

# BakerHostetler

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June 14, 2019

**CONFIDENTIAL**

**VIA E-MAIL**

Federal Election Commission  
Office of Complaints Examination  
and Legal Administration  
999 E Street, NW  
Washington, DC 20436

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

Dear Mr. Shonkwiler:

We represent New Day for America and J. Matthew Yuskewich (collectively “New Day”) in the above referenced matters. The Commission determined on April 23, 2019 that it had reason to believe that New Day violated 52 U.S.C. §§ 30104(b), 30116 and 30118(a) by making and failing to report impermissible and excessive in-kind contributions, and 52 U.S.C. § 30120(d)(1)(B) by failing to include competent disclaimers on three television advertisements. The Commission subsequently notified New Day of its findings through counsel, posed additional questions and sought production of certain documents. This letter serves as New Day’s response to those requests.

## **I. Introduction and Background.**

An initial complaint, MUR #6955, was filed against New Day, as well as John R. Kasich, and Kasich for America, on August 10, 2015, asserting claims that New Day failed to timely

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register with the FEC and that New Day made an impermissible and excessive in-kind contribution in the form of a coordinated communication. The allegations center around the incorrect belief that Governor Kasich had become a candidate for President on June 28, 2015. But that allegation was based solely on an internet news article from June 28 claiming that Governor Kasich would announce his Presidential bid on July 21, 2015 through general references to unidentified advisors. Based upon that faulty assertion, the complaint alleged that New Day had not timely registered with the FEC as a political committee. The complaint also falsely alleged that New Day had made an impermissible in-kind contribution through advertisements containing video footage of Governor Kasich that aired on July 8, 2015. New Day served a response to this complaint on October 1, 2015 explaining that Governor Kasich had not become a candidate on June 28 and therefore it timely registered with the FEC and had not made any impermissible in-kind contributions.

A second complaint, MUR #6983, was filed on November 10, 2015 asserting duplicative, or similar allegations relating to an August 5, 2015 advertisement by New Day that the complaint alleged was an impermissible in-kind contribution. New Day served its response to that complaint on January 5, 2016 likewise denying the allegations and providing evidence supporting its position. On March 30, 2016, the Commission received additional information from the complainant pertaining to the allegations in MUR #6983 ("Supplemental Information"). The Supplemental Information purportedly identified additional information relating to the advertisements that New Day ran in New Hampshire on July 8 and for the first time asserted that New Day had made impermissible expenditures for Governor Kasich to "test-the-waters." However, New Day never received proper notice of this Supplemental Information. The letter was directed and mailed to

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Stanley Trevor, not the undersigned counsel who is counsel of record for New Day in these matters. As such, New Day has not had an opportunity to respond to the allegations raised in the Supplemental Information.

On April 23, 2019, the Commission found reason to believe that New Day violated the provisions identified above and subsequently provided notice to New Day, which was received by counsel on or about May 8, 2019. Because New Day did not receive a copy of the Supplemental Information until June 4, 2019, this response is timely filed. New Day continues to assert that the allegations in these matters are without merit.

## **II. New Day Did Not Pay for Any “Testing-the-Waters” Activities.**

The Factual and Legal Analysis found reason to believe that New Day violated 52 U.S.C. §§ 30116(f) and 30118(a) in making impermissible and excessive in-kind contributions for Governor Kasich’s testing-the-waters activities. However, its conclusion is based upon the faulty premise asserted in the Supplemental Information that Governor Kasich was “testing-the-waters” through his efforts with New Day.

FEC regulations define “testing-the-waters” as any activity “undertaken to determine whether the individual should become a candidate.” 11 C.F.R. 100.72; *see also* FEC, Federal Election Campaign Guide: Congressional Candidates and Committees 1 (June 2014).<sup>1</sup> There are certain activities listed in the regulations that are considered *de facto* testing-the-water activities including conducting a poll, telephone calls, or travel if the activity was done for the purposes of determining whether an individual should become a candidate. *See* 11 C.F.R. 100.72; 100.131.

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<sup>1</sup> Available at <http://fec.gov/pdf/candgui.pdf>.

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The Factual and Legal Analysis relies upon blanket assertions in the Supplemental Information that Governor Kasich was “engage[d] in prototypical ‘testing-the-waters’ activities, such as traveling around the country and meeting with voters to learn about their ideas.” But many prominent individuals, including politicians, travel around the country to share and discuss ideas without being labelled as “testing-the-waters” for a federal office. It is not just traveling and discussing ideas but doing so for the purposes of evaluating whether to run for office that is the benchmark.

Governor Kasich’s activities with New Day were to help promote the successful policies implemented in Ohio and to discuss how the nation could benefit from similar policies as well as other issues of national importance, not to determine if he should be a candidate for President. 6.11.19 Carle Decl. ¶ 2, attached as Ex. A. Indeed, as the responses and documents will reflect, New Day did not pay for any polling or telephone calls to assist Governor Kasich in determining if he should run for President. Moreover, any travel paid for by New Day was to promote New Day’s objectives, not for Governor Kasich to “test-the waters”. *Id.* at ¶ 3. And, one of the trips specifically referenced in the Supplemental Information and the Factual and Legal Analysis – Governor Kasich’s trip in April to speak at the New Hampshire Republican Party’s First in the Nation Leadership summit – was not even paid for by New Day. *Id.* at ¶ 4.

