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2016 DEC -2 PM 4: 50

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT **CFLA**

MUR: 7063
DATE COMPLAINT FILED: May 19, 2016
DATE OF NOTIFICATION: May 20, 2016
LAST RESPONSE RECEIVED: June 7, 2016
DATE OF ACTIVATION: August 5, 2016

ELECTION CYCLE: 2016
EXPIRATION OF SOL: Earliest: May 2021
Latest: August 2021

COMPLAINANT:

Dr. Michael P. Ward

Ward for Senate and Chrissie Hastie, in her official capacity as treasurer

RESPONDENTS:

Arizona Grassroots Action PAC and Lisa Lisker, in her official capacity as treasurer

Unknown Respondents

RELEVANT STATUTES AND REGULATIONS:

52 U.S.C. § 30101(17), (22), (23)
52 U.S.C. § 30104(b), (c)
52 U.S.C. § 30120
11 C.F.R. § 100.22(a), (b)
11 C.F.R. § 100.26
11 C.F.R. § 100.27
11 C.F.R. § 110.11(a)(2)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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1 **I. INTRODUCTION**

2 The Complaint alleges that Arizona Grassroots Action PAC and Lisa Lisker in her
3 official capacity as treasurer ("AGA PAC") distributed a mailer in the Spring of 2016 that
4 attacked Arizona U.S. Senate Republican primary candidate Dr. Kelli Ward, but failed to include
5 a disclaimer, in violation of 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a)(2).¹ AGA PAC
6 denies paying to produce or disseminate the mailer.²

7 Because it does not appear that AGA PAC paid for or disseminated the mailer, we
8 recommend that the Commission find no reason to believe that AGA PAC violated 52 U.S.C.
9 § 30120(a) and 11 C.F.R. § 110.11(a)(2) by failing to include a proper disclaimer on the mailer,
10 or 52 U.S.C. § 30104(b)(4) by failing to report independent expenditures related to the mailer.
11 We also recommend, however, that the Commission find reason to believe Unknown
12 Respondents violated 52 U.S.C. § 30120(a) and 11 C.F.R § 110.11(a)(2) by failing to include a
13 proper disclaimer on the mailer, and also violated 52 U.S.C. § 30104(b) or (c) by failing to report
14 expenditures or independent expenditures.

15 **II. FACTUAL AND LEGAL ANALYSIS**

16 **A. Background**

17 Ward was a candidate for Senate in the 2016 Arizona Republican primary election and
18 Ward for Senate and Chrissie Hastie in her official capacity as treasurer is her authorized
19 committee.³ Although Ward previously served as a member of the Arizona State Senate, she
20 resigned her State Senate seat on December 2, 2015.

¹ Compl. at 1.

² Resp. at 1.

³ The Arizona Republican Primary Election was held August 30, 2016; Ward finished in second place.

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1 AGA PAC registered with the Commission as an independent-expenditure-only political
2 committee in 2014.⁴ During 2015-2016, AGA PAC reported making independent expenditures
3 opposing Ward and supporting her opponent, John McCain, in the 2016 Arizona Republican
4 Senate primary. Various AGA PAC television advertisements opposing Ward have been posted
5 online.

6 The Complaint attaches a copy of a mailer distributed in Arizona in early 2016. The
7 mailer does not contain a disclaimer of any kind. The return address lists only a U.S. Post Office
8 Box number and a U.S.P.S. Standard Bulk Mail Permit number. The mailer contains multiple
9 references to Ward, including her name and picture. The first page states, "ISLAMIC
10 TERRORISTS are on the Attack and Plotting Their Next Target...And our law enforcement is
11 struggling to stay ahead of the threat...Arizona needs leaders who will fight to keep us
12 safe...Kelli Ward has NOT been that leader."⁵ The second page includes an image of Ward,
13 over which read the words, "Kelli Ward's Record on National Security is Dangerous and Weak.
14 The phrase "Kelli Ward...Bad Judgment. Dangerous Record" appears on the bottom of the
15 second and third pages of the mailer.⁶ The mailer also contains text criticizing Ward's purported
16 positions on funding U.S. military efforts to fight ISIS and her purported opposition to Arizona
17 law enforcement officers working with intelligence agencies. The last page of the mailer
18 includes an instruction to "Write to Kelli Ward and tell her to get serious and support funding
19 our troops."⁷

⁴ See Arizona Grassroots Action PAC Statement of Organization (Feb. 28, 2014).

