

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**
4

5 MUR 7416
6 DATE COMPLAINT FILED: June 21, 2018
7 DATE OF LAST RESPONSE: Not Applicable
8 DATE ACTIVATED: September 14, 2018
9

10 EXPIRATION OF SOL: May 1, 2023
11 ELECTION CYCLE: 2018

12 **COMPLAINANT:** Richard Frank
13
14 **RESPONDENTS:** Unknown Respondents
15

16 **RELEVANT STATUTES**
17 **AND REGULATIONS:** 52 U.S.C. § 30101(17), (22)
18 52 U.S.C. § 30104(b), (c), (g)
19 52 U.S.C. § 30120(a)
20 11 C.F.R. § 100.22
21 11 C.F.R. § 100.26
22 11 C.F.R. § 104.4
23 11 C.F.R. § 109.10
24 11 C.F.R. § 110.11
25

26 **INTERNAL REPORTS CHECKED:** Disclosure reports

27 **FEDERAL AGENCIES CHECKED:** None

28 **I. INTRODUCTION**

29 The Complaint, filed by the Campaign Manager for Bryan Maryott's principal campaign
30 committee, alleges that during or before May 2018, an unknown person disseminated an
31 unauthorized mailer in California's 49th Congressional District advocating for Maryott, a
32 Republican primary candidate.¹ The Complaint alleges that the mailers failed to include any

¹ Compl. at 1 (June 21, 2018). Maryott was one of sixteen candidates for a House seat in California's 49th District in the June 5, 2018, open primary election, and came in fourth among eight Republican candidates. Diane Harkey was the Republican candidate who received the most votes in the primary. She advanced to the general election and was defeated by Mike Levin.

1 disclaimers or otherwise identify who paid for them.² Because the mailers appear to be public
2 communications containing express advocacy, and any expenditures made in connection with the
3 mailers were not disclosed to the Commission, we recommend that the Commission find reason to
4 believe that Unknown Respondents violated 52 U.S.C. §§ 30120(a); 30104(b) or (c), and (g), and
5 investigate to determine who paid for the mailers and their cost.

6 **II. FACTUAL BACKGROUND**

7 The Complaint alleges that an unknown person disseminated mailers the Maryott
8 campaign did not authorize.³ The Maryott campaign states it learned of the mailer on May 27,
9 2018.⁴ A photocopy of one mailer was attached to the Complaint. The front of the mailer reads
10 "2018 CONGRESSIONAL VOTING GUIDE." The back of the mailer states "WHERE DO
11 LOCAL CONGRESSIONAL CANDIDATES STAND ON IMPORTANT ISSUES?" (emphasis
12 in original). Underneath are two photographs, one of Maryott and another of a primary opponent,
13 Rocky Chávez,⁵ accompanied by paragraphs in smaller type:

14 ROCKY CHAVEZ failed to vote on a statewide sanctuary policy and health
15 benefits for undocumented immigrants, and he criticized President Trump's
16 approach to immigration.

17 BRIAN MARYOTT supports Trump, has led the charge against California's
18 sanctuary law and supports enhanced border security.

19
20
21 The mailer opens up to a two-page spread (reproduced below) and repeats the statement:

22 "WHERE DO LOCAL CONGRESSIONAL CANDIDATES STAND ON IMPORTANT

² Compl. at 1.

