A.     There is Reason to Believe that New Day Made Impermissible and Excessive**  
16           **In-Kind Contributions and the Committee Failed to Report Them**

17           An individual becomes a candidate under the Act if: (a) such individual receives  
18           contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her  
19           contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her

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32           Statement of Candidacy (July 23, 2015).

33           Kasich for America, Statement of Org. (July 23, 2015).

34           2015 Oct. Quarterly Rpt., Kasich for America at 9 (Oct. 15, 2015).

35           *Id.* at Schedule A-P (Itemized Receipts).

36           *Id.* at Schedule B-P (Itemized Disbursements).

1 consent to another person to receive contributions or make expenditures on behalf of such  
2 individual and if such person has received such contributions or has made such expenditures in  
3 excess of \$5,000.<sup>37</sup>

4 The Commission has established testing-the-waters exemptions that permit an individual  
5 to test the feasibility of a campaign for federal office without becoming a candidate under the  
6 Act.<sup>38</sup> These exemptions exclude from the definitions of “contribution” and “expenditure” those  
7 funds received and payments made solely to determine whether an individual should become a  
8 candidate.<sup>39</sup> These regulations seek to draw a distinction between activities directed to  
9 evaluating the feasibility of one’s candidacy and conduct signifying that a decision to become a  
10 candidate has been made.<sup>40</sup> However, only funds permissible under the Act may be used for  
11 testing-the-waters activities.<sup>41</sup>

12 Testing-the-waters activities for which only funds permissible under the Act may be used  
13 include, but are not limited to, payments for polling, telephone calls, and travel.<sup>42</sup> In advisory  
14 opinions, the Commission has stated that “travel throughout the country for speaking to political  
15 and non-political groups on a variety of public issues and meeting with opinion makers and  
16 others interested in public affairs for the purpose of determining whether potential political

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<sup>37</sup> 52 U.S.C. § 30101(2).

<sup>38</sup> See 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

<sup>39</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

<sup>40</sup> See Advisory Op. 1981-32 (Askew) (“AO 1981-32”).

<sup>41</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>42</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

1 support exists for a national campaign” fits within testing-the-waters activities,<sup>43</sup> and that  
2 expenses for such activities should be allocated to the individual’s potential candidacy.<sup>44</sup>  
3 Additionally, in MUR 5908 (Duncan Hunter), the Commission found reason to believe that a  
4 candidate’s spending on travel to early primary states “to publicize his Presidential campaign,  
5 and/or gauge support for his campaign” before declaring his candidacy should have been  
6 reported as testing-the-waters or campaign expenses.<sup>45</sup>

7 An individual who is testing the waters need not register or file disclosure reports with  
8 the Commission unless and until the individual subsequently decides to run for federal office.<sup>46</sup>  
9 However, an individual who tests the waters must keep financial records and, if he or she  
10 becomes a candidate, all funds received or payments made in connection with testing the waters  
11 become contributions and expenditures under the Act and must be reported as such in the first  
12 report filed by the candidate’s principal campaign committee.<sup>47</sup>

13 The Complaint alleges that New Day, after its founding in April 2015, illegally paid for  
14 Kasich’s testing-the-waters activities such as travel and “political advertising that allowed him to

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<sup>43</sup> AO 1981-32 at 2, 4; *see also id.* at 5 (stating that events “oriented to ascertaining whether there is an initial base of support adequate to launch a campaign effort” are testing-the-waters activities).

<sup>44</sup> *See* Advisory Op. 1985-40 (Republican Majority Fund) at 9.

<sup>45</sup> Factual and Legal Analysis at 4-7, MUR 5908 (Duncan Hunter). The Commission took no further action in this matter where the investigation revealed that the leadership committee’s excessive contributions to the candidate were likely *de minimis*. *See* Statement of Reasons, Comm’rs Petersen, Hunter, McGahn, Walther & Weintraub at 2-3, *id.*

<sup>46</sup> *Id.*, *see also* Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) (“AO 2015-09”). The testing-the-waters exemption is not available to individuals who have made a decision to become a candidate. 11 C.F.R. §§ 100.72(b), 100.131(b). *See also* AO 2015-09 at 5; Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption “explicitly limited ‘solely’ to activities designed to evaluate a potential candidacy”).