⁵ Compl. at Exh. 1. (emphasis in original).

⁶ *Id.*

⁷ *Id.*

1 Complainant also attaches screen shots of an AGA PAC television commercial
2 containing images and text that had been posted on YouTube.⁸ Based on the similarities between
3 the mailer and the AGA PAC advertisement, Complainant alleges that AGA PAC distributed the
4 mailer. AGA PAC denies paying to produce or disseminate the mailer.⁹

5 **B. Analysis**

6 **1. Disclaimer Violations**

7 The Act and Commission regulations require disclaimers whenever any person makes a
8 disbursement for the purpose of financing public communications that expressly advocates the
9 election or defeat of a clearly identified candidate.¹⁰ A public communication authorized and
10 paid for by a candidate, an authorized committee of a candidate, or an agent of either, must
11 clearly state that the communication was paid for by the authorized political committee.¹¹ A
12 public communication authorized by a candidate, an authorized committee of a candidate, or an
13 agent of either but paid for by another person, must clearly state that the communication was
14 paid for by such person but authorized by the political committee.¹² A public communication
15 not authorized by a candidate, an authorized committee, or an agent of either, must clearly state
16 the name and permanent street address, telephone number, or World Wide Web address of the

⁸ *Id.* at 2.

⁹ Resp. at 1.

¹⁰ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). In addition, the Act and Commission regulations require disclaimers on all public communications by political committees, electronic mail of more than 500 substantially similar communications sent by a political committee, publicly available websites of political committees, all public communications by any person that solicit any contribution, and all electioneering communications by any person. 11 C.F.R. § 110.11(a)(1), (3), (4).

¹¹ 52 U.S.C. § 30120(b)(1).

¹² *Id.* § 30120(b)(2).

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1 person who paid for the communication and state that the communication was not authorized by
2 any candidate or candidate's committee.¹³

3 A "mass mailing," which is defined as a mailing of more than 500 pieces of mail of an
4 identical or substantially similar nature within any 30-day period, is one type of "public
5 communication."¹⁴ Given that the mailer was distributed using a U.S.P.S. Standard Bulk Mail
6 Permit, there is a reasonable basis to infer that more than 500 copies of the mailer may have been
7 distributed. If so, this volume would make the mailer a public communication that would require
8 a disclaimer if it expressly advocated the election or defeat of a clearly identified candidate.

9 In determining whether a public communication contains express advocacy, the
10 Commission analyzes the message under either 11 C.F.R. § 100.22(a), or the broader definition
11 at 11 C.F.R. § 100.22(b).¹⁵ Here, the record suggests that the mailer is a public communication
12 that expressly advocated Ward's defeat under both 11 C.F.R. § 100.22(a) and (b).

13 **a. The Mailer Contains Express Advocacy Under Section 100.22(a)**

14 A communication expressly advocates the election or defeat of a clearly identified federal
15 candidate under Section 100.22(a) if it uses phrases such as "Smith for Congress," "Bill McKay
16 in '94," or "vote Pro-Life" or "vote Pro-Choice" with a listing of clearly identified candidates
17 described as Pro-Life or Pro-Choice, among other enumerated examples, or "communications of
18 campaign slogan(s) or individual word(s), which in context can have no other reasonable
19 meaning than to urge the election or defeat of one or more clearly identified candidates such as
20 posters, bumper stickers, advertisements, etc., which say 'Nixon's the One,' 'Carter '76,'

¹³ *Id.* § 30120(b)(3).

¹⁴ 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

¹⁵ Political Committee Status, 72 Fed. Reg. at 5595, 5606 (Feb. 7, 2007) ("PC Status E&J").

