

**FEDERAL ELECTION COMMISSION**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 7495**

DATE COMPLAINT FILED: Sept. 11, 2018  
Oct. 5, 2018

DATE OF NOTIFICATIONS: Sept. 12, 2018  
Oct. 10, 2018  
Apr. 8, 2019

LAST RESPONSE RECEIVED: May 29, 2019  
DATE ACTIVATED: July 1, 2019

EARLIEST SOL: Jan. 27, 2023

LATEST SOL: Nov. 4, 2023

ELECTION CYCLE: 2018

**COMPLAINANT:**

Michael Stoll, Executive Director, Republican Party  
of Pennsylvania

**RESPONDENTS:**

Common Defense Action Fund (f/k/a Common  
Defense/Beyond the Choir Action Fund) and  
Perry O'Brien in his official capacity as  
treasurer<sup>1</sup>  
Lancaster Stands Up  
Friends of Jess King and Juzer Rangoonwala in his  
official capacity as treasurer

**RELEVANT STATUTES**

52 U.S.C. § 30104(b)  
52 U.S.C. § 30104(g)  
52 U.S.C. § 30116(f)  
52 U.S.C. § 30118(a)  
52 U.S.C. § 30120  
11 C.F.R. § 104.4(b)  
11 C.F.R. § 109.10(d)  
11 C.F.R. § 109.21

**INTERNAL REPORTS CHECKED:**

Disclosure reports

**FEDERAL AGENCIES CHECKED:**

None

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<sup>1</sup> The committee changed its name from Common Defense/Beyond the Choir Action Fund to Common Defense Action Fund on April 11, 2019. Common Def. PAC Amended Statement of Organization (Apr. 11, 2019).

**I. INTRODUCTION**

During the 2018 election cycle, Common Defense Action Fund (“Common Defense PAC”), an independent expenditure-only political committee, and Lancaster Stands Up (“Lancaster”), a “member-led organization,” supported the Democratic candidate in Pennsylvania’s 11th Congressional District election, Jess King. The Complaint and the Supplemental Complaint allege that Common Defense PAC and Lancaster failed to properly report independent expenditures supporting King and opposing her opponent, Lloyd Smucker, and that many of their public communications did not contain the required disclaimers.<sup>2</sup> The Supplemental Complaint also alleges that Common Defense PAC and Lancaster coordinated their activities with, and thus made prohibited or excessive contributions to, Friends of Jess King and Juser Rangoonwala in his official capacity as treasurer (“King Committee”).<sup>3</sup>

Common Defense PAC, which claims to have paid for all of the communications referenced in the Complaints, acknowledges errors in how it initially reported the \$7,863 in independent expenditure expenses made prior to the Complaint but asserts that it corrected these errors well before the election.<sup>4</sup> Common Defense PAC further claims that all of its non-Facebook communications contained appropriate disclaimers and asserts that its Facebook advertisements were too small to conveniently include a disclaimer. Common Defense PAC also denies the Complaints’ coordination allegations. Lancaster, which Common Defense PAC claims did not pay for any of the communications, did not respond to the Complaints. The King Committee denies that it received any coordinated in-kind contributions.<sup>5</sup>

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<sup>2</sup> Compl. at 4-5 (Sept. 11, 2018); Supp. Compl. at 2 (Oct. 5, 2019).

<sup>3</sup> Supp. Compl. at 2-5.

<sup>4</sup> Common Def. PAC Resp. at 2 (Oct. 14, 2018) (“First Common Def. PAC Resp.”).

<sup>5</sup> King Comm. Resp. at 1 (May 29, 2019).

As set forth below, we recommend that the Commission find reason to believe that Common Defense PAC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by misreporting independent expenditures. We also recommend that the Commission find reason to believe that Common Defense PAC violated 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include compliant disclaimers on its paid Facebook communications. We recommend, however, that the Commission dismiss the allegations that Lancaster violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) or 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to report independent expenditures or by failing to include compliant disclaimers on communications. We also recommend that the Commission find no reason to believe that Common Defense PAC or Lancaster made, or the King Committee accepted, excessive or prohibited coordinated in-kind contributions in violation of 52 U.S.C. §§ 30116 or 30118. Finally, we recommend that the Commission enter into pre-probable cause conciliation with Common Defense PAC.

## **II. FACTS**

Jessica King was a 2018 congressional candidate in Pennsylvania's 11th Congressional District. The King Committee was her principal campaign committee.<sup>6</sup>

Common Defense PAC is an independent expenditure-only political committee ("IEOPC") that has been registered with the Commission since 2016.<sup>7</sup> Common Defense PAC states that it partnered with Lancaster to "conduct activities in support of" Jessica King's campaign for Pennsylvania's 11th congressional district, and to oppose her opponent Lloyd Smucker.<sup>8</sup> Common Defense PAC reported making a total of \$161,064 in independent

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<sup>6</sup> King Comm. Statement of Organization (June 28, 2017); King Comm. Amended Statement of Organization (Mar. 6, 2019).

<sup>7</sup> See Common Def. PAC Statement of Organization (June 15, 2016).

<sup>8</sup> First Common Def. PAC Resp. at 2.

expenditures supporting Jessica King and \$23,335 in independent expenditures opposing King's  
 opponent.<sup>9</sup>

Lancaster, which is not registered with the Commission, describes itself as a “member-  
 led organization” located in Lancaster County, Pennsylvania, that works on “base-building,  
 campaigning, [and] leadership development,” among other activities; Lancaster states on its  
 website that it has a “partnership” with Beyond the Choir,<sup>10</sup> a section 501(c)(4) non-profit  
 corporation that Common Defense PAC listed as a “Connected Organization, Affiliated  
 Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1  
 from 2016 through the entirety of the 2018 election cycle.<sup>11</sup> Lancaster, which did not respond to  
 the Complaint, did not report making any independent expenditures.

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<sup>9</sup> Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct 15, 2018); Common Def. PAC 2018 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019).

<sup>10</sup> *Our Staff*, LANCASTER STANDS UP, <https://lancasterstandsup.org/staff> (last visited Feb. 4, 2020). Lancaster does not appear to be registered as a corporation or LLC in Pennsylvania. *See* PA. DEP'T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/search/corpsearch> (search for “Lancaster Stands Up”) (last visited Feb. 4, 2020). Lancaster's website now includes a disclaimer indicating it is “Paid for in part by PA Stands Up State PAC,” and an entity named PA Stands Up State PAC appears to have registered with the Pennsylvania Department of State on April 1, 2019. LANCASTER STANDS UP, <https://lancasterstandsup.org> (last visited Feb. 4, 2020); PA. DEP'T OF STATE, *Committee Information: PA Stand Up State PAC*, <https://www.pavoterservices.pa.gov/ElectionInfo/CommitteeInfo.aspx?ID=16215> (last visited Feb. 4, 2020). Lancaster's website pages have had different disclaimers at different times, as discussed further below.