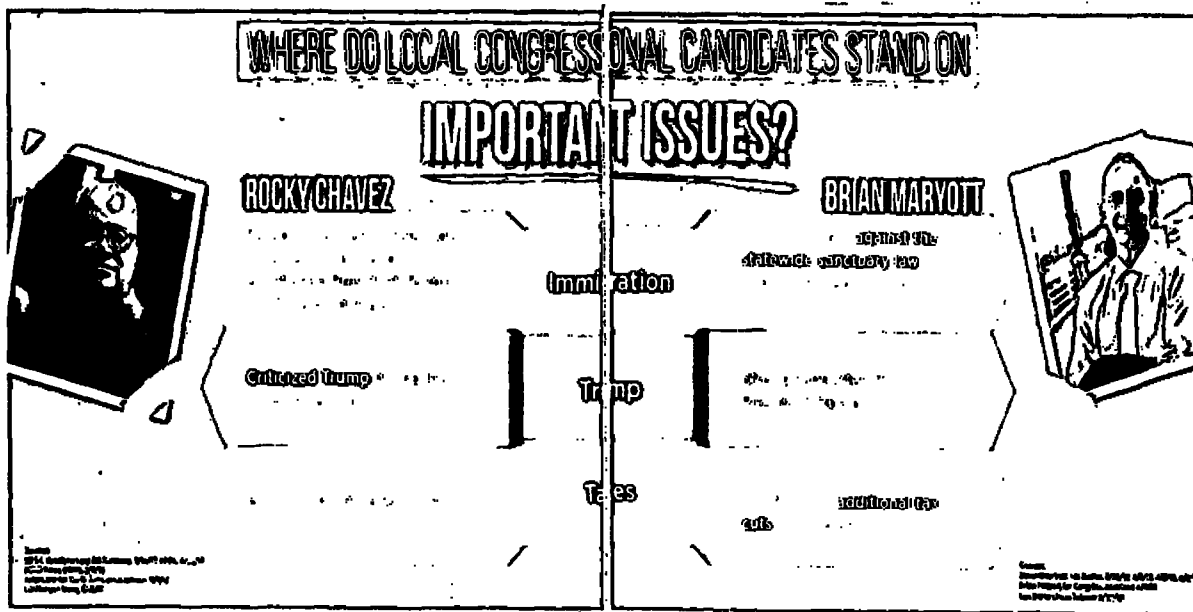
³ *Id.*

⁴ *Id.*

⁵ Rocky Chávez was another of the eight Republican candidates in the primary election. Chávez, a California State Assemblyman, came in third among the Republican candidates in the primary.

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1 ISSUES?"



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3 Notably, the mailer states Maryott “will fight for additional tax cuts in Congress.”

4 The mailer was sent via bulk mail with no return address. The postmark, set apart in a box,
5 reads: “PRSR STANDARD U.S. POSTAGE PAID SANTA CLARITA, CA PERMIT NO.

6 1594.” The designation “CA49-A” is printed directly below the postmark.⁶

7 **III. LEGAL ANALYSIS**

8 The Federal Election Campaign Act of 1971, as amended (the “Act”), requires that a
9 communication authorized and paid for by a candidate, an authorized committee of a candidate, or
10 an agent of either, must clearly state that the communication was paid for by the authorized
11 political committee.⁷ A communication authorized by a candidate, an authorized committee of a

⁶ The address label bears the imprint “ECRWSH” (indicating “Enhanced Carrier Route, Walk Sequence, High Density”), see https://pe.usps.com/qsg_archive/pdf/qsg_archive_20060108/qsg300/q240d.pdf, and features an Intelligent Mail barcode beneath the address, indicating the mail was prepared for automation prices, see <https://postalpro.usps.com/mailing/intelligent-mail-barcode>.

⁷ 52 U.S.C. § 30120(a)(1).

1 candidate, or an agent of either but paid for by another person, must clearly state that the
2 communication was paid for by such person but authorized by the political committee.⁸

3 The Act also requires that all public communications that expressly advocate the election
4 or defeat of a clearly identified candidate include a disclaimer.⁹ A "public communication"
5 includes a "mass mailing," defined as a mailing of more than 500 pieces of mail matter of an
6 identical or substantially similar nature within any 30-day period.¹⁰

7 Any person other than a political committee that makes expenditures that expressly
8 advocate the election or defeat of a federal candidate that exceed \$250 must file an independent
9 expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).¹¹ Political committees
10 that make such expenditures, whether authorized by any candidate or not, must also disclose these
11 expenditures to the Commission as part of their regular reporting.¹² Additionally, political
12 committees and other persons that make independent expenditures aggregating \$1,000 or more
13 made after the 20th day, but more than 24 hours before, the date of an election, must report the
14 expenditures by filing a 24-hour notice.¹³

⁸ 52 U.S.C. § 30120(a)(2).