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1 'Reagan/Bush,' or 'Mondale!'"¹⁶ Express advocacy also encompasses communication that
2 contains "in effect an explicit directive" to vote for or against a candidate.¹⁷ The fact that the
3 message is marginally less direct than "Vote for Smith" does not change its essential nature.¹⁸

4 Commission authorities support the conclusion that the language in the mailer attacking
5 Ward is express advocacy under both 11 C.F.R. § 100.22(a) and § 100.22(b) because it
6 effectively tells the recipient to vote against her. In MUR 5024R (Council for Responsible
7 Government/Kean) the Commission concluded that, in context, the phrase "Tell Tom Kean
8 Jr....New Jersey Needs New Jersey Leaders," constituted express advocacy under 11 C.F.R.
9 § 100.22(a) because it effectively directed readers to vote against Kean since the only way to
10 ensure that New Jersey would have New Jersey Leaders—as opposed to Kean, who the mailer
11 described as having lived in Massachusetts—was to vote against Kean.¹⁹ In that matter, the
12 Commission concluded that identifying Kean as having lived in Massachusetts and then stating
13 "New Jersey Needs New Jersey Leaders" was no different than identifying the candidate as "pro-
14 choice" or "pro-life" and then telling the reader to "vote pro-choice" or "vote pro-life."²⁰
15 See 11 C.F.R. § 100.22(a).

16 The mailer attacking Ward is also similar to language that the Commission found to be
17 express advocacy under both 11 C.F.R. § 100.22(a) and § 100.22(b) in MURs 5511/5525 (Swift

¹⁶ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. See *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) ("EA E&J").

¹⁷ See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates) ("MCFL").

¹⁸ See *MCFL*, 479 at 249.

¹⁹ MUR 5024R (Council for Responsible Government/Kean) Factual and Legal Analysis at 13-14.

²⁰ *Id.*

1 Boat Veterans). In that matter, the Commission found that language in a fundraising letter
2 stating "All of this makes it clear to us that Mr. Kerry is clearly unfit for command of the armed
3 forces of the United States!" constituted express advocacy under 11 C.F.R. § 100.22(a) because
4 it effectively directed readers to contribute funds to defeat Kerry in the upcoming presidential
5 election.²¹ See 11 C.F.R. § 100.22(a).

6 The language in the anti-Ward mailer also is similar to language the Commission found
7 to be express advocacy under both 11 C.F.R. § 100.22(a) and § 100.22(b) in MUR 5831 (Softer
8 Voices). In that matter the Commission concluded that the ad, which both praised Rick
9 Santorum and attacked the qualifications of his opponent Bob Casey, particularly his lack of
10 experience on national security issues, followed by the phrase "Can we really risk Bob Casey
11 learning on the job?," constituted express advocacy under 11 C.F.R. § 100.22(a) because it
12 effectively directed readers to vote against Casey in his race for United States Senate, since the
13 only way to ensure that voters could avoid the risk of Casey learning on the job was for him to
14 lose the election.²²

15 Similarly, the mailer attacking Ward contains express advocacy under 11 C.F.R.
16 § 100.22(a) because it uses individual words that in context can have no reasonable meaning
17 other than to urge the defeat of Ward in the upcoming primary election. At the time the mailer
18 was sent, Ward no longer held State office; she was running for the U.S. Senate. After attacking
19 Ward's qualifications and judgment, the mailer states "Arizona needs leaders who will fight to
20 keep us safe...Kelli Ward has NOT been that leader." Like the language found to be express
21 advocacy in MUR 5024R and MUR 5831, the mailer tells the potential voter what type of leader

²¹ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.24.

²² MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

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1 Arizona needs, and then states that Ward has not been that type of leader. Like MUR 5831, the
2 mailer here addressed an issue of intense national interest relating to the responsibilities of a U.S.
3 Senator. Thus, the ad is, in context, a directive to vote against Ward in the upcoming Arizona
4 Republican Senate primary.

5 **b. The Mailer Contains Express Advocacy Under Section 100.22(b)**

6 A communication expressly advocates the election or defeat of a clearly identified federal
7 candidate under Section 100.22(b) if it contains an "electoral portion" that is "unmistakable,
8 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could
9 not differ as to whether it encourages actions to elect or defeat" a clearly identified candidate. In
10 its explanation and justification for section 100.22(b), the Commission stated, "communications
11 discussing or commenting on a candidate's character, qualifications or accomplishments are
12 considered express advocacy under new section 100.22(b) if, in context, they can have no other
13 reasonable meaning than to encourage actions to elect or defeat the candidate in question."²³

14 As noted above, the language in the mailer is similar to language the Commission found
15 to be express advocacy under § 100.22(b) in MURs 5024R, 5511/5525 and 5831. In MUR
16 5024R, the Commission concluded that, in context, the brochures constituted express advocacy
17 under 11 C.F.R. § 100.22(b), because the electoral portions of the "New Jersey Needs New
18 Jersey Leaders" brochure were "unmistakable, unambiguous and suggestive of only one
19 meaning" – to vote against Tom Kean.²⁴ In MURs 5511/5525, the Commission concluded that
20 attacks on John Kerry's character, fitness for public office, and capacity to lead, including
21 phrases such as "JOHN KERRY CANNOT BE TRUSTED" and "unfit for command" were

²³ EA E&J, 60 Fed. Reg. at 35295.

