

Federal Election Commission
 received
 office of General Counsel

BEFORE THE
 FEDERAL ELECTION COMMISSION

2015 NOV 10 AM 9:00

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

SENSITIVE

Complainant,

v.

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

MUR # 6983

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

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

Respondents.

2015 NOV 19 PM 12:51

COMPLAINT

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

A. FACTS

On July 21, 2015, former Ohio Governor John R. Kasich announced his candidacy for President of the United States.¹ He filed his Statement of Candidacy on July 23, 2015.²

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

New Day for America is an independent expenditure-only political organization organized under Internal Revenue Code Section 527;³ New Day for America filed a Statement of Organization with the Federal Election Commission (the “FEC”) on July 23, 2015.⁴ New Day for America’s website⁵ features Mr. Kasich’s picture, his biography,⁶ and a video of Mr. Kasich explaining why “we created the New Day for America Committee.”⁷ New Day for America’s donation page contains text that reads, “New Day for America may accept unlimited contributions from individuals, corporations, and other organizations.”⁸

On August 5, 2015, New Day for America ran a television advertisement on three stations in the New Hampshire media market featuring Mr. Kasich: (1) at 5:48 AM on New England Cable News; (2) at 7:28 AM on WBZ-BOS (CBS); and at 7:59 AM on WFXT-BOS (Fox).⁹ The advertisement is titled “John Kasich Is For Us - National Security,” and features Mr. Kasich speaking directly to the camera about his qualifications to be President.¹⁰ The advertisement includes a “paid-for” box and oral disclaimer explaining that New Day for America paid for the advertisement. The advertisement does not include a “stand-by-your-ad”

² John R. Kasich, FEC Form 2 Statement of Candidacy, July 23, 2015, *available at* <http://docquery.fec.gov/pdf/022/201507230300013022/201507230300013022.pdf>.

³ New Day For America, Political Organization Notice of Section 527 Status, Form 8871, *available at* http://forms.irs.gov/app/pod/basicSearch/search?_eventId_displayForm=true&formId=80871&formtype=e8871&execution=e1s3.

⁴ *See* New Day For America, FEC Form 1 Statement of Organization, July 23, 2015, *available at* <http://docquery.fec.gov/pdf/003/201507230300013003/201507230300013003.pdf>.

⁵ New Day For America, <https://newdayforamerica.com/> (last visited Oct. 15, 2015) [<https://web.archive.org/web/20150729205858/https://newdayforamerica.com/>].

⁶ New Day For America, *Mission*, <https://newdayforamerica.com/mission/> (last visited Oct. 15, 2015) [<https://web.archive.org/web/20150729210144/https://newdayforamerica.com/mission/>].

⁷ *Id.*

⁸ New Day For America, *Donate*, <https://newdayforamerica.com/donate/> (last visited Oct. 15, 2015) [<https://web.archive.org/web/20150729210304/https://newdayforamerica.com/donate/>].

⁹ *See* TVEyes, Inc., Media Monitoring Suite, New England Cable News 8/5/2015 5:48 AM, *available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=d9bed811-4b26-4d32-a7d3-88515775f45d>; *id.*, WBZ-BOS 8/5/2015 7:28 AM, *available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=f0382ec9-71a2-48e1-bad1-f132f435d8c7>; *id.* WFXT-BOS 8/5/2015 7:59 AM, *available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=985a4c95-033b-4396-8d0c-a0a98ba5ad88>.

¹⁰ New Day for America, *John Kasich Is For Us - National Security*, YouTube (July 31 2015), https://www.youtube.com/watch?v=JYDplaO_kF4.

disclaimer from Mr. Kasich. On August 4, 2015, New Day for America filed an independent expenditure report for television advertising in support of Mr. Kasich's candidacy in New Hampshire in the amount of \$375,000.¹¹

B. LEGAL ARGUMENT

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

Under 52 U.S.C. § 30116(a)(7)(B)(i), "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." An expenditure for a public communication will be considered an in-kind contribution to a campaign if it is (1) paid for by an entity other than the campaign; (2) meets certain content standards, including by expressly advocating the election or defeat of a clearly identified federal candidate; and (3) meets certain conduct standards regarding the coordination between the entity that paid for the ad and the campaign or an agent of the campaign.¹²

The paid-for prong of the coordinated communications standard is clearly satisfied by the television advertisement. The advertisement appears on New Day for America's YouTube channel,¹³ and the "paid-for" box on the advertisement states that it was "Paid for by New Day for America."¹⁴

¹¹ See New Day for America, FEC 24/48 Hour Report of Independent Expenditures, Aug. 4, 2015, available at <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf#navpanes=0>.