⁹ 52 U.S.C. § 30120(a); *see* 11 C.F.R. § 110.11(a)(2).

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

¹¹ 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).

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

¹³ *See* 52 U.S.C. § 30104(g)(1)(A). Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. *See* 11 C.F.R. §§ 104.4(c), 109.10(d).

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1 Commission regulations specify that a communication expressly advocates the election or
2 defeat of a clearly identified federal candidate if it uses "phrases" such as "Smith for Congress,"
3 "Bill McKay in '94," or "vote Pro-Life" or "vote Pro-Choice" with a listing of clearly identified
4 candidates described as Pro-Life or Pro-Choice, among other enumerated examples, or
5 "communications of campaign slogan(s) or individual word(s), which in context can have no other
6 reasonable meaning than to urge the election or defeat of one or more clearly identified candidates
7 such as posters, bumper stickers, advertisements, etc., which say 'Nixon's the One,' 'Carter '76,'
8 'Reagan/Bush,' or 'Mondale!'"¹⁴ The Commission's regulations further provide that express
9 advocacy includes communications containing an "electoral portion" that is "unmistakable,
10 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not
11 differ as to whether it encourages actions to elect or defeat" a clearly identified candidate when
12 taken as a whole and with limited reference to external events, such as the proximity to the
13 election.¹⁵

14 In its explanation and justification for section 100.22(b), the Commission stated,
15 "communications discussing or commenting on a candidate's character, qualifications or
16 accomplishments are considered express advocacy under new section 100.22(b) if, in context, they

¹⁴ 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*, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) ("EA E&J") (explanation and justification); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL") (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates). Here, while the mailing is labeled as a "Voting Guide" and favors Maryott, unlike the content of the publication in *Massachusetts Citizens for Life, Inc.*, it does not appear to "provide, in effect, an explicit directive" to vote for the candidate. See *MCFL*, 479 U.S. at 249. Accordingly, the mailer does not appear to satisfy the Commission's regulatory definition of express advocacy at 11 C.F.R. § 100.22(a), because it does not contain a clear exhortation to vote for or against a candidate. In *MCFL*, the content of the publication found to be express advocacy positioned an exhortation to vote with photos of candidates, contained the statement, "Vote Pro-Life" and featured the photographs of thirteen candidates. *Id.* at 233-34.

¹⁵ 11 C.F.R. § 100.22(b).

1 can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in
2 question.”¹⁶ Here, the language in the mailer is similar to language the Commission found to be
3 express advocacy under section 100.22(b) in MURs 5024R, 5511/5525 and 5831. In MUR
4 5024R, the Commission concluded that, in context, the brochures constituted express advocacy
5 under 11 C.F.R. § 100.22(b), because the electoral portions of the brochure, including the phrase
6 “Tell Tom Kean Jr....New Jersey Needs New Jersey Leaders,” were “unmistakable, unambiguous
7 and suggestive of only one meaning” — to vote against Tom Kean.¹⁷ In MURs 5511/5525, the
8 Commission concluded that attacks on John Kerry’s character, fitness for public office, and
9 capacity to lead, including phrases such as “JOHN KERRY CANNOT BE TRUSTED” and “unfit
10 for command” were “unmistakable, unambiguous and suggestive of only one meaning” — and
11 had no reasonable meaning other than to encourage actions to defeat him in the upcoming
12 election.¹⁸ Similarly, in MUR 5831, the Commission concluded that, in context, the ad attacking
13 Bob Casey’s qualifications and stating “Can we really risk Bob Casey learning on the job?”
14 constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions were
15 “unmistakable, unambiguous and suggestive of only one meaning” — to vote against Bob
16 Casey.¹⁹ The Commission concluded that outside the context of the upcoming election, these
17 advertisements were virtually meaningless.²⁰

¹⁶ EA E&J, 60 Fed. Reg. at 35,295.