<sup>47</sup> 11 C.F.R. § 101.3.

1 convey his policy prerogatives and solicit support for his nascent candidacy.”<sup>48</sup> New Day’s  
2 response does not confirm or deny the allegation that New Day paid for Kasich’s testing-the-  
3 waters activity. The Committee’s initial report to the Commission shows that it received  
4 \$40,050 in contributions and made \$19,180 in disbursements prior to July 21, but it does not  
5 specifically designate any of these entries as in-kind contributions made to Kasich for testing-  
6 the-waters activities, and the first reported disbursement occurred only 11 days prior to Kasich’s  
7 announcement of his candidacy.<sup>49</sup> Nonetheless, New Day’s IRS disclosure reports indicate that  
8 New Day made substantial disbursements for media consulting, phone banks, polling, airfare,  
9 travel, and travel expense reimbursements.<sup>50</sup>

10 The available information indicates that Kasich did spend funds to test the waters prior to  
11 declaring his candidacy in July 2015, and that New Day may have paid for at least a portion of  
12 those expenses. In the months before he announced his candidacy, Kasich began traveling the  
13 country to speak about his policy positions on nationwide issues such as balancing the budget,  
14 tax reform and healthcare. During this time, Kasich reportedly engaged in fundraising and made  
15 statements indicating that he was considering running for President.<sup>51</sup> For example, CNN

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<sup>48</sup> MUR 6983 Supp. Compl. at 5, 9; *see also* Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 presidential run*, CLEVELAND PLAIN DEALER (Apr. 20, 2015), at [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html) (the creation of New Day “takes the Ohio Republican Party, which paid for Kasich’s recent trips to the early primary states of New Hampshire and South Carolina, off the hook for his travel expenses.”).

<sup>49</sup> *See* Kasich for America Oct. 2015 Quarterly Report (Oct. 15, 2015).

<sup>50</sup> New Day’s first FEC disclosure report, the 2015 Year-End Report, does not include any disbursements made prior to the date of Kasich’s announcement. *See* New Day Amend. 2015 Year-End Report (July 11, 2016).

<sup>51</sup> Section II.A, *supra*.

1 reported that Kasich said in late April that “If I can win, I’m likely to run,”<sup>52</sup> and stated that  
2 “[o]ne good thing about thinking of running for President is that I get invited to stuff like this,  
3 where I can talk about what I care about.”<sup>53</sup> He explained:

4 I’ve taken a big step, for me, and created a political organization to  
5 accumulate more resources so I can travel more robustly and begin  
6 to think about infrastructure. And then once that’s done, if I should  
7 be successful in raising . . . that seed money, then . . . the next step  
8 is to see if people like what I have to say. And then . . . find out  
9 around the country whether I can raise enough money to compete at  
10 least in the early states. If that works, then I’m likely to go  
11 forward.<sup>54</sup>

12 Further, Kasich’s travel included stops in key early primary states, including South  
13 Carolina and New Hampshire, where, among other things, he held news conferences, addressed  
14 Republican caucuses, and spoke at the Republican Leadership Summit.<sup>55</sup>

15 Further, it appears that New Day, once it was formed in April 2015, may have paid for at  
16 least a portion of Kasich’s testing-the-waters expenses. Kasich was the face of New Day and it  
17 appears that New Day was formed as a vehicle for Kasich to present his platform of ideas for the  
18 country’s future. In Kasich’s April 20, 2015, video message announcing the formation of New  
19 Day, Kasich stated, “Those are some of my thoughts, but I would like to hear what yours are too,  
20 and I’d like to talk to you about them. And that’s why I’m announcing that we’ve created the

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<sup>52</sup> Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>.

<sup>53</sup> *Id.*

<sup>54</sup> MUR 6983 Supp. Compl. at 8 (citing Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <http://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/>).

<sup>55</sup> *See supra*, Section II.A.