²⁴ MUR 5024R (Kean) F&LA at 14-15.

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1 “unmistakable, unambiguous and suggestive of only one meaning” – and had no reasonable
2 meaning other than to encourage actions to defeat him in the upcoming election.²⁵ Similarly, in
3 MUR.5831, the Commission concluded that, in context, the ad attacking Bob Casey’s
4 qualifications and stating “Can we really risk Bob Casey learning on the job?” constituted
5 express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions were
6 “unmistakable, unambiguous and suggestive of only one meaning” – to vote against Bob
7 Casey.²⁶ The Commission again concluded that outside the context of the upcoming election,
8 these advertisements were virtually meaningless.

9 Similarly, the mailer attacking Ward contains express advocacy under 11 C.F.R.
10 § 100.22(b) because it is “unmistakable, unambiguous and suggestive of only one meaning” – to
11 vote against Ward in the upcoming election. The mailer was distributed during the middle of a
12 Senate primary campaign, and Ward was no longer an Arizona state senator. The language used
13 in the mailer directly attacks Ward’s character, qualities, and fitness as a leader by stating, “Kelli
14 Ward’s Record on National Security is Dangerous and Weak. Kelli Ward...Bad Judgment.
15 Dangerous Record.” These national security issues are relevant only in the context of Ward’s
16 candidacy for the U.S. Senate. The electoral portion of the mailer says, “Arizona needs leaders
17 who will fight to keep us safe...Kelli Ward has NOT been that leader.”²⁷ The criticism of
18 Ward’s judgment and fitness as a leader, coupled with the fact that she was running for U.S.
19 Senate, are unmistakable, unambiguous and suggestive of only one meaning – that she does not
20 possess the qualities to be a Senator and should be defeated. Outside of the context of the

²⁵ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

²⁶ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

²⁷ See Compl. at Exh. 1 (emphasis in original).

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1 upcoming election, the mailer attacking Ward's qualifications as a leader are virtually
2 meaningless. Accordingly, the mailer contains express advocacy under 100.22(b).

3 **c. Conclusion**

4 Because the mailer contains express advocacy, and it appears to be a public
5 communication, there is reason to believe that it required a disclaimer. Complainant suggests
6 that the mailer contains screenshots taken from one of AGA PAC's online television
7 commercials. AGA PAC, however, expressly denies paying to produce or disseminate the
8 mailer, and we have no information to rebut this assertion.²⁸ Because we do not have any such
9 information, we recommend that the Commission find no reason to believe that AGA PAC
10 violated the disclaimer requirements of 52 U.S.C. § 30120(a). We do, however, recommend the
11 Commission find reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a).²⁹

12 **2. Reporting violations**

13 Any person other than a political committee that makes expenditures that expressly
14 advocate the election or defeat of a federal candidate that exceed \$250 must file an independent
15 expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³⁰ Political
16 committees that make such expenditures, whether authorized or unauthorized by any candidate,
17 must also disclose these expenditures to the Commission as part of their regular reporting.³¹

²⁸ Resp. at 1.

²⁹ See e.g., MUR 6838 (Unknown Respondents); MUR 5583 (Unknown Respondents)(finding reason to believe against Unknown Respondents in cases involving written communications containing express advocacy).

³⁰ The Act defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

³¹ 52 U.S.C. § 30104(b)(4)(G), (H)(iii).

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1 Here, the available information suggests that expenditures for the mailer likely exceeded
2 \$250, and whether independent or not, they should have been disclosed to the Commission, and
3 they were not. Because we have no information to suggest that AGA PAC is responsible for the
4 mailer, we recommend that the Commission find no reason to believe that AGA PAC violated
5 52 U.S.C. § 30104(b)(4) by failing to report independent expenditures made in connection with
6 the mailer. We do, however, recommend that the Commission find reason to believe that
7 Unknown Respondents violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures
8 made in connection with the mailer.