¹⁷ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

¹⁸ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

¹⁹ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

²⁰ *Id.*

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1 Here, the available information indicates that the mailer required a disclaimer because it is
2 a public communication containing express advocacy under 11 C.F.R. § 100.22(b).²¹ The mailer
3 is labeled as a "Congressional Voting Guide," refers to "Congressional Candidates," clearly
4 identifies two federal candidates, Maryott and Chávez, contains an image of the U.S. Capitol, and
5 states that Maryott "will fight for additional tax cuts *in Congress*." Additionally, the mailers were
6 sent in late May 2018, close to the June 5, 2018, primary election. The mailer's timing, the
7 repeated references to Congressional candidates and voting, the statement of what Maryott will do
8 *in Congress*, and the consistently positive comments about Maryott and negative comments about
9 Chávez, have an unmistakable, unambiguous meaning: vote for Maryott in the upcoming primary
10 election, not Chávez. Similarly, the statement that Maryott "will fight for additional tax cuts in
11 Congress" is meaningless unless Maryott is elected to Congress, and outside of the context of the
12 upcoming election, the endorsements of Maryott's qualifications as a leader and criticisms of
13 Chávez are likewise meaningless. Therefore, the mailers contained express advocacy, and they
14 required a disclaimer whether or not they were paid for or authorized by a political committee.²²

15 At this time, we do not know who is responsible for the mailers, how many were sent, or
16 how much they cost, but there is some information suggesting that the cost may have been

²¹ It appears at least 200 copies of the mailer were distributed because the bulk mail permit imprint indicates that the mailers were sent by Standard Mail. The U.S. Postal Service ("USPS") requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. See USPS, See <https://pe.usps.com/businessmail101?ViewName=StandardMail>. (Last visited December 18, 2018). Given the size of the district, it is likely that more than 500 pieces were mailed.

²² A communication not authorized by a candidate, an authorized committee, or an agent of either, must clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication was not authorized by any candidate or candidate's committee. 52 U.S.C. § 30120(a)(3).

1 reasonably significant.²³ In addition, the Commission has found reason to believe in other
2 unknown respondent matters involving mailings where, as here, there is information in the record
3 that indicated an investigation would reveal the responsible party.²⁴ In these matters, the existence
4 of a bulk mail permit number on the mailing indicated that an investigation would likely lead to
5 the identity of the permit holder and, ultimately, the entity that paid for the mailings.²⁵
6 Accordingly, we recommend that the Commission find reason to believe that Unknown
7 Respondents violated 52 U.S.C. § 30120(a).

8 The available information suggests that expenditures for the mailer likely exceeded \$250,
9 and whether independent or not, they should have been disclosed to the Commission, and they
10 were not. Accordingly, we also recommend that the Commission find reason to believe that
11 Unknown Respondents violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures
12 made in connection with the mailer. Also, because the mailer appears to have been distributed on
13 or around May 27, 2018,²⁶ less than 20 days before the June 5, 2018, primary election, and it
14 appeared to cost well over \$1,000, a 24-hour notice may also have been required. Accordingly,

²³ At the time of the mailing, there were 140,264 registered Republican voters in California's 49th District. See California Secretary of State *Report of Registration as of May 21, 2018, Registration by US Congressional District* at 39, available at <https://elections.cdn.sos.ca.gov/ror/15day-stwddirprim-2018/congressional.pdf>. Assuming that the mailer was sent to all of these voters, postage alone would have likely cost between \$24,125 and \$28,053, depending on the claimed destination entry price for each piece. See USPS Business Price Calculator, available at <https://dbcalc.usps.com/CalculatorSetPage.aspx>, (140,264 pieces, mailed as Enhanced Carrier Route, Walk Sequence, High Density, and prepared for automation prices). See also *USPS Price List – Notice 123* at https://pe.usps.com/text/dmm300/Notice123.htm#_c109.