<sup>11</sup> *See* Common Def. PAC Amended Statement of Organization (Oct. 28, 2016) (also representing that Common Defense PAC is not separate segregated fund); Common Def. PAC Amended Statement of Organization (May 22, 2017) (same); First Common Def. PAC Resp. at 2 (representing that Beyond the Choir is a non-profit 501(c)(4) corporation formed in August 2016 in Pennsylvania); PA. DEP'T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/Search/corpsearch> (search for “beyond the choir”). In this matter, Common Defense PAC indicates that the two organizations are “allied,” sharing staff, office space, and other resources pursuant to an agreement for Common Defense PAC to reimburse Beyond the Choir for its share of the operating expenses. First Common Def. PAC Resp. at 2. According to Beyond the Choir's website, the non-profit formed Common Defense PAC in 2016. *See Mission*, BEYOND THE CHOIR, <https://beyondthechoir.org/mission> (last visited Feb. 4, 2019) (“Beyond the Choir Mission”). In April 2019, Common Defense PAC listed Common Defense Civic Engagement, a 501(c)(4) non-profit corporation, as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1. Common Def. PAC Amended Statement of Organization (April 11, 2019) (also representing that Common Defense PAC is not separate segregated fund); *see also* COMMON DEFENSE, <https://commondefense.us/> (including disclaimer at bottom stating it is “joint website of Common Defense Civic Engagement and Common Defense Action Fund” and that “Common Defense

Common Defense PAC, Beyond the Choir, and Lancaster appear to have worked closely with each other during the 2018 election cycle. Documents attached to Common Defense PAC's Response to the Supplemental Complaint appear to describe Lancaster as a "project" of both Common Defense PAC and Beyond the Choir.<sup>12</sup> Beyond the Choir states on its website that it "played a central role in supporting and sustaining" Lancaster and "provided ongoing training and significant staff time" to Lancaster; on its website, Lancaster identifies Beyond the Choir as one of its "Affiliates and Sponsors."<sup>13</sup> It is unclear whether these references to "Beyond the Choir" on Lancaster's website refer to the Beyond the Choir section 501(c)(4) non-profit corporation, or to "Common Defense/Beyond the Choir Action Fund," which was Common Defense PAC's name during the 2018 election cycle.

#### **A. Alleged Failure to Report Independent Expenditures**

The Complaint alleges that Common Defense PAC and Lancaster failed to report independent expenditures supporting King and opposing her opponent, relying on the Lancaster website, Facebook ads, printed materials containing express advocacy, phone banking efforts, as well as staff salary costs.<sup>14</sup> Common Defense PAC states that it paid and reported all of the costs of all public communications it produced together with Lancaster, "including ad placement on

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Civic Engagement is a 501(c)(4) organization") (last visited Feb. 4, 2020); Beyond the Choir Mission (stating "Common Defense incorporated as a separate organization to run all of the veterans organizing work incubated through Beyond the Choir" and linking to Common Defense joint website).

<sup>12</sup> Compare Common Def. PAC Resp., Ex. C (Nov. 2, 2018) ("Second Common Def. PAC Resp.") (presenting compliance training sign-in sheet with heading "Common Defense/Beyond the Choir Action Fund" and subheading "Project: Lancaster Stands Up"), with *id.*, Ex. D (presenting several "Confidentiality Agreements" signed by Lancaster volunteers describing Lancaster as "a fiscally sponsored project of Beyond the Choir . . . a 501c4 non-profit organization").

<sup>13</sup> See Beyond the Choir Mission; *Affiliates*, LANCASTER STANDS UP, <https://lancasterstandsup.org/affiliates> (last visited Feb. 4, 2020).

<sup>14</sup> Compl. at 5, Exs. A-M.

Facebook, costs of design, printing and distribution of all printed materials, and the compensation of any paid staff associated with its campaign activities.”<sup>15</sup>

Common Defense PAC acknowledges that it initially misreported \$7,863.14 in payments for independent expenditures as operating expenses (via disbursements to Beyond the Choir, with which it was “allied” and with which it shared some costs), but states that it made contact with its assigned Reports Analysis Division (“RAD”) analyst regarding potential amendments to past reports, and that it corrected the errors by filing amendments to its 2018 April and July Quarterly Reports.<sup>16</sup> Common Defense PAC’s amendments disclosed the following fifteen independent expenditures, with an aggregate value of \$7,863.14, which were misreported on the committee’s original reports as operating expenses.

Report	Support/ Oppose	Expend. Date	Dissem. Date	Amount	Payee	Description
Amend. 2018 Apr.	Smucker (O)	2/19/18	1/12/18	\$120.00	Facebook	Online Advertising
		3/26/18	1/12/18	\$709.24	Facebook	Online Advertising
		2/19/18	1/22/18	\$111.83	The Ups Store	Printing
	King (S)	2/19/18	1/24/18	\$826.61	Hotcards	Door Hangers
		3/26/18	1/31/18	\$300.00	Yoder, Josh	Printing
		3/26/18	2/9/18	\$1,400.00	The Gloo Factory	Buttons, Stickers
		3/26/18	3/6/18	\$403.50	Hotcards	Door Hangers
		3/26/18	3/7/18	\$225.00	Facebook	Online Advertising
2018 April Quarterly Total:				\$4,096.18		
Amend. 2018 July	Smucker (O)	4/15/18	4/1/18	\$262.81	Facebook	Online Advertising
		6/5/18	6/5/18	\$63.30	Toskr, Inc.	Texting Services
	King (S)	5/16/18	4/10/18	\$556.43	Hotcards	Door Hangers
		5/16/18	4/10/18	\$1,770.00	Signrocket.Com	Buttons, Stickers
		5/16/18	4/11/18	\$83.11	Yoder, Josh	Graphic Design
		6/5/18	6/5/18	\$253.18	Toskr, Inc.	Texting Services
		6/23/18	6/23/18	\$778.13	Hotcards	Door Hangers
2018 July Quarterly Total:				\$3,766.96		

<sup>15</sup> First Common Def. PAC Resp. at 2.

<sup>16</sup> *Id.*; Common Def. PAC Amended 2018 April Quarterly Report at 6 (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report at 6 (Oct. 9, 2018). RAD records show that Common Defense PAC spoke with their RAD analyst on July 18, 2018.

The amendments to Common Defense PAC's reports included text entries stating: "Items related to those communications [which might meet the definition of independent expenditures], previously reported on the 2018 Q1 report are now reported on line 24 and itemized on Schedule E."<sup>17</sup> Common Defense PAC's Response denies any subsequent filing errors or omissions and asserts that Common Defense PAC properly filed 48-hour reports for all of its independent expenditures once it crossed the \$10,000 threshold for independent expenditure 48-hour reporting in connection with the 2018 Pennsylvania 11th Congressional District general election.<sup>18</sup>

Common Defense PAC filed three 48-hour reports between October 5-17, 2018, disclosing independent expenditures supporting King and opposing Smucker. Then, during the 20 days prior to the election, Common Defense PAC filed four 24-hour reports disclosing additional, similar independent expenditures.<sup>19</sup> Common Defense PAC also included these independent expenditures on Schedule E of its regular disclosure reports.