¹² See 11 C.F.R. §§ 109.20(b), 109.21.

¹³ New Day for America, YouTube Channel, <https://www.youtube.com/channel/UC6vGX0eWKXqdaRj2rQMRoGA>.

¹⁴ New Day for America, *John Kasich Is For Us - National Security* at :27, YouTube (July 31 2015), https://www.youtube.com/watch?v=JYDplaO_kF4.

The advertisement also easily meets the content prong because it is a public communication that expressly advocates the election of a clearly identified candidate for Federal office¹⁵ and is also “the functional equivalent of express advocacy.”¹⁶ A “public communication” includes a communication by means of any broadcast, cable, or satellite communication.¹⁷ As *New Day for America* aired the advertisement on broadcast and cable television networks---New England Cable News, WBZ-BOS (CBS), and WFXT-BOS (Fox)---it is unmistakably a public communication.¹⁸

The advertisement expressly advocates for the election of Mr. Kasich. “Expressly advocating” includes communications that “in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as . . . advertisements . . . which say ‘Carter ‘76.’”¹⁹ “Expressly advocating” also includes messages that

When taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.²⁰

¹⁵ 11 C.F.R. § 109.21(c)(3).

¹⁶ *Id.* § 109.21(c)(5).

¹⁷ *Id.* § 100.26.

¹⁸ See *TVEyes, Inc., Media Monitoring Suite, New England Cable News 8/5/2015 5:48 AM, available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=d9bed811-4b26-4d32-a7d3-88515775f45d>; *id.*, *WBZ-BOS 8/5/2015 7:28 AM, available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=f0382ec9-71a2-48e1-bad1-f132f435d8c7>; *id.* *WFXT-BOS 8/5/2015 7:59 AM, available at* <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=985a4c95-033b-4396-8d0c-a0a98ba5ad88>.

¹⁹ 11 C.F.R. § 100.22(a).

²⁰ *Id.* § 100.22(b).

A public communication is the functional equivalent of express advocacy “if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”²¹

In the August 5 communications, New Day for America contrasts Mr. Kasich with other clearly identified candidates for President and current office holders. Against images of Democratic presidential candidate Secretary Hillary Clinton and President Obama, the voiceover says, “weakness, pandering, inexperience . . . they’re looking out for us?”²² Mr. Kasich speaks after the images of other clearly identified candidates for President are shown and discusses his experience on the House Armed Services Committee. In an echo of the regulation’s examples of express advocacy, “Carter ‘76,” and “Bill McKay in ‘94”²³ Mr. Kasich’s description of his past experience is followed by text reading “John Kasich President 2016.”²⁴ Reasonable minds could not differ that the communication encourages viewers to vote for Mr. Kasich for President.²⁵ For the same reasons, the advertisement is also the functional equivalent of express advocacy.²⁶ Because the advertisement expressly advocates the election of a clearly identified federal candidate, the communications meet the content prong of the test.²⁷

Further demonstrating that the advertisement expressly advocates for the election of Mr. Kasich, New Day for America reported the independent expenditure with the FEC.²⁸ As these expenditures by definition are those that “expressly advocate[e] the election or defeat of a clearly

²¹ *Id.* § 109.21(c)(5).

²² New Day for America, *John Kasich Is For Us - National Security*, YouTube (July 31 2015), https://www.youtube.com/watch?v=JYDpIaO_kF4.

²³ 11 C.F.R. § 100.22(a).

²⁴ New Day for America, *John Kasich Is For Us - National Security*, YouTube (July 31 2015), https://www.youtube.com/watch?v=JYDpIaO_kF4.