9 III. PROPOSED DISCOVERY

10 We propose conducting a limited investigation to identify the person or persons who paid
11 for and authorized the mailer by tracing the identity of the holder of the bulk mail permit.³² We
12 also intend to investigate the cost of the mailer and dates the mailer was distributed.³³ Although
13 we will attempt to conduct the investigation informally, formal discovery may be necessary.
14 Therefore, we recommend the Commission authorize the use of compulsory process, as
15 necessary.

16 IV. RECOMMENDATIONS

- 17 (1) Find no reason to believe that Arizona Grassroots Action PAC and Lisa Lisker in
18 her official capacity as treasurer violated 52 U.S.C. § 30120(a); 11 C.F.R.
19 § 110.11(a)(2) by failing to include a disclaimer on the mailer.
20
21 (2) Find reason to believe that Unknown Respondents failed to include a proper
22 disclaimer on the mailer, in violation of 52 U.S.C. § 30120(a); 11 C.F.R.
23 § 110.11(a)(2).
24

³² The Commission authorized such an investigation under similar circumstances in MUR 6838 (Unknown Respondents) and MUR 5583 (Unknown Respondents).

³³ If the mailer cost more than \$1,000, and was sent by a group of persons, we also will seek information about this group to determine if they should have registered with the Commission as a political committee.

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- (3) Find no reason to believe that Arizona Grassroots Action PAC and Lisa Lisker in her official capacity as treasurer failed to report independent expenditures, in violation of 52 U.S.C. § 30104(b)(4).
- (4) Find reason to believe that Unknown Respondents failed to report expenditures or independent expenditures, in violation of 52 U.S.C. § 30104(b) or (c).
- (5) Authorize the use of compulsory process, as necessary;
- (6) Approve the attached Factual and Legal Analyses;
- (7) Approve the appropriate letters; and
- (8) Close the file as to Arizona Grassroots Action PAC and Lisa Lisker in her official capacity as treasurer.


Lisa J. Stevenson
Acting General Counsel

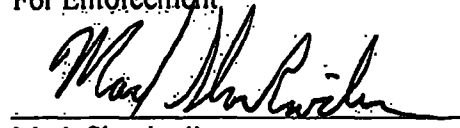
Kathleen M. Guith
Acting Associate General Counsel
For Enforcement


12.2.16

Date

BY:


Stephen Gura
Deputy Associate General Counsel
For Enforcement


Mark Shonkwiler
Assistant General Counsel


Camilla Jackson Jones
Attorney

Attachments:

2. Unknown Respondents Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENT:** Unknown Respondents

MUR: 7063

6
7 **I. INTRODUCTION**

8 The Complaint alleges that Arizona Grassroots Action PAC and Lisa Lisker in her
9 official capacity as treasurer ("AGA PAC") distributed a mailer in the Spring of 2016 that
10 attacked Arizona U.S. Senate Republican primary candidate Dr. Kelli Ward, but failed to include
11 a disclaimer, in violation of 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a)(2).¹ AGA PAC
12 denies paying to produce or disseminate the mailer.²

13 Because it does not appear that AGA PAC paid for or disseminated the mailer, the
14 Commission finds reason to believe Unknown Respondents violated 52 U.S.C. § 30120(a) and
15 11 C.F.R. § 110.11(a)(2) by failing to include a proper disclaimer on the mailer, and also violated
16 52 U.S.C. § 30104(b) or (c) by failing to report expenditures or independent expenditures.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Background**

19 Ward was a candidate for Senate in the 2016 Arizona Republican primary election and
20 Ward for Senate and Chrissie Hastie in her official capacity as treasurer is her authorized
21 committee.³ Although Ward previously served as a member of the Arizona State Senate, she
22 resigned her State Senate seat on December 2, 2015.

1. Compl. at 1.

2. Resp. at 1.

3. The Arizona Republican Primary Election was held August 30, 2016; Ward finished in second place.

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2 committee in 2014.⁴ During 2015-2016, AGA PAC reported making independent expenditures
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4 Senate primary. Various AGA PAC television advertisements opposing Ward have been posted
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17 law enforcement officers working with intelligence agencies. The last page of the mailer
18 includes an instruction to "Write to Kelli Ward and tell her to get serious and support funding
19 our troops."⁷

⁴ See Arizona Grassroots Action PAC Statement of Organization (Feb. 28, 2014).