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<sup>17</sup> First Common Def. PAC Resp. at 2.

<sup>18</sup> *Id.* Commission records reflect that Common Defense PAC made \$1,203.88 in independent expenditures opposing Smucker in the 2018 Republican primary election and \$5,564.65 in independent expenditures supporting King in the Democratic primary; all of the reported primary election independent expenditures were distributed before the beginning of the 24-hour reporting window. Common Defense PAC reported having made its first independent expenditures related to the 2018 general election on June 5, 2018, and reported eventually exceeding the \$10,000 aggregate threshold with a \$3,000 independent expenditure on October 3, 2018. *See* Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct. 15, 2018); Common Def. PAC 12 Day Pre-General Report, Sched. E (Oct. 25, 2018).

<sup>19</sup> *See* Common Def. PAC 48-Hour Report (Oct. 5, 2018) (reporting independent expenditures for paid Facebook ads); Common Def. PAC Amended 48-Hour Report (Oct. 12, 2018) (same); Common Def. PAC 48-Hour Report (Oct. 17, 2018) (same); Common Def. PAC 24-Hour Report (Oct. 24, 2018) (same); Common Def. PAC 24-Hour Report (Oct. 30, 2018) (same); Common Def. PAC 24-Hour Report (Nov. 2, 2018) (same); Common Def. PAC 24-Hour Report (Nov. 5, 2018) (same). There were no reported independent expenditures made during the 20-day period preceding the 2018 Pennsylvania primary when 24-hour reports would have been required.

## 1           **B.    Disclaimers**

2           During the 2018 election cycle, Common Defense PAC reported spending over \$184,000  
 3   on independent expenditures supporting King and opposing Smucker — of which \$6,458 was for  
 4   “door hangers” and \$42,182 was for paid ads on Facebook — and an additional \$7,196 on other  
 5   (*i.e.*, non-express advocacy) ads on Facebook.<sup>20</sup> The Complaints allege that some of Lancaster  
 6   and Common Defense PAC’s public communications did not contain disclaimers and reproduce  
 7   images of printed door hangers and Facebook posts as exhibits. At least one door hanger  
 8   reproduced in the Complaint’s exhibits, however, does appear to include the allegedly missing  
 9   disclaimer.<sup>21</sup> None of the Facebook ads reproduced in the Complaint and Supplemental  
 10   Complaint exhibits, including those for sponsored events, contain compliant disclaimers within  
 11   the ads’ text fields or images, although it appears that all of the Facebook ads reproduced in the  
 12   exhibits were accompanied by Facebook-generated labels indicating that the ads were  
 13   “Sponsored”; only one of these Facebook-generated labels also indicates that the ad was “paid  
 14   for by Common Defense/Beyond the Choir Action Fund.”<sup>22</sup> None of the Facebook-generated

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<sup>20</sup>       *See* Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct. 15, 2018); Common Def. PAC 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019); *see also* Common Def. PAC 2017 Mid-Year Report at 64-66 (reporting seven disbursements for issue ads on Facebook totaling \$4,941); Common Def. PAC 2018 July Quarterly Report at 51, 60 (reporting two disbursements for issue ads on Facebook totaling \$1,352); Common Def. PAC 2018 October Quarterly Report at 110, 118, 127 (reporting three disbursements for issue ads on Facebook totaling \$903).

<sup>21</sup>       *Compare* Compl., Ex. A (reproduction of a printed door hanger reading “Lets Replace Lloyd” that appears to include printed text, illegible in the reproduced image, in a box at the bottom) *with* Compl., Exs. H and I (identical photographs of a person holding a “We Like Jess” door hanger that appears to have no disclaimer on the side facing the camera).

<sup>22</sup>       *Compare* Compl., Exs. B-D, G, K (showing advertisements without payor name in platform-appended label) *with id.*, Ex. I (showing an advertisement with payor name in platform-appended label); *see also Improving Enforcement and Transparency of Ads on Facebook*, FACEBOOK (Oct. 2, 2017), <https://newsroom.fb.com/news/2017/10/improving-enforcement-and-transparency/> (announcing plans to institute policy appending labels with “paid for by” language to paid political ads); *Shining a Light on Ads With Political Content*, FACEBOOK (May 24,



1 labels reproduced in the Complaints disclose the payor's permanent street address, telephone  
 2 number, or website address, or state whether the communication is authorized by any candidate  
 3 or candidate's committee.<sup>23</sup>

4 Common Defense PAC asserts that its door hangers contained disclaimers located in a  
 5 box at the bottom of the printed materials stating "Paid for by Common Defense/Beyond the  
 6 Choir Action Fund. Not Authorized by any candidate or candidate's committee."<sup>24</sup>

7 Additionally, it asserts that its Facebook advertisements were "so small in size that a disclaimer  
 8 could not conveniently fit within them" and that the committee understood them to fall within  
 9 the exceptions in the Commission's regulations.<sup>25</sup> Common Defense PAC further asserts that,  
 10 consistent with the facts of Advisory Opinion 2010-19 (Google), all of its Facebook ads linked to  
 11 the Lancaster website, which included a disclaimer meeting the requirements of 11 C.F.R.  
 12 § 110.11 on every page.<sup>26</sup> Archived versions of Lancaster's website show that during the 2018

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2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/> (announcing implementation of label policy).

<sup>23</sup> The Facebook Ad Library shows at least one of what appears to be an ad reproduced in the Supplemental Complaint as containing a different Facebook-generated label, with an authorization statement. *Compare* Supp. Compl. at 8 (Vets for Jess ad showing label without authorization statement), *with* Facebook Ad # 738154269870447, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=US&impression\\_search\\_field=has\\_impressions\\_lifetime&id=738154269870447&view\\_all\\_page\\_id=435178106978835](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&id=738154269870447&view_all_page_id=435178106978835) (showing same apparent ad with authorization included in label) (last visited Feb. 4, 2020). Because Facebook currently allows payors to edit the information included in the label, it is unclear whether the labels on ads included in the Facebook Ad Library are static (that is, always appearing in the Library as they originally appeared to viewers of the ad), or dynamic (that is, retroactively changing when a payor subsequently edits the information to include in the label). *See How Disclaimers Work for Ads about Social Issues, Elections or Politics*, FACEBOOK, <https://www.facebook.com/business/help/198009284345835?id=288762101909005> (last visited Feb. 4, 2020), (outlining Facebook's current policy for political ad labels); *Updates to Ads about Social Issues, Elections or Politics in the US*, FACEBOOK (Aug. 28, 2019), <https://about.fb.com/news/2019/08/updates-to-ads-about-social-issues-elections-or-politics-in-the-us/> (announcing further revisions to political ad policy).