²⁴ See MUR 5583 (Unknown Respondents, aka someone who loves Jesus and friends of swlJ) (Finding reason to believe and investigating the source of anonymous flyers containing express advocacy); MUR 6838 (Joseph Aossey, formerly Unknown Respondent) (Same). See also MUR 6658 (Unknown Respondent) (Finding reason to believe and investigating the source of anonymous yard signs containing express advocacy); MURs 6486/6491 (Unknown Respondents/Mark Hicks) (Finding reason to believe and investigating the source of anonymous billboards containing express advocacy).

²⁵ Conversely, the Commission has dismissed other unknown respondent matters in which the lack of information suggested that an investigation would likely not yield results. See, e.g., MUR 6135 (Unknown Respondents), MUR 5455 (Unknown in South Dakota).

²⁶ See Compl. at 1.

1 we recommend that the Commission find reason to believe that Unknown Respondents violated
2 52 U.S.C. § 30104(g).

3 **IV. PROPOSED DISCOVERY**

4 We intend to ask the U.S. Postal Service to identify the holder of the bulk mail permit, and
5 then ask the holder to provide the name of the person who was responsible for the mailers. We
6 will also determine the number and cost of the mailers. Although we intend to conduct the
7 investigation through informal means, we recommend the Commission authorize compulsory
8 process if informal means fail.

9 **V. RECOMMENDATIONS**

- 10 1. Find reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a).
11 2. Find reason to believe that Unknown Respondents violated 52 U.S.C. § 30104(b) or (c),
12 and (g).
13 3. Authorize the use of compulsory process, as necessary.
14 4. Approve the attached Factual and Legal Analysis.²⁷
15 5. Approve the appropriate letters.

16
17
18 Lisa J. Stevenson
19 Acting General Counsel
20

21
22
23 2.25.19
24 _____
25 Date

26
27
28 
29 Stephen Gura
Deputy Associate General Counsel

²⁷ The Factual and Legal Analysis will be sent to the party responsible for the mailers once its identity is ascertained in the investigation.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENT: Unknown Respondents

MUR: 7416

4
5 **I. INTRODUCTION**

6 The Complaint, filed by the Campaign Manager for Bryan Maryott's principal campaign
7 committee, alleges that during or before May 2018, an unknown person disseminated an
8 unauthorized mailer in California's 49th Congressional District advocating for Maryott, a
9 Republican primary candidate.¹ The Complaint alleges that the mailers failed to include any
10 disclaimers or otherwise identify who paid for them.² Because the mailers appear to be public
11 communications containing express advocacy, and any expenditures made in connection with the
12 mailers were not disclosed to the Commission, the Commission finds reason to believe that
13 Unknown Respondents violated 52 U.S.C. §§ 30120(a); 30104(b) or (c), and (g).

14 **II. FACTUAL BACKGROUND**

15 The Complaint alleges that an unknown person disseminated mailers the Maryott
16 campaign did not authorize.³ The Maryott campaign states it learned of the mailer on May 27,
17 2018.⁴ A photocopy of one mailer was attached to the Complaint. The front of the mailer reads
18 "2018 CONGRESSIONAL VOTING GUIDE." The back of the mailer states "WHERE DO
19 LOCAL CONGRESSIONAL CANDIDATES STAND ON IMPORTANT ISSUES?" (emphasis

¹ Compl. at 1 (June 21, 2018). Maryott was one of sixteen candidates for a House seat in California's 49th District in the June 5, 2018, open primary election, and came in fourth among eight Republican candidates. Diane Harkey was the Republican candidate who received the most votes in the primary. She advanced to the general election and was defeated by Mike Levin.

² Compl. at 1.