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

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

The evidence relied upon in the complaints and in the Factual and Legal Analysis is from speculative internet news articles and is not to the contrary. First, the complaints rely upon an April 20, 2015 article in the Cleveland Plain Dealer titled *John Kasich begins raising money to test the waters for a 2016 presidential run.*<sup>2</sup> The article was written on the same day that New Day registered as a 527 tax-exempt political organization and merely speculates about New Day's purpose on the day it was created. Nowhere in the article does it quote Governor Kasich, or anyone affiliated with him, as saying that he is testing-the-waters or thinking about running for President. Nor does it state that New Day was formed for such a purpose. To the contrary, the article states that "Kasich's 527 is not an official statement of candidacy. It's also not a formal federal exploratory committee, which potential White House hopefuls such as retired neurosurgeon Ben Carson have established."<sup>3</sup> Thus, contrary to the allegations in the complaint, this article supports the fact that New Day's formation was not an official statement of Governor Kasich's candidacy, nor was it established as a federal exploratory committee designed for testing the waters like other candidates had done.

Second, the complaints rely upon a May 17, 2015 CNN article by Gloria Borger and Brian Rokus that has an ostensible attention-grabbing headline: "*John Kasich 'very likely' to run*

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<sup>2</sup> 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 [https://www.cleveland.com/open/2015/04/ohio\\_gov\\_john\\_kasich\\_begins\\_ra.html](https://www.cleveland.com/open/2015/04/ohio_gov_john_kasich_begins_ra.html)

<sup>3</sup> *Id.*

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*in 2016.*”<sup>4</sup> The article appears to be based upon an interview with Governor Kasich by Ms. Borger. A link to the video can be accessed from the article. Nowhere in that interview does Governor Kasich indicate he is running for President or expressly state that he is considering running.

To the contrary, in response to Ms. Borger’s direct question of whether Governor Kasich was going to run for President, he directly responded: “I don’t know yet.”<sup>5</sup> The article likewise does not include any quote from Governor Kasich that he was running for President or testing the waters. Rather, it merely references an undisclosed “source close to John Kasich” stating that he is “very likely” to run.<sup>6</sup> But that same source, according to the article, also cautioned that it was not definitive.<sup>7</sup> The article also relies upon a purported statement made by Governor Kasich in front of an audience at the New America Foundation’s annual conference. But the complaints provide no link to any audio or video verifying this statement, nor does the article. In addition, in another interview linked in this same article titled “*Gov. Kasich: I’m worried about America,*” Governor Kasich is asked by Ms. Borger directly whether this is a way to test the Presidential waters and he responded: “Not really.” He goes on to state that he does not know if he is going to run but that he is leaving all options on the table. Rather, he explains that his goal is to “tell the people what’s happened in Ohio.”<sup>8</sup>

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<sup>4</sup> Gloria Borger and Brian Rokus, *Source: John Kasich ‘very likely’ to run in 2016*, CNN (May 17, 2015), available at <https://www.cnn.com/2015/05/17/politics/john-kasich-election-2016-running-announcement/index.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

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Finally, the complaints rely upon a June 28, 2015 Politico article claiming that Governor Kasich was going to announce his candidacy on July 21, 2015.<sup>9</sup> But as addressed more fully in its responses to the complaints, the article attributes this information to undisclosed advisers and the Commission has never held that such generalizations can be used to conclude that an individual has formally declared their candidacy. *See* Complaint, MUR #5934; *see also* Statement of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub. MUR #5934 (a direct comment by a named advisor stating that the potential candidate “has made up his mind” did not amount to a statement of candidacy). As the declaration from Matt Carle, the former Executive Director for New Day, stated in response to MUR #6955, New Day did not inform the author that Governor Kasich would announce his candidacy on July 21 nor was it aware at that time whether Governor Kasich would declare his candidacy for President. 10.1.15 Carle Decl. ¶¶ 9-11, attached to New Day’s Response to MUR #6955.

For these reasons, the allegations that Governor Kasich was testing-the-waters through New Day and therefore that New Days’ activities violated 52 U.S.C. §§ 30116(f) and 30118(a) are without merit.

### **III. The New Day Advertisements Were Not Coordinated Communications.**

The second theme of the complaints and the Factual and Legal Analysis is that New Day impermissibly provided excessive in-kind contributions in the form of coordinated communications with Governor Kasich and/or Kasich for America. The purported coordinated communications are several television advertisements that aired on July 8, 2015, July 26, 2015,

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<sup>9</sup> Mike Allen, *John Kasich to Announce Presidential Bid July 21*, POLITICO (June 28, 2015), available at <https://www.politico.com/story/2015/06/john-kasich-2016-presidential-bid-119517>.