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⁶ *Id.*

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1 Complainant also attaches screen shots of an AGA PAC television commercial
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¹³ *Id.* § 30120(b)(3).

¹⁴ 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

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8 Jr....New Jersey Needs New Jersey Leaders," constituted express advocacy under 11 C.F.R.
9 § 100.22(a) because it effectively directed readers to vote against Kean since the only way to
10 ensure that New Jersey would have New Jersey Leaders—as opposed to Kean, who the mailer
11 described as having lived in Massachusetts—was to vote against Kean.¹⁹ In that matter, the
12 Commission concluded that identifying Kean as having lived in Massachusetts and then stating
13 "New Jersey Needs New Jersey Leaders" was no different than identifying the candidate as "pro-
14 choice" or "pro-life" and then telling the reader to "vote pro-choice" or "vote pro-life."²⁰
15 See 11 C.F.R. § 100.22(a).

16 The mailer attacking Ward is also similar to language that the Commission found to be
17 express advocacy under both 11 C.F.R. § 100.22(a) and § 100.22(b) in MURs 5511/5525 (Swift

¹⁶ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. See *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) ("EA E&J").

¹⁷ See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates) ("*MCFL*").

¹⁸ See *MCFL*, 479 at 249.

¹⁹ MUR 5024R (Council for Responsible Government/Kean) Factual and Legal Analysis at 13-14.

²⁰ *Id.*

1 Boat Veterans). In that matter, the Commission found that language in a fundraising letter
2 stating "All of this makes it clear to us that Mr. Kerry is clearly unfit for command of the armed
3 forces of the United States!" constituted express advocacy under 11 C.F.R. § 100.22(a) because
4 it effectively directed readers to contribute funds to defeat Kerry in the upcoming presidential
5 election.²¹ See 11 C.F.R. § 100.22(a).

6 The language in the anti-Ward mailer also is similar to language the Commission found
7 to be express advocacy under both 11 C.F.R. § 100.22(a) and § 100.22(b) in MUR 5831 (Softer
8 Voices). In that matter the Commission concluded that the ad, which both praised Rick
9 Santorum and attacked the qualifications of his opponent Bob Casey, particularly his lack of
10 experience on national security issues, followed by the phrase "Can we really risk Bob Casey
11 learning on the job?," constituted express advocacy under 11 C.F.R. § 100.22(a) because it
12 effectively directed readers to vote against Casey in his race for United States Senate, since the
13 only way to ensure that voters could avoid the risk of Casey learning on the job was for him to
14 lose the election.²²

15 Similarly, the mailer attacking Ward contains express advocacy under 11 C.F.R.
16 § 100.22(a) because it uses individual words that in context can have no reasonable meaning
17 other than to urge the defeat of Ward in the upcoming primary election. At the time the mailer
18 was sent, Ward no longer held State office; she was running for the U.S. Senate. After attacking
19 Ward's qualifications and judgment, the mailer states "Arizona needs leaders who will fight to
20 keep us safe...Kelli Ward has NOT been that leader." Like the language found to be express
21 advocacy in MUR 5024R and MUR 5831, the mailer tells the potential voter what type of leader

²¹ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.24.

²² MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

1 Arizona needs, and then states that Ward has not been that type of leader. Like MUR 5831, the
2 mailer here addressed an issue of intense national interest relating to the responsibilities of a U.S.
3 Senator. Thus, the ad is, in context, a directive to vote against Ward in the upcoming Arizona
4 Republican Senate primary.

5 **b. The Mailer Contains Express Advocacy Under Section 100.22(b)**

6 A communication expressly advocates the election or defeat of a clearly identified federal
7 candidate under Section 100.22(b) if it contains an “electoral portion” that is “unmistakable,
8 unambiguous, and suggestive of only one meaning” and about which “reasonable minds could
9 not differ as to whether it encourages actions to elect or defeat” a clearly identified candidate. In
10 its explanation and justification for section 100.22(b), the Commission stated, “communications
11 discussing or commenting on a candidate’s character, qualifications or accomplishments are
12 considered express advocacy under new section 100.22(b) if, in context, they can have no other
13 reasonable meaning than to encourage actions to elect or defeat the candidate in question.”²³