<sup>24</sup> Common Def. PAC Resp. at 3-4 (stating that text at bottom of the "Let's Replace Lloyd" door hanger reproduced as Exhibit A to the Complaint, was, in fact, a compliant disclaimer); *id.* Ex. 2 (reproducing "We Like Jess" door hanger, shown in Exhibit H of the Complaint, in manner showing that it, too, bore disclaimer).

<sup>25</sup> *Id.* at 3 (citing disclaimer exception at 11 C.F.R. § 110.11(f)(1)(i)).

<sup>26</sup> *Id.*

election cycle, certain pages bore a disclaimer in a box at the bottom of the page stating: “Paid for by Common Defense / Beyond the Choir Action Fund. Not authorized by any candidate or candidate’s committee.”<sup>27</sup> Notwithstanding the representation that “all” of Common Defense PAC’s Facebook ads linked to the Lancaster website, the advertisements reproduced in the Complaint exhibits do not all appear to link to the Lancaster website.<sup>28</sup>

### C. Coordination

The Complaint and Supplemental Complaint also allege that Common Defense PAC and Lancaster coordinated their public communications with, and thus made prohibited or excessive contributions to, the King Committee.<sup>29</sup> Specifically, the Supplemental Complaint alleges that Common Defense PAC and Lancaster coordinated with the King Committee because:

- (1) Common Defense PAC and the King Committee used a common vendor, Middle Seat Consulting LLC;
- (2) two King Committee employees (Becca Rast and Nicholas Martine) were previously associated with Lancaster;
- (3) one of these King Committee employees, Becca Rast, was married to Common Defense PAC Executive Director Jonathan Smucker; and
- (4) both Common Defense PAC and the King Committee based their campaign strategies on a book called “Beautiful Trouble,” written by Andrew Boyd, which included contributions from

<sup>27</sup> See, e.g., [https://web.archive.org/web/20171022185052/http://www.lancasterstandsup.org/working\\_groups](https://web.archive.org/web/20171022185052/http://www.lancasterstandsup.org/working_groups) (snapshot from Oct. 22, 2017); <https://web.archive.org/web/20181201071259/https://lancasterstandsup.org> (snapshot from Dec. 1, 2018); see also Common Def. PAC Resp. at 3 (stating that Common Defense PAC paid a portion of Lancaster’s website “maintenance” costs and reported those payments as operating expenditures, but denying that Common Defense PAC paid to place content on Lancaster’s website).

<sup>28</sup> See, e.g., Compl., Ex. B (linking to event page at [actionnetwork.org](http://actionnetwork.org), a third-party platform); *id.*, Ex. E (linking, via URL shortener, to form hosted on third-party platform at [https://docs.google.com/forms/d/e/1FAIpQLSete9zaRVmxHBba6yhu\\_IYOPuEBUaaZK96ouXDjltRLs0MRcQ/viewform](https://docs.google.com/forms/d/e/1FAIpQLSete9zaRVmxHBba6yhu_IYOPuEBUaaZK96ouXDjltRLs0MRcQ/viewform) (last visited Feb. 4, 2020)); *id.*, Ex. I (linking to [everyaction.com](http://everyaction.com), a third-party platform); see also *FAQs: What is the Action Network?*, THE ACTION NETWORK, <https://help.actionnetwork.org/hc/en-us/articles/203117679-What-is-the-Action-Network> (last visited Feb. 4, 2020) (describing “progressive online organizing platform”); *About Us*, EVERYACTION, <https://www.everyaction.com/about> (last visited Feb. 4, 2020).

<sup>29</sup> Supp. Compl. at 2 (Oct. 9, 2019).

Jonathan Smucker.<sup>30</sup> The Supplemental Complaint asserts that these relationships establish “a distinct possibility of deliberations” between Lancaster/Common Defense PAC and the King Committee.<sup>31</sup>

Common Defense PAC denies coordinating with the King Committee and asserts that it implemented a “strict firewall policy” in June 2017 that guides its interactions with vendors and “interpersonal interactions between people involved in Common Defense PAC and others in the close-knit community of Lancaster, PA.”<sup>32</sup> The internal policy, which was attached to the Response, prohibits contact between staff, consultants, and volunteers working on independent expenditures and a candidate’s campaign or their agents “on election-related matters,” and provides examples of what would constitute such improper contact.<sup>33</sup> The Response describes how the internal policy applies to Jonathan Smucker, Rast, and Martin, in light of Jonathan Smucker and Rast’s marriage, and Rast and Martin’s former roles as co-founders of Lancaster.<sup>34</sup> It also describes the circumstances surrounding Rast and Martin’s departures from Lancaster to work on the King campaign.<sup>35</sup> The Response also attaches copies of sign-in sheets for training on legal compliance regarding independent expenditures that Common Defense PAC states it

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<sup>30</sup> *Id.* at 3-5. The book, “Beautiful Trouble,” is described by its publisher as a collection of writings by “ten grassroots groups and dozens of seasoned artists and activists,” and includes a contribution by Jonathan Smucker. *See Beautiful Trouble: A Toolbox for Revolution*, OR BOOKS, <https://www.orbooks.com/catalog/beautiful-trouble> (last visited Feb. 4, 2020). The record includes no information indicating that Boyd worked for any of the Respondents in this matter or that he had any contact with Respondents regarding King’s election.

<sup>31</sup> Supp. Compl. at 4.

<sup>32</sup> Second Common Def. PAC Resp. at 2.

<sup>33</sup> *Id.*, Ex. A.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

provided to staff and volunteers in 2017 and 2018, as well as copies of 30 confidentiality agreements signed by volunteers and staff.<sup>36</sup>

The internal policy also includes a section applicable to vendors. Specifically, it states that Common Defense PAC would avoid using the same vendors being used by a candidate, and that vendors would be required to agree to abide by a firewall restricting communication between Common Defense PAC and the candidate in order to avoid coordination.<sup>37</sup> Common Defense PAC filed disclosure reports stating that it made 29 disbursements to Middle Seat for “digital services” between February 6, 2017 and December 28, 2018.<sup>38</sup> The aggregate value of these disbursements was \$199,168.14.<sup>39</sup> The King Committee reported making four disbursements to Middle Seat for “digital consulting” between November 21, 2017 and January 10, 2018.<sup>40</sup> The aggregate value of these disbursements was \$47,500.<sup>41</sup>

Common Defense PAC asserts that once it learned that Middle Seat had a contract with King’s campaign, it required Middle Seat to adopt an internal firewall policy and that, to further avoid the possibility of inadvertent coordination, Common Defense PAC ultimately decided not

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<sup>36</sup> *Id.*, Exs. B-E. The Confidentiality agreements note that they are for Lancaster staff and indicate that Lancaster is “a fiscally sponsored project of” Beyond the Choir. Although the forms, on their face, are unclear about who was sponsoring the training and providing the confidentiality agreement forms, Respondents assert that the signatories were staff and volunteers for Lancaster. *See supra* note 12.