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and August 5, 2015. As identified in New Day's responses to both complaints, there are two major flaws with these allegations. First, Governor Kasich had not announced his Presidential bid until July 21, 2015, so the July 8 advertisement could not have been an expenditure "in cooperation, consultation or concert, with . . . *a candidate* . . . ." (52 U.S.C. § 30116(a)(7)(B)) when Governor Kasich was not yet a candidate. As discussed above, the claim that Governor Kasich became a candidate on June 28 through citation to an internet news article quoting unidentified advisors is faulty and contrary to prior decisions of the Commission.

Second, neither Governor Kasich nor Kasich for America had any role in the decisions regarding the content, intended audience, means or mode, the specific media outlet, or the time and frequency for any of these three advertisements. *See* 1.5.16 Carle Decl. at ¶ 11, attached to New Day's Response to MUR #6983. As will be demonstrated in the below responses and documentation, Governor Kasich's sole role relating to these advertisements was participating in an interview in late June 2015 prior to him becoming a candidate to answer some general questions about his opinions on important national issues that was subsequently used in the advertisements along with other "B" roll footage. 6.11.19 Carle Decl. at ¶ 7. Governor Kasich had no role in creating, producing or distributing the advertisements, nor was he involved in any decisions regarding them. *Id.* at ¶ 8. If Governor Kasich's participation in an interview constitutes "material involvement" then nearly every candidate for federal office could potentially violate the Act every time they give an interview. That certainly is not and cannot be the law. Governor Kasich's other unrelated involvement with promoting the objectives of New Day to tell the success story of Ohio is irrelevant and a red herring. It has nothing to do with his lack of involvement with the creation,



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production, or distribution of these advertisements. *See* 11 C.F.R. § 109.21(d). The complaints provide no evidence to the contrary.

Moreover, as previously stated in response to the complaints, the footage of the interview of Governor Kasich that was later used for the advertisements did not promote any candidate for President, but merely discussed issues of national importance. For this reason, too, the allegations that the advertisements were impermissible coordinated communications are without merit.

**IV. New Day Did Not Fail to Include Required Disclaimers in the Advertisements.**

The advertisements at issue were not authorized by Governor Kasich or Kasich for America. Again, Governor Kasich's sole role with these advertisements was participating in an interview where he answered questions on several issues of national importance. 6.11.19 Carle Decl. at ¶ 7. Thus, none of the advertisements required the stand by your ad disclaimer that they were approved by Kasich or Kasich for America.

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## **VI. Conclusion**

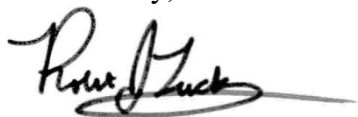
For the foregoing reasons, New Day believes the complaints should be dismissed.

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Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Tucker", with a long horizontal flourish extending to the right.

Robert J. Tucker

Enclosures

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

American Democracy Legal Fund	:	
	:	MUR# 6955 & 6983
Complainant,	:	
	:	
vs.	:	
	:	
John R. Kasich, et al.	:	
	:	
Respondents.	:	

**Declaration of Matthew J. Carle**

I, Matthew J. Carle, declare as follows:

1. I was the Executive Director of New Day For America (“New Day”) from April 26, 2015 through May 2016. I currently still serve as a board member for New Day. My business address is 105 E. Mound Street, Suite 103, Columbus, Ohio 43215. The statements in this declaration are based upon my personal knowledge.
2. Governor Kasich’s activities with New Day were to help promote the successful policies implemented in Ohio and to discuss how the nation could benefit from similar policies as well as other issues of national importance, not to determine if he should be a candidate for President.
3. Any travel for Governor Kasich paid for by New Day was to promote New Day’s objectives, not for Governor Kasich to “test-the waters.”
4. New Day did not pay for Governor Kasich’s trip in April to speak at the New Hampshire Republican Party’s First in the Nation Leadership summit.
5. New Day has no knowledge of Governor Kasich’s intention to “test-the-waters” and did not pay for any such activities.
6. New Day’s affiliation with governor Kasich prior to him declaring his candidacy for President on July 21, 2015 was to have Governor Kasich assist in promoting the interests of New Day to raise awareness about the success of the turnaround in Ohio and to discuss issues of great public importance including the need for a balanced budget, creating jobs, and reforming the tax code.

7. Governor Kasich's sole role relating to the July 8, 2015, July 26, 2015, and August 5, 2015 New Day advertisements was participating in an interview in or around late June 2015 prior to him becoming a candidate to answer some general questions about his opinions on important national issues that was subsequently used in the advertisements along with other "B" roll footage.
8. Governor Kasich had no role in creating, producing or distributing the advertisements, nor was he involved in any decisions regarding them.
9. New Day's responses to the questions posed by the FEC contained in Section V of its June 14, 2019 letter are true to the best of my knowledge, information and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

By:  Dated: June 11, 2019  
Matthew J. Carle



