14 As noted above, the language in the mailer is similar to language the Commission found
15 to be express advocacy under § 100.22(b) in MURs 5024R, 5511/5525 and 5831. In MUR
16 5024R, the Commission concluded that, in context, the brochures constituted express advocacy
17 under 11 C.F.R. § 100.22(b), because the electoral portions of the “New Jersey Needs New
18 Jersey Leaders” brochure were “unmistakable, unambiguous and suggestive of only one
19 meaning” – to vote against Tom Kean.²⁴ In MURs 5511/5525, the Commission concluded that
20 attacks on John Kerry’s character, fitness for public office, and capacity to lead, including
21 phrases such as “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command” were

²³ EA E&J, 60 Fed. Reg. at 35295.

²⁴ MUR 5024R (Kean) F&LA at 14-15.

1 “unmistakable, unambiguous and suggestive of only one meaning” – and had no reasonable
2 meaning other than to encourage actions to defeat him in the upcoming election.²⁵ Similarly, in
3 MUR 5831, the Commission concluded that, in context, the ad attacking Bob Casey’s
4 qualification and stating “Can we really risk Bob Casey learning on the job?” constituted express
5 advocacy under 11 C.F.R. § 100.22(b), because the electoral portions were “unmistakable,
6 unambiguous and suggestive of only one meaning” – to vote against Bob Casey.²⁶ The
7 Commission again concluded that outside the context of the upcoming election, these
8 advertisements were virtually meaningless.

9 Similarly, the mailer attacking Ward contains express advocacy under 11 C.F.R.
10 § 100.22(b) because it is “unmistakable, unambiguous and suggestive of only one meaning” – to
11 vote against Ward in the upcoming election. The mailer was distributed during the middle of a
12 Senate primary campaign, and Ward was no longer an Arizona state senator. The language used
13 in the mailer directly attacks Ward’s character, qualities, and fitness as a leader by stating, “Kelli
14 Ward’s Record on National Security is Dangerous and Weak. Kelli Ward...Bad Judgment.
15 Dangerous Record.” These national security issues are relevant only in the context of Ward’s
16 candidacy for the U.S. Senate. The electoral portion of the mailer says, “Arizona needs leaders
17 who will fight to keep us safe...Kelli Ward has NOT been that leader.”²⁷ The criticism of
18 Ward’s judgment and fitness as a leader, coupled with the fact that she was running for U.S.
19 Senate, are unmistakable, unambiguous and suggestive of only one meaning – that she does not
20 possess the qualities to be a Senator and should be defeated. Outside of the context of the

²⁵ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

²⁶ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

²⁷ See Compl. at Exh. 1 (emphasis in original).

1 upcoming election, the mailer attacking Ward's qualifications as a leader are virtually
2 meaningless. Accordingly, the mailer contains express advocacy under 100.22(b).

3 **c. Conclusion**

4 Because the mailer contains express advocacy, and it appears to be a public
5 communication, there is reason to believe that it required a disclaimer. Complainant suggests
6 that the mailer contains screenshots taken from one of AGA PAC's online television
7 commercials. AGA PAC, however, expressly denies paying to produce or disseminate the
8 mailer, and we have no information to rebut this assertion.²⁸ Accordingly, the Commission finds
9 reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a).²⁹

10 **2. Reporting violations**

11 Any person other than a political committee that makes expenditures that expressly
12 advocate the election or defeat of a federal candidate that exceed \$250 must file an independent
13 expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³⁰ Political
14 committees that make such expenditures, whether authorized or unauthorized by any candidate,
15 must also disclose these expenditures to the Commission as part of their regular reporting.³¹

16 Here, the available information suggests that expenditures for the mailer likely exceeded
17 \$250, and whether independent or not, they should have been disclosed to the Commission, and
18 they were not. Thus, the Commission finds reason to believe that Unknown Respondents

²⁸ Resp. at 1.

²⁹ See e.g., MUR 6838 (Unknown Respondents); MUR 5583 (Unknown Respondents)(finding reason to believe against Unknown Respondents in cases involving written communications containing express advocacy).

³⁰ The Act defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

³¹ 52 U.S.C. § 30104(b)(4)(G), (H)(iii).

- 1 violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures made in connection with
- 2 the mailer.

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