<sup>37</sup> Second Common Def. PAC Resp., Exs. B-E.

<sup>38</sup> *See* Common Def. PAC 2017 Mid-Year Report at 70-72 (July 31, 2017); Common Def. PAC 2017 Year-End Report at 160-161 (Jan. 30, 2018); Common Def. PAC Amended 2018 April Quarterly Report at 44-45 (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report at 67-68 (Oct 9, 2018); Common Def. PAC 2018 October Quarterly Report at 133 (Oct 15, 2018); Common Def. PAC 2018 12-Day Pre-General Report at 21 (Oct 25, 2018); Common Def. PAC Amended 2018 30-Day Post-General Report at 63 (May 22, 2018); Common Def. PAC Amended 2018 Year-End Report at 61 (May 22, 2018).

<sup>39</sup> *Id.*

<sup>40</sup> *See* King Comm. Amended 2017 Year-End Report at 85 (Apr. 26, 2018); King Comm. Amended 2018 April Quarterly Report at 237 (Oct. 14, 2018).

<sup>41</sup> *Id.*

1 to use Middle Seat to produce any public communications in connection with the 2018 PA-11  
2 election.<sup>42</sup> The Response also specifically denies that Smucker shared any information with Rast  
3 and states that Jonathan Smucker developed Common Defense PAC's firewall policy, in part,  
4 specifically because he knew that Rast was discussing joining the King campaign.<sup>43</sup>

5 The King Committee filed a Response requesting that the Commission dismiss the  
6 allegations that the committee illegally coordinated with Common Defense PAC.<sup>44</sup> In a sworn  
7 affidavit attached to the Response, Becca Rast, King's campaign manager, states that the King  
8 Committee had a firewall policy in place that was compliant with 11 C.F.R. § 109.21(h).<sup>45</sup> Rast  
9 attests that all committee employees and volunteers were trained on the firewall policy, and that  
10 all volunteers with access to non-public information signed non-disclosure agreements.<sup>46</sup> She  
11 further attests that the firewall policy was adhered to at all times, and that no information about  
12 the campaign's plans, projects, activities, or needs was ever shared with Common Defense PAC  
13 or Lancaster.<sup>47</sup> Rast specifically denies sharing any such information with her husband,  
14 Jonathan Smucker.<sup>48</sup> Lastly, Rast attests that in her role as campaign manager, she had  
15 conversations with Middle Seat in which the company assured her that they had a compliant  
16 firewall policy in place which prohibited staff from working on projects for both King

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<sup>42</sup> Second Common Def. PAC Resp. at 4. The Response did not provide a copy of the firewall policy that Lancaster asserts Middle Seat had in place or copies of any agreements signed by Middle Seat representatives.

<sup>43</sup> *Id.*

<sup>44</sup> King Comm. Resp. at 1.

<sup>45</sup> *Id.*, Attach. 1 at 1 ("Rast Affidavit").

<sup>46</sup> Rast Affidavit at 1-2.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* Jonathan Smucker, through counsel, also specifically denies sharing any such information. Second Common Def. PAC Resp. at 4.

Committee and any IEOPC making public communications in connection with the 2018 PA-11 election.<sup>49</sup>

### III. LEGAL ANALYSIS

#### A. Independent Expenditure Reporting

An “independent expenditure” is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified federal candidate, and is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents.<sup>50</sup> Under the Federal Election Campaign Act of 1971, as amended (the “Act”), nonconnected political committees, as well as other persons, must disclose independent expenditures.<sup>51</sup> Nonconnected political committees must itemize each independent expenditure which exceeds \$200 or which, when added to previous independent expenditures made on behalf of (or in opposition to) the same candidate, aggregates over \$200 during a calendar year.<sup>52</sup>

Despite the Complaints’ inclusion of screenshots of Lancaster-“sponsored” Facebook posts, there is insufficient information to indicate that Lancaster made or failed to report any independent expenditures during the 2018 election cycle. Rather, Common Defense PAC asserts

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<sup>49</sup> Rast Affidavit at 2-3.

<sup>50</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.22(a), (b) (definition of “expressly advocating”).

<sup>51</sup> *See* 52 U.S.C. § 30104.

<sup>52</sup> 52 U.S.C. § 30104(b)(6)(B)(iii). Independent expenditures of \$200 or less must be subtotaled and reported as unitemized expenditures. In addition to a political committee’s regular reporting obligations, when a committee makes or contracts to make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours before, the date of an election, the Act requires the Committee to file an additional report describing those expenditures within 24 hours. *See* 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). Further, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more outside of that 20-day period, up to and including the 20th day, must file a report describing those expenditures within 48 hours. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

1 that it paid for the complained-of public communications made under the Lancaster name, and  
2 neither the Complaint nor the public record we have reviewed contain any information to the  
3 contrary.<sup>53</sup> Accordingly, we recommend that the Commission dismiss the allegation that  
4 Lancaster Stands Up violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by failing to report  
5 independent expenditures.

6 Common Defense PAC acknowledges that it initially failed to itemize \$7,863.14 in  
7 independent expenditures on its 2018 April and July Quarterly Reports and erroneously disclosed  
8 those expenditures as operating expenses on the reports filed with the Commission.<sup>54</sup> The  
9 available information indicates, however, that Common Defense PAC properly disclosed  
10 subsequent independent expenditures on both its regular reports and on 24- and 48-hour reports  
11 the committee filed.<sup>55</sup> Although Common Defense PAC properly amended its reports to  
12 correctly disclose these expenditures, it initially misreported the disbursements as operating  
13 expenses.<sup>56</sup> Accordingly, we recommend that the Commission find reason to believe that  
14 Common Defense Action Fund and Perry O'Brien, in his official capacity as treasurer, violated  
15 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by misreporting independent expenditures.

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<sup>53</sup> Although Lancaster did not file a response, the Complaint does not identify any payments alleged to have been made by Lancaster and there is no publicly available information which contradicts Common Defense PAC's assertion that it paid for all costs related to the public communications that it distributed under Lancaster's name.

<sup>54</sup> First Common Def. PAC Resp. at 2-3.

<sup>55</sup> *See supra* notes 18-20.

<sup>56</sup> Although the amended reports were filed after Common Defense PAC was notified of the Complaint, Common Defense PAC asserts that it became aware of the misreported independent expenditures during the summer of 2018 and reached out to its RAD analyst to discuss amending its reports. Common Defense PAC states that it "was in the process of gathering information for these amendments when it learned of the Complaint." First Common Def. PAC Resp. at 2.