1 New Day for America committee. We're going to start getting around the country more,  
2 meeting and talking with more people, and see if by coming together we can put in motion the  
3 solutions that will get this great idea called America working the right way again."<sup>56</sup>  
4 Furthermore, Kasich appears to acknowledge that a "political organization" that he had recently  
5 formed — presumably New Day, as Kasich did not establish a testing-the-waters account — was  
6 used to engage in testing-the-waters activities.

7 Thus, it appears likely New Day funded Kasich's travel, which was at least in part  
8 connected to his testing-the-waters activities.<sup>57</sup> Even if Kasich's travel on behalf of New Day  
9 was partially unrelated to his testing-the-waters activities, he would have to allocate any  
10 expenses between New Day and his testing-the-waters activities. Because New Day is an  
11 IEOPC that accepted contributions from corporations and contributions in excess of the Act's  
12 limits,<sup>58</sup> and because an "independent expenditure-only political committee may not make  
13 contributions to candidates ... including in-kind contributions,"<sup>59</sup> New Day may not make  
14 contributions to Kasich, including by making payments that are later required to be reported by  
15 the Committee as contributions for testing-the-waters activities.

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<sup>56</sup> Henry J. Gomez, *Ohio Gov. John Kasich begins raising money to test the waters for a 2016 Presidential Run*, CLEVELAND.COM (Apr. 20, 2015), [http://www.cleveland.com/open/index.ssf/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](http://www.cleveland.com/open/index.ssf/2015/04/ohio_gov_john_kasich_begins_ra.html).

<sup>57</sup> *Cf.* MUR 6932 (Clinton).

<sup>58</sup> *See, e.g.*, 2015 Amend. Year-End Report of New Day for America at 15, 19.

<sup>59</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy).

1           Therefore, the Commission finds reason to believe that New Day violated 52 U.S.C.  
2   §§ 30116(f) and 30118(a) by making excessive and prohibited in-kind contributions to the  
3   Committee for testing-the-waters activities.

4           **B.     There Is Reason to Believe the New Day Advertisements Were Coordinated**  
5           **Communications**

6           The Act defines a “contribution” to include “any gift . . . or anything of value made by  
7   any person for the purpose of influencing any election for Federal office.”<sup>60</sup> IEOPCs are  
8   prohibited from making contributions to candidates and their authorized committees,<sup>61</sup> and it is  
9   unlawful for candidates, political committees, and their officers and employees to knowingly accept  
10   an excessive or prohibited contribution.<sup>62</sup>

11           A “coordinated expenditure” — which is an expenditure made by any person “in  
12   cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, a  
13   candidate’s authorized committee, or the agents of either — is also a contribution to the  
14   candidate.<sup>63</sup> A “coordinated communication” is one form of coordinated expenditure.<sup>64</sup> Thus,  
15   “[a]n independent expenditure-only political committee may not make contributions to  
16   candidates or political party committees, including in-kind contributions such as coordinated  
17   communications.”<sup>65</sup>

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<sup>60</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a).

<sup>61</sup> See 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

<sup>62</sup> 52 U.S.C. §§ 30116(f), 30118(a)

<sup>63</sup> 52 U.S.C. § 30116(a)(7)(B); see also 11 C.F.R. § 109.20.

<sup>64</sup> See 11 C.F.R. § 109.21(b).

<sup>65</sup> Advisory Op. 2017-10.

1 Commission regulations provide a three-prong test to determine if a communication is a  
2 “coordinated communication.”<sup>66</sup> First, a person other than the federal candidate or the  
3 candidate’s authorized committee must pay for all or part of the communication.<sup>67</sup> Second, the  
4 communication must satisfy at least one content standard.<sup>68</sup> Third, the communication must  
5 satisfy at least one conduct standard.<sup>69</sup>

6 The Complaint alleges that the three New Day advertisements featuring Kasich (“Us,”  
7 “Balancing the Budget,” and “John Kasich is for Us – National Security,” collectively, the “New  
8 Day Ads”) are coordinated communications and thus, because New Day accepts soft money,  
9 they are prohibited in-kind contributions to the Committee.<sup>70</sup> Respondents argue that there was  
10 no coordinated communication because the footage used in the video appearing on New Day’s  
11 website and in the New Day advertisements was filmed before Kasich became a candidate, and  
12 thus was not made “in cooperation, consultation or concert with” a candidate.<sup>71</sup>

13 Here, each of the three New Day advertisements — “Us,” “Balancing the Budget,” and  
14 “John Kasich is for Us – National Security” — appear to be coordinated communications. First,  
15 the ads were paid for by a third party, thereby satisfying the first prong of the coordination

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<sup>66</sup> 11 C.F.R. § 109.21(a).