³ *Id.*

⁴ *Id.*

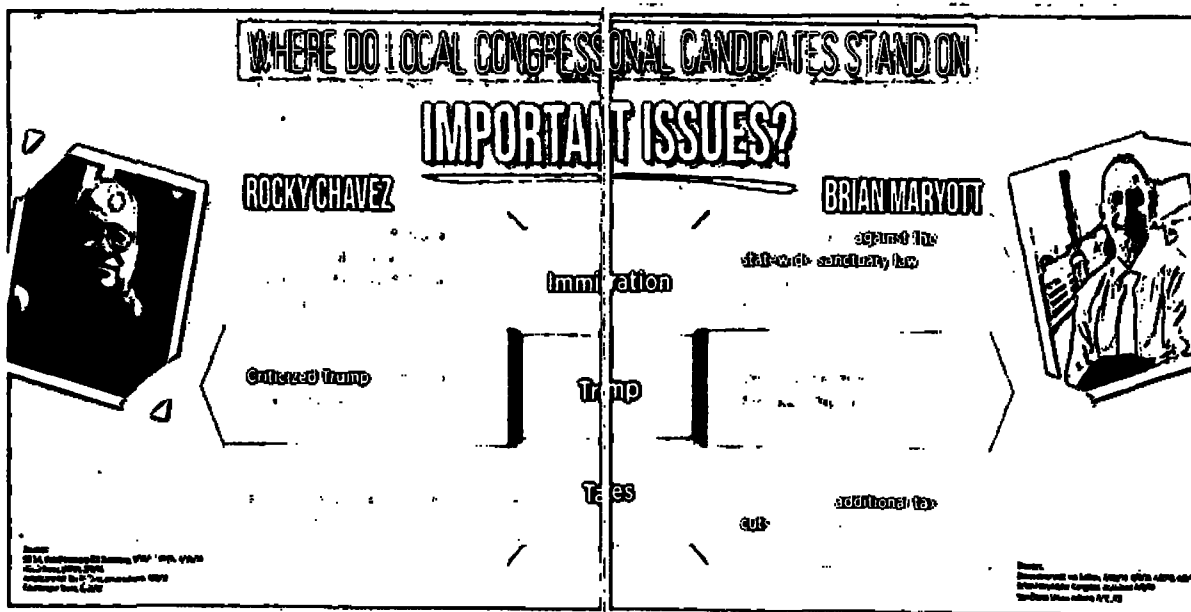
1 in original). Underneath are two photographs, one of Maryott and another of a primary
2 opponent, Rocky Chávez,⁵ accompanied by paragraphs in smaller type:

3 ROCKY CHAVEZ failed to vote on a statewide sanctuary policy and health
4 benefits for undocumented immigrants, and he criticized President Trump's
5 approach to immigration.

6
7 BRIAN MARYOTT supports Trump, has led the charge against California's
8 sanctuary law and supports enhanced border security.

9
10 The mailer opens up to a two-page spread (reproduced below) and repeats the statement:

11 "WHERE DO LOCAL CONGRESSIONAL CANDIDATES STAND ON IMPORTANT
12 ISSUES?"



13
14 Notably, the mailer states Maryott "will fight for additional tax cuts in Congress."

⁵ Rocky Chávez was another of the eight Republican candidates in the primary election. Chávez, a California State Assemblyman, came in third among the Republican candidates in the primary.

1 The mailer was sent via bulk mail with no return address. The postmark, set apart in a
2 box, reads: "PRSR STANDARD U.S. POSTAGE PAID SANTA CLARITA, CA PERMIT
3 NO. 1594." The designation "CA49-A" is printed directly below the postmark.⁶

4 **III. LEGAL ANALYSIS**

5 The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that a
6 communication authorized and paid for by a candidate, an authorized committee of a candidate,
7 or an agent of either, must clearly state that the communication was paid for by the authorized
8 political committee.⁷ A communication authorized by a candidate, an authorized committee of a
9 candidate, or an agent of either but paid for by another person, must clearly state that the
10 communication was paid for by such person but authorized by the political committee.⁸

11 The Act also requires that all public communications that expressly advocate the election
12 or defeat of a clearly identified candidate include a disclaimer.⁹ A "public communication"
13 includes a "mass mailing," defined as a mailing of more than 500 pieces of mail matter of an
14 identical or substantially similar nature within any 30-day period.¹⁰

15 Any person other than a political committee that makes expenditures that expressly
16 advocate the election or defeat of a federal candidate that exceed \$250 must file an independent

⁶ The address label bears the imprint "ECRWSH" (indicating "Enhanced Carrier Route, Walk Sequence, High Density"), *see* https://pe.usps.com/qsg_archive/pdf/qsg_archive_20060108/qsg300/q240d.pdf, and features an Intelligent Mail barcode beneath the address, indicating the mail was prepared for automation prices, *see* <https://postalpro.usps.com/mailing/intelligent-mail-barcode>.