**B. Disclaimers**

A disclaimer identifying who paid for a communication and, where applicable, whether a communication was authorized by a candidate is required on, among other communications, all “public communications” made by a political committee and all “public communications” made by any person that expressly advocate the election or defeat of a clearly identified candidate.<sup>57</sup> The term “public communication” includes “communications placed for a fee on another person’s Web site.”<sup>58</sup> Thus, disclaimer requirements apply to “all potential forms of advertising” placed for a fee online, including “banner advertisements, streaming video, popup advertisements, and directed search results.”<sup>59</sup> If the communication “is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.”<sup>60</sup> The disclaimer must be presented in a clear and conspicuous manner; more specifically, for any printed public communication, the disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication, in a printed box, and with a reasonable degree of color contrast between the background and the printed statement.<sup>61</sup>

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<sup>57</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1)-(2).

<sup>58</sup> 11 C.F.R. § 100.26.

<sup>59</sup> *See Internet Communications*, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

<sup>60</sup> 11 C.F.R. § 110.11(b)(3).

<sup>61</sup> *Id.* § 110.11(c).



1           Here, it appears that the door hangers submitted in the Complaints and Responses  
2     contained disclaimers in printed boxes that identified Common Defense PAC as having paid for  
3     the communications and indicated that the communications were not authorized by any candidate  
4     or candidate's committee.<sup>62</sup> However, it appears that the Facebook ads, which Common Defense  
5     PAC admits purchasing and which, as communications placed for a fee on another person's  
6     website by a political committee, are all subject to the disclaimer requirement, regardless of the  
7     content of the communications, lacked the required disclaimers.<sup>63</sup> While it does appear that  
8     some of Common Defense PAC's paid Facebook ads were accompanied by Facebook-generated  
9     labels indicating that Common Defense PAC paid for the ads, the communications did not  
10    themselves include any disclaimers and, in any event, the Facebook-generated labels did not  
11    always include the payor's name and never included additional information that the Act and  
12    Commission regulations stipulate for compliant disclaimers, such as an authorization statement  
13    and the payor's address, phone, or website.<sup>64</sup>

14           In Advisory Opinion 2017-12 (Take Back Action Fund) ("AO 2017-12"), the  
15    Commission concluded that the requester was required to include all of the disclaimer  
16    information required by 52 U.S.C. § 30120(a) on its paid Facebook Image and Video  
17    advertising.<sup>65</sup> Prior to that advisory opinion, the Commission had received requests regarding

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<sup>62</sup>     *See* Compl., Exs. A, H, I; First Common Def. PAC Resp., Ex. 2.

<sup>63</sup>     *See* Compl., Exs. B-E, G, I, K; Supp. Compl. at 11-15.

<sup>64</sup>     *See supra* notes 22-23 (detailing the possibly conflicting label information as reproduced in Exhibits to the Complaints and in the Facebook Ad Library). Most of Common Defense PAC's reported disbursements for Facebook advertisements occurred after Facebook began appending payor names to paid ad postings but before Facebook allowed users to generate their own information to include in the labels.

<sup>65</sup>     *See* AO 2017-12 (addressing Facebook "Image" and "Video" ads, the former of which appear to be the same type of ad product as the complained-of communications in this matter); *see also* Concurrence of Comm'r Weintraub at 1, AO 2017-12; Concurrence of Comm'rs Hunter, Goodman & Petersen at 1-2, AO 2017-12

whether small, character-limited internet advertisements could be exempt from the disclaimer requirements under the small items exception at 11 C.F.R. § 110.11(f)(1)(i) or the impracticable exception at 11 C.F.R. § 110.11(f)(1)(ii),<sup>66</sup> though the Commission has never approved of the application of either exception to internet ads by the required four affirmative votes. Although Common Defense PAC argues that it complied with the Act's disclaimer requirements by linking to Lancaster's website, pursuant to the guidance in Advisory Opinion 2010-19 (Google), the record indicates that most of the ads did not, in fact, link to Lancaster's website. Moreover, the Google AdWords ad product discussed in Advisory Opinion 2010-19, which included a limited number of text characters and no images or videos, is materially distinguishable from the ad products purchased by Common Defense PAC, which are, instead, very similar or identical to the Facebook ad products for which the Commission, in AO 2017-12, concluded that disclaimers are required.<sup>67</sup> Because the Commission has never determined that one of the regulatory exceptions applies to Facebook advertisements, even those created under Facebook's previous and more restrictive size- and character-count parameters,<sup>68</sup> and because the Commission's most recent guidance, which pre-dates any of Common Defense PAC's Facebook ad purchases,

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(concluding that disclaimers would be required on Facebook Image and Video ads in cases where the specific circumstances were substantially similar to those laid out in the request).

<sup>66</sup> See Advisory Op. Req. at 1, AO 2011-09 (Facebook) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Op. Req., AO 2013-18 (Revolution Messaging) (concerning application of exceptions to mobile banner ads); *see also* Advisory Op. 2010-19 (Google) (concluding that Google's proposed AdWords program, in which 95-character text-only ads that would link to the payor's own website with a full disclaimer, "under the circumstances described . . . [was] not in violation of the Act or Commission regulations," but not answering whether Google AdWords ads would qualify for the small items or impracticable exception).

<sup>67</sup> See *also* Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12,864, 12,868 (Mar. 26, 2018) (quoting comment from Facebook s representing that Facebook has expanded its advertising platform beyond what was offered at the time of its advisory opinion request in 2011, allowing users to create advertisements with larger images and more text).

<sup>68</sup> See Advisory Op. Req., AO 2011-09 (Facebook).

1 unequivocally stated that a payor “must include all of the disclaimer information specified by 52  
 2 U.S.C. § 30120(a)” on Facebook Image advertising, the paid Facebook advertisements at issue in  
 3 this matter appear to be public communications requiring disclaimers under the Act and  
 4 Commission regulations.<sup>69</sup>

5 Because the available information generally indicates that Common Defense PAC, not  
 6 Lancaster, paid for the complained-of door hangers and Facebook ads, we recommend that the  
 7 Commission dismiss the allegation that Lancaster violated 52 U.S.C. § 30120 and 11 U.S.C.  
 8 § 110.11 by failing to include proper disclaimers on public communications containing express  
 9 advocacy. Common Defense PAC appears to have paid for and included compliant disclaimers  
 10 on the complained-of door hangers but, while it appears to have paid for numerous Facebook ads  
 11 (including those under the Lancaster name), those public communications on Facebook contain  
 12 no disclaimers. Accordingly, we recommend that the Commission find reason to believe that  
 13 Common Defense Action Fund and Perry O’Brien, in his official capacity as treasurer, violated  
 14 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include proper disclaimers on its paid  
 15 Facebook communications.