<sup>67</sup> *Id.* § 109.21(a)(1).

<sup>68</sup> *Id.* § 109.21(a)(2), (c).

<sup>69</sup> *Id.* § 109.21(a)(3), (d).

<sup>70</sup> MUR 6955 Compl. at 9-12; MUR 6983 Compl. at 3-7.

<sup>71</sup> MUR 6955 New Day Resp. at 8-9.

1 analysis. Second, all three ads satisfy the content standard as “public communications”<sup>72</sup> that  
2 contain express advocacy or its functional equivalent.<sup>73</sup>

3 For purposes of the content standard of the coordinated communications test, a  
4 communication that is the functional equivalent of express advocacy means a communication  
5 that “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a  
6 clearly identified Federal candidate.”<sup>74</sup>

7 “Us,” which aired in New Hampshire on July 8 (before Kasich’s July 21 announcement  
8 event but after the June 28 Politico article), begins with a reference to the 2016 presidential  
9 primary and general elections by presenting a succession of images and sound clips of several  
10 Democratic and Republican presidential candidates. A narrator then asks “Hey, what about us?”  
11 The ad thereafter features Kasich discussing his accomplishments, as well as his qualifications  
12 and experience “creat[ing] jobs,” “cut[ting] taxes,” “balanc[ing] our budgets,” and serving on the  
13 Armed Services Committee (“John Kasich looked out for America”), before concluding, “John  
14 Kasich’s for us.” The tagline “John Kasich’s for us” in context — that is, paired with a recitation  
15 of Kasich’s political experience, contrasting other primary candidates, and the absence of an  
16 identifiable issue beyond the qualifications of Kasich himself — can have “no reasonable  
17 interpretation other than as an appeal to vote” for Kasich.<sup>75</sup>

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<sup>72</sup> “Public communication” includes “a communication by means of any broadcast, cable, or satellite communication . . . .” 11 C.F.R. § 100.26.

<sup>73</sup> *Id.* § 109.21(c)(3), (5), § 100.22(a).

<sup>74</sup> *Id.* § 109.21(c)(5).

<sup>75</sup> *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007).

1 “Balancing the Budget” aired on July 26, 2015, five days after Kasich’s announcement  
2 event on July 21, and three days after New Day’s registration with the Commission as an IEOPC  
3 on July 23. It explicitly refers to Kasich as a candidate for President (“No one running for  
4 president has balanced the federal budget for us but John Kasich”), discusses his experience  
5 balancing the budget and serving on the Armed Services Committee, compares him favorably to  
6 other candidates for President (“No one else comes close”), includes the caption “John. Kasich.  
7 President 2016,” before concluding, “John Kasich’s for us.”<sup>76</sup> The caption is akin to the phrases  
8 enumerated in section 100.22(a) (such as “Bill McKay in ‘94”) and in context can have no other  
9 reasonable meaning than to urge Kasich’s election. The ad thus contains express advocacy.

10 Likewise, the “John Kasich is for Us – National Security” advertisement discusses  
11 Kasich’s qualifications for office in the context of the upcoming election, contrasting them with  
12 the “weakness, handwringing, [and] inexperience” of fellow candidate Hillary Clinton as well as  
13 President Obama, before closing with an image of Kasich over the caption “John Kasich.  
14 President 2016.” The caption is akin to the phrases enumerated in section 100.22(a) (such as  
15 “Bill McKay in ‘94”) and in context can have no other reasonable meaning than to urge Kasich’s  
16 election.<sup>77</sup> The ad thus contains express advocacy.