⁷ 52 U.S.C. § 30120(a)(1).

⁸ 52 U.S.C. § 30120(a)(2).

⁹ 52 U.S.C. § 30120(a); *see* 11 C.F.R. § 110.11(a)(2).

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

1 expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).¹¹ Political
2 committees that make such expenditures, whether authorized by any candidate or not, must also
3 disclose these expenditures to the Commission as part of their regular reporting.¹² Additionally,
4 political committees and other persons that make independent expenditures aggregating \$1,000
5 or more made after the 20th day, but more than 24 hours before, the date of an election, must
6 report the expenditures by filing a 24-hour notice.¹³

7 Commission regulations specify that a communication expressly advocates the election or
8 defeat of a clearly identified federal candidate if it uses “phrases” such as “Smith for Congress,”
9 “Bill McKay in ’94,” or “vote Pro-Life” or “vote Pro-Choice” with a listing of clearly identified
10 candidates described as Pro-Life or Pro-Choice, among other enumerated examples, or
11 “communications of campaign slogan(s) or individual word(s), which in context can have no
12 other reasonable meaning than to urge the election or defeat of one or more clearly identified
13 candidates such as posters, bumper stickers, advertisements, etc., which say ‘Nixon’s the One,’
14 ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’”¹⁴ The Commission’s regulations further provide

¹¹ 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).

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

¹³ See 52 U.S.C. § 30104(g)(1)(A). Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. See 11 C.F.R. §§ 104.4(c), 109.10(d).

¹⁴ 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*, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) (“EA E&J”) (explanation and justification); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (“MCFL”) (a communication is express advocacy when “it provides, in effect, an explicit directive” to vote for the named candidates). Here, while the mailing is labeled as a “Voting Guide” and favors Maryott, unlike the content of the publication in *Massachusetts Citizens for Life, Inc.*, it does not appear to “provide, in effect, an explicit directive” to vote for the candidate. See *MCFL*, 479 U.S. at 249. Accordingly, the mailer does not appear to satisfy the

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1 that express advocacy includes communications containing an “electoral portion” that is
2 “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable
3 minds could not differ as to whether it encourages actions to elect or defeat” a clearly identified
4 candidate when taken as a whole and with limited reference to external events, such as the
5 proximity to the election.¹⁵

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7 “communications discussing or commenting on a candidate’s character, qualifications or
8 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
9 they can have no other reasonable meaning than to encourage actions to elect or defeat the
10 candidate in question.”¹⁶ Here, the language in the mailer is similar to language the Commission
11 found to be express advocacy under section 100.22(b) in MURs 5024R, 5511/5525 and 5831. In
12 MUR 5024R, the Commission concluded that, in context, the brochures constituted express
13 advocacy under 11 C.F.R. § 100.22(b), because the electoral portions of the brochure, including
14 the phrase “Tell Tom Kean Jr....New Jersey Needs New Jersey Leaders,” were “unmistakable,
15 unambiguous and suggestive of only one meaning” — to vote against Tom Kean.¹⁷ In MURs
16 5511/5525, the Commission concluded that attacks on John Kerry’s character, fitness for public
17 office, and capacity to lead, including phrases such as “JOHN KERRY CANNOT BE

Commission’s regulatory definition of express advocacy at 11 C.F.R. § 100.22(a), because it does not contain a clear exhortation to vote for or against a candidate. In *MCFL*, the content of the publication found to be express advocacy positioned an exhortation to vote with photos of candidates, contained the statement, “Vote Pro-Life” and featured the photographs of thirteen candidates. *Id.* at 233–34.