### 16 C. Coordination

17 “An independent expenditure-only political committee ‘may not make contributions to  
 18 candidates or political party committees, including in-kind contributions such as coordinated  
 19 communications.’”<sup>70</sup> Under the Act, “coordinated” means made in cooperation, consultation, or  
 20 concert with, or at the request or suggestion of, a candidate or a candidate’s authorized

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<sup>69</sup> AO 2017-12.

<sup>70</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2 (quoting Advisory Op. 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011))); *see also* 52 U.S.C. §§ 30116(a), (f), 30118(a); Advisory Op. 2011-11 (Commonsense Ten) at 2-3.

committee.<sup>71</sup> The Commission's regulations provide a three-part test for determining when a communication is a "coordinated communication," which is treated as an in-kind contribution.<sup>72</sup> To be considered coordinated, the communication must: (1) be paid for by a third party; (2) satisfy one of five "content" standards listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of five "conduct" standards listed in 11 C.F.R. § 109.21(d).<sup>73</sup> All three prongs must be satisfied for a communication to be considered a "coordinated communication."<sup>74</sup>

Here, Common Defense PAC admits to paying for communications that expressly advocated for Jess King or opposed her opponent, Lloyd Smucker,<sup>75</sup> and Common Defense PAC disclosed over \$184,000 of such expenditures in reports filed with the Commission.<sup>76</sup> Thus, the payment and content prongs of the coordinated communication analysis are satisfied. As to the conduct prong, the Supplemental Complaint alleges generally that there was coordination between Common Defense PAC or Lancaster and the King Committee, and more specifically contends that (a) certain King campaign staff members previously worked for Lancaster, and (b) Common Defense PAC and the King Committee used a common vendor, Middle Seat.

Under the Commission's regulations, the conduct prong may be satisfied where the payor employed a person who had been an employee or independent contractor of the candidate during

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<sup>71</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

<sup>72</sup> 11 C.F.R. § 109.21(a)-(b).

<sup>73</sup> *Id.* The five types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>74</sup> *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

<sup>75</sup> *See* 11 C.F.R. § 109.21(c)(3) (including in content prong communications that expressly advocate, as defined at 11 C.F.R. § 100.22).

<sup>76</sup> *See supra* note 20.

1 the previous 120 days and that former employee or independent contractor conveyed to the payor  
2 material information about the campaign's plans, projects, activities or needs, or used  
3 information gained from past work with the candidate that was material to creating, producing,  
4 or distributing the communication.<sup>77</sup>

5 Here, the Complaint does not provide any information identifying specific conduct by the  
6 former Lancaster employees to suggest that they shared information with Common Defense PAC  
7 about the King campaign's plans, and we have not located any other information so suggesting.  
8 Indeed, the Complaint itself merely states that there is "a distinct possibility of deliberations"  
9 between Lancaster/Common Defense PAC and the King Committee through Rast, Martin,  
10 Smucker, and Boyd.<sup>78</sup> Additionally, although the Commission's regulation contemplates  
11 situations involving conduct by a former employee or independent contractor of the candidate,  
12 the available record here indicates that Rast and Martin did the opposite: they left an outside  
13 group to join the candidate's committee. Moreover, the former employee conduct prong does  
14 not regulate persons, like Smucker and Boyd, who are not alleged to have ever been employed  
15 by the candidate's committee. Furthermore, Respondents deny any coordination involving Rast  
16 and Martin, and state that the King Committee had written policies in place to prevent  
17 communication between campaign workers and IEOPCs. Common Defense PAC submitted a  
18 copy of an internal policy, a memorandum regarding "2018 Election Cycle — Internal Firewall  
19 Policies," in support of its argument that there was no coordination. Absent any available  
20 information about specific conduct by the King campaign's former employees that could

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<sup>77</sup> 11 C.F.R. § 109.21(d)(5).

<sup>78</sup> Supp. Compl. at 4. Boyd does not appear to have been employed by or connected with any of the Respondents and does not appear to have been involved in any way with the communications and disbursements at issue; his only connection to this matter appears to be that Jonathan Smucker contributed to his book in 2012.

1 constitute coordination, the existence and stated reliance upon this firewall policy between  
 2 Common Defense PAC's independent expenditure operations staff and staff who have contact  
 3 with campaign committees sufficiently indicates that Common Defense PAC did not coordinate  
 4 with the King Committee through "former employees" Rast, Martin, Smucker, or Boyd.

5 The coordinated communication conduct prong can also be satisfied by use of a  
 6 "common vendor." The common vendor conduct standard is satisfied if all of the following  
 7 conditions are satisfied: (1) the person paying for the communication uses a commercial  
 8 vendor<sup>79</sup> to "create, produce, or distribute" the communication; (2) that vendor, including any  
 9 owner, officer, or employee, has provided certain delineated services to the candidate identified  
 10 in the communication (or that candidate's opponent) during the 120 days preceding the  
 11 communication;<sup>80</sup> and (3) the vendor uses or conveys to the payor information about the  
 12 candidate's (or that candidate's opponent's) "plans, projects, activities, or needs," or uses or  
 13 conveys to the payor information previously used by the vendor in providing services to the  
 14 candidate (or that candidate's opponent), and that information is material to the creation,  
 15 production, or distribution of the communication.<sup>81</sup> Under a "safe harbor" provision, the  
 16 common vendor conduct standard is not satisfied if a commercial vendor has established and

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<sup>79</sup> "Commercial vendor" means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services. 11 C.F.R. § 116.1(c).

<sup>80</sup> The relevant services are: (A) development of media strategy, including the selection or purchasing of advertising slots; (B) selection of audiences; (C) polling; (D) fundraising; (E) developing the content of a public communication; (F) producing a public communication; (G) identifying voters or developing voter lists, mailing lists, or donor lists; (H) selecting personnel, contractors or subcontractors; or (I) consulting or otherwise providing political or media advice. *Id.* § 109.21(d)(4)(ii).

<sup>81</sup> *Id.* § 109.21(d)(4)(i)-(iii). The common vendor conduct standard is not satisfied if the information used was obtained from a publicly available source. *Id.* § 109.21(d)(4)(iii).