17 Third, the conduct prong of the coordination test is satisfied if: (1) the communication  
18 was created, produced, or distributed at the request or suggestion of a candidate, campaign, or

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<sup>76</sup> See 11 C.F.R. § 100.22(a).

<sup>77</sup> See 11 C.F.R. § 100.22(a); see also Factual and Legal Analysis at 13, MUR 5024R (Tom Kean, Jr.) (Apr. 13, 2005) (an advertisement featuring a candidate wearing a campaign button identifying him as a candidate (“Tom Kean Jr. for Congress”) followed by the word “NEVER” can have no other reasonable meaning than to urge the candidate’s defeat). New Day appears to have filed an independent expenditure report for “John Kasich is for Us – National Security.” See Schedule E, 24/48 Hour Report of Independent Expenditures, at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf>.

1 political party committee, or the payor suggests the communication and the candidate, campaign  
2 or political party committee assents to the suggestion (the “request or suggestion” standard);  
3 (2) the candidate, campaign, or political party committee was materially involved in decisions  
4 regarding the communication (the “material involvement” standard); or (3) the communication  
5 was created, produced, or distributed after one or more substantial discussions between the payor  
6 and the candidate, campaign, or a political party committee involving information that is material  
7 to the communication (the “substantial discussion” standard).<sup>78</sup>

8           It appears that all three New Day Ads may satisfy the “material involvement” standard.  
9 Kasich’s apparent relationship with New Day provides reason to believe he was either materially  
10 involved in decisions regarding the communications, or that his conduct satisfies the request or  
11 suggestion, or substantial discussion standards of the Commission’s regulations. As the public  
12 face of New Day, Kasich appears to have been heavily involved with the origination of New  
13 Day, as evidenced by his presence on the group’s website and in the video announcing its  
14 creation, as well as by Kasich and Fred Davis’s descriptions of Kasich’s interactions with New  
15 Day in advance of Kasich’s public announcement of his candidacy.

16           Based on the available information, the Commission finds reason to believe New Day  
17 made excessive and prohibited contributions in the form of coordinated communications in  
18 violation of 52 U.S.C. §§ 30116 and 30118(a), and failed to disclose those contributions in  
19 violation of 52 U.S.C. § 30104(b).

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<sup>78</sup> 11 C.F.R. § 109.21(d)(1)-(3). The conduct prong may also be satisfied in other ways, such as if the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication. *See id.* at § 109.21(d)(4).

1           **C.     There is Reason to Believe that the New Day Ads Failed To Include Complete**  
2           **Disclaimers**

3           Under the Act and Commission regulations, any public communication that expressly  
4           advocates the election or defeat of a clearly identified federal candidate must include a  
5           disclaimer.<sup>79</sup> If the communication is paid for by other persons but authorized by a candidate, an  
6           authorized political committee of a candidate, or its agents, the communication shall clearly state  
7           that the communication has been paid for by such other persons and authorized by such  
8           authorized political committee.<sup>80</sup>

9           Here, the New Day Ads each included disclaimers but did not include a stand by your ad  
10          portion indicating that Kasich approved the advertisements. The Complaint alleges that the New  
11          Day Ads failed to include proper disclaimers under 52 U.S.C. § 30120 because they did not state  
12          that Kasich approved the content.<sup>81</sup> As noted above, we have concluded that Kasich became a  
13          candidate as least as early as June 28, 2015, prior to the airing of the advertisements, and that  
14          Kasich's involvement with New Day, including filming footage for the advertisements, resulted  
15          in the advertisements being coordinated communications between Kasich and New Day under  
16          Commission regulations. The same facts that support these conclusions support the conclusion  
17          that Kasich approved the advertisements. Accordingly, the Commission finds reason to believe  
18          that New Day violated 52 U.S.C. § 30120(d)(1)(B) by failing to include complete disclaimers.

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<sup>79</sup> See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2).

<sup>80</sup> 52 U.S.C. § 30120(a)(2) and (d)(1)(B); 11 C.F.R. § 110.11(c)(3)(ii).

<sup>81</sup> MUR 6955 Compl. at 3; MUR 6983 Compl. at 2-3.