¹⁵ 11 C.F.R. § 100.22(b).
¹⁶ EA E&J, 60 Fed. Reg. at 35,295.
¹⁷ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

1 TRUSTED” and “unfit for command” were “unmistakable, unambiguous and suggestive of only
2 one meaning” — and had no reasonable meaning other than to encourage actions to defeat him in
3 the upcoming election.¹⁸ Similarly, in MUR 5831, the Commission concluded that, in context,
4 the ad attacking Bob Casey’s qualifications and stating “Can we really risk Bob Casey learning
5 on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral
6 portions were “unmistakable, unambiguous and suggestive of only one meaning” — to vote
7 against Bob Casey.¹⁹ The Commission concluded that outside the context of the upcoming
8 election, these advertisements were virtually meaningless.²⁰

9 Here, the available information indicates that the mailer required a disclaimer because it
10 is a public communication containing express advocacy under 11 C.F.R. § 100.22(b).²¹ The
11 mailer is labeled as a “Congressional Voting Guide,” refers to “Congressional Candidates,”
12 clearly identifies two federal candidates, Maryott and Chávez, contains an image of the U.S.
13 Capitol, and states that Maryott “will fight for additional tax cuts *in Congress*.” Additionally, the
14 mailers were sent in late May 2018, close to the June 5, 2018, primary election. The mailer’s
15 timing, the repeated references to Congressional candidates and voting, the statement of what
16 Maryott will do *in Congress*, and the consistently positive comments about Maryott and negative
17 comments about Chávez, have an unmistakable, unambiguous meaning: vote for Maryott in the

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¹⁹ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

²⁰ *Id.*

²¹ It appears at least 200 copies of the mailer were distributed because the bulk mail permit imprint indicates that the mailers were sent by Standard Mail. The U.S. Postal Service (“USPS”) requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. *See* USPS, *See* <https://pe.usps.com/businessmail101?ViewName=StandardMail>. (Last visited December 18, 2018). Given the size of the district, it is likely that more than 500 pieces were mailed.

1 upcoming primary election, not Chávez. Similarly, the statement that Maryott “will fight for
2 additional tax cuts in Congress” is meaningless unless Maryott is elected to Congress, and
3 outside of the context of the upcoming election, the endorsements of Maryott’s qualifications as
4 a leader and criticisms of Chávez are likewise meaningless. Therefore, the mailers contained
5 express advocacy, and they required a disclaimer whether or not they were paid for or authorized
6 by a political committee.²² Accordingly, the Commission finds reason to believe that Unknown
7 Respondents violated 52 U.S.C. § 30120(a).

8 The available information suggests that expenditures for the mailer likely exceeded
9 \$250,²³ and whether independent or not, they should have been disclosed to the Commission,
10 and they were not. Accordingly, the Commission finds reason to believe that Unknown
11 Respondents violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures made in
12 connection with the mailer. Also, because the mailer appears to have been distributed on or
13 around May 27, 2018,²⁴ less than 20 days before the June 5, 2018, primary election, and it
14 appeared to cost well over \$1,000, a 24-hour notice may also have been required. Accordingly,
15 the Commission finds reason to believe that Unknown Respondents violated 52 U.S.C.
16 § 30104(g).

²² A communication not authorized by a candidate, an authorized committee, or an agent of either, must clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication was not authorized by any candidate or candidate’s committee. 52 U.S.C. § 30120(a)(3).

²³ At the time of the mailing, there were 140,264 registered Republican voters in California’s 49th District. See California Secretary of State *Report of Registration as of May 21, 2018, Registration by US Congressional District* at 39, available at <https://elections.cdn.sos.ca.gov/ror/15day-stwddirprim-2018/congressional.pdf>. Assuming that the mailer was sent to all of these voters, postage alone would have likely cost between \$24,125 and \$28,053, depending on the claimed destination entry price for each piece. See USPS Business Price Calculator, available at <https://dbcalc.usps.com/CalculatorSetPage.aspx>, (140,264 pieces, mailed as Enhanced Carrier Route, Walk Sequence, High Density, and prepared for automation prices). See also *USPS Price List – Notice 123* at https://pe.usps.com/text/dmm300/Notice123.htm#_c109.

²⁴ See Compl. at 1.