²⁵ *See* 11 C.F.R. § 109.21(c)(5).

²⁶ *See id.* § 109.21(c)(5).

²⁷ *Id.* § 109.21(c)(3).

²⁸ *See* New Day for America, FEC 24/48 Hour Report of Independent Expenditures, Aug. 4, 2015, *available at* <http://docquery.fec.gov/pdf/187/201508049000801187/201508049000801187.pdf#navpanes=0>.

identified candidate,”²⁹ the advertisements covered by the FEC report categorically meet the definition of express advocacy.

Despite the fact that New Day for America filed an independent expenditure report, signifying that the communication was “not made in cooperation, consultation, or concert with [] a candidate,”³⁰ the advertisement was actually a coordinated communication because it meets the conduct prong of the coordinated communication test. A communication is coordinated if it was made in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.³¹ When a candidate is “materially involved” in its creation,³² a communication satisfies the test’s conduct requirement. Here, in the advertisement, Mr. Kasich appears directly on camera and appears to be reading lines scripted specifically for the advertisement. The FEC has said that “[g]iven the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication.”³³ Thus, here, Mr. Kasich was materially involved in creating the advertisement, and the communications meet the conduct prong under 11 C.F.R. § 109.21(d)(2).

New Day for America’s implicit assertion in filing an independent expenditure report that the communications were not made in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents does not survive scrutiny. Because the advertisements meet the paid-for, content, and conduct prongs under 11 C.F.R. § 109.21, they are coordinated communications, not independent expenditures,

²⁹ 11 C.F.R. § 100.16(a).

³⁰ *Id.*

³¹ *Id.* § 109.20(a).

³² *Id.* § 109.21(d)(2).

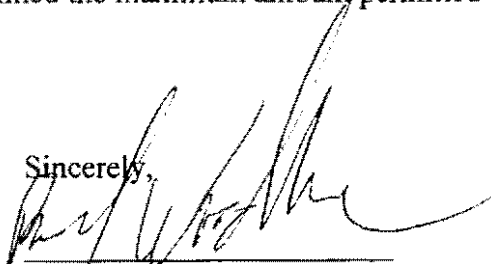
³³ FEC Adv. Op. 2004-1 (Bush/Kerr) at 4 (quoting FEC Adv. Op. 2003-25 (Weinzapfel) at 6).

and thus must be treated as in-kind contributions to Mr. Kasich's campaign.³⁴ As New Day for America is prohibited from making contributions to Mr. Kasich's campaign because it raises soft money,³⁵ it is also prohibited from making coordinated communications.³⁶ Even if New Day for America were permitted to make contributions to Mr. Kasich's campaign, these coordinated contributions well exceed the \$2,700 limit on contributions to federal candidates under 52 U.S.C. § 30116(a)(1). Thus, Mr. Kasich violated 52 U.S.C. 30125(e)(1) by receiving illegal and excessive contributions, and New Day for America violated 52 U.S.C. 30116(a)(1) by making such contributions.

C. REQUESTED ACTION

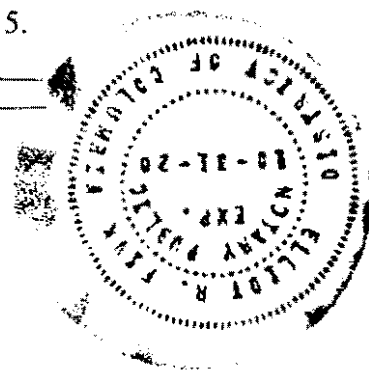
As shown, Mr. Kasich and New Day for America violated the Act by accepting and making an illegal and excessive in-kind contribution in the form of a coordinated communication. We respectfully request that the Commission investigate these violations and that Respondents be enjoined from further violations and fined the maximum amount permitted by law.

Sincerely,



SUBSCRIBED AND SWORN to before me this 27 day of October, 2015.


Notary Public



My Commission Expires:

10/31/2020

³⁴ See 11 C.F.R. § 109.21(b).

³⁵ See 52 U.S.C. § 30125(e)(1).

³⁶ 11 C.F.R. § 109.22.