1 implemented a written firewall policy that meets certain requirements, so long as material  
2 information is not shared.<sup>82</sup>

3 Here, the Complaint alleges coordination via a common vendor by reference to reports  
4 filed with the Commission showing that Common Defense PAC made disbursements to digital  
5 media vendor Middle Seat after the King Committee made disbursements to the same vendor.  
6 The Complaint does not allege any specific facts which, if true, would indicate that Middle Seat  
7 used or conveyed to the Common Defense PAC non-public information about the campaign's  
8 "plans, projects, activities, or needs," that was material to the creation, production, or distribution  
9 of the communications paid for by Common Defense PAC. But an allegation of coordination  
10 based solely on the existence of a common vendor, without regard to that vendor's use or  
11 conveyance of information, does not satisfy the requirements of the common vendor conduct  
12 standard; the Commission has explained that this standard "does not presume coordination from  
13 the mere presence of a common vendor."<sup>83</sup>

14 Moreover, Common Defense PAC's Response included a copy of its internal policy  
15 designed to prevent inadvertent coordination through common vendors, which states that  
16 Common Defense PAC would avoid using the same vendors being used by a candidate, and that  
17 vendors would be required to agree to abide by a firewall restricting communication between

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<sup>82</sup> *Id.* § 109.21(h). A firewall policy satisfies this safe harbor if it (1) is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or that candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee; and (2) is described in a written policy distributed to all relevant employees, consultants and clients. *Id.* § 109.21(h)(1)-(2). This safe harbor does not apply if specific information indicates that, despite the firewall policy, material information about the candidate's campaign plans, projects, activities, or needs was used or conveyed to the person paying for the communication. *Id.* § 109.21(h).

<sup>83</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. at 437.

1 Common Defense PAC and the candidate in order to avoid coordination.<sup>84</sup> The King Committee  
2 also included an affidavit from Rast attesting that the King Committee had a similar internal  
3 policy in place to avoid coordinated communications.<sup>85</sup> Common Defense PAC asserts that it  
4 discussed the issue with Middle Seat and received assurances that Middle Seat maintained its  
5 own firewall which prohibited employees from performing work for both a campaign and an  
6 IEOPC supporting the candidate. Despite receiving assurances that Middle Seat had a compliant  
7 firewall in place, Common Defense PAC asserts that it went a step further to avoid the  
8 possibility of inadvertent coordination, ultimately deciding not to use Middle Seat to produce any  
9 of its independent expenditure communications in connection with the 2018 PA-11 election.

10 In light of the available record, Respondents' specific denials, and the facts indicating  
11 that Middle Seat represented to both Common Defense PAC and King Committee that it  
12 maintained a compliant firewall policy, the available information fails to give rise to a reasonable  
13 inference that the conduct prong was satisfied through the use of a Middle Seat as a common  
14 vendor.

15 Accordingly, because the available information does not support a reasonable inference  
16 that the conduct prong was satisfied, and thus does not support a reasonable inference that a  
17 violation occurred, we recommend that the Commission find no reason to believe that Common  
18 Defense Action Fund and Perry O'Brien, in his official capacity as treasurer, and Lancaster  
19 Stands Up violated 52 U.S.C. § 30118 by making prohibited in-kind contributions in the form of  
20 coordinated communications, and find no reason to believe that Friends of Jess King and Juzer

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<sup>84</sup> Second Common Def. PAC Resp., Ex. A.

<sup>85</sup> King Comm. Resp., Attach. 1.



1     Rangoonwala, in his official capacity as treasurer, violated 52 U.S.C. § 30116 by accepting such  
2     prohibited in-kind contributions.

13     **V.     RECOMMENDATIONS**

- 14             1. Find reason to believe that Common Defense Action Fund and Perry O'Brien, in his  
15             official capacity as treasurer, violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b)  
16             by misreporting independent expenditures;

2. Find reason to believe that Common Defense Action Fund and Perry O'Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include proper disclaimers on public communications in the form of paid advertisements on Facebook;
3. Dismiss the allegation that Lancaster Stands Up violated 52 U.S.C. § 30104 and 11 C.F.R. § 104.4(b) by failing to report independent expenditures;
4. Dismiss the allegation that Lancaster Stands Up violated 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include proper disclaimers on public communications containing express advocacy;
5. Find no reason to believe that Common Defense Action Fund and Perry O'Brien, in his official capacity as treasurer, and Lancaster Stands Up violated 52 U.S.C. § 30118 by making prohibited in-kind contributions to the King Committee in the form of coordinated communications;
6. Find no reason to believe that Friends of Jess King and Juzer Rangoonwala, in his official capacity as treasurer, violated 52 U.S.C. § 30116 by accepting prohibited in-kind contributions in the form of coordinated communications;
7. Approve the attached Factual and Legal Analysis;
8. Authorize pre-probable cause conciliation with Common Defense Action Fund and Perry O'Brien, in his official capacity as treasurer;
9. Approve the attached proposed conciliation agreement; and
10. Approve the appropriate letters.

Lisa J. Stevenson  
Acting General Counsel

February 20, 2020

Date

*Charles Kitcher*  
\_\_\_\_\_  
Charles Kitcher  
Acting Associate General Counsel for Enforcement

*Mark Shonkwiler*  
\_\_\_\_\_  
Mark Shonkwiler  
Assistant General Counsel

*Ray L. Wolcott*  
\_\_\_\_\_  
Ray L. Wolcott  
Attorney

MUR 7495 (Common Defense Action Fund, *et al.*)

First General Counsel's Report

Page 27 of 27

1

2 Attachments

3

1. Factual and Legal Analysis for Common Defense Action Fund

4

2. Factual and Legal Analysis for Lancaster Stands Up

5

3. Factual and Legal Analysis for Friends of Jess King

6

**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Common Defense Action Fund MUR 7495  
(f/k/a Common Defense/Beyond the Choir  
Action Fund) and Perry O'Brien in his official  
capacity as treasurer

**I. INTRODUCTION**

During the 2018 election cycle, Common Defense Action Fund ("Common Defense PAC"), an independent expenditure-only political committee, and Lancaster Stands Up ("Lancaster"), a "member-led organization," supported the Democratic candidate in Pennsylvania's 11th Congressional District election, Jess King. The Complaint and the Supplemental Complaint allege that Common Defense PAC and Lancaster failed to properly report independent expenditures supporting King and opposing her opponent, Lloyd Smucker, and that many of their public communications did not contain the required disclaimers.<sup>1</sup> The Supplemental Complaint also alleges that Common Defense PAC and Lancaster coordinated their activities with, and thus made prohibited or excessive contributions to, Friends of Jess King and Juzer Rangoonwala in his official capacity as treasurer ("King Committee").<sup>2</sup>

Common Defense PAC, which claims to have paid for all of the communications referenced in the Complaints, acknowledges errors in how it initially reported the \$7,863 in independent expenditure expenses made prior to the Complaint but asserts that it corrected these errors well before the election.<sup>3</sup> Common Defense PAC further claims that all of its non-Facebook communications contained appropriate disclaimers and asserts that its Facebook

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<sup>1</sup> Compl. at 4-5 (Sept. 11, 2018); Supp. Compl. at 2 (Oct. 5, 2019).

<sup>2</sup> Supp. Compl. at 2-5.

<sup>3</sup> Common Def. PAC Resp. at 2 (Oct. 14, 2018) ("First Common Def. PAC Resp.").

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 2 of 23

advertisements were too small to conveniently include a disclaimer. Common Defense PAC also denies the Complaints' coordination allegations.

As set forth below, the Commission finds reason to believe that Common Defense PAC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by misreporting independent expenditures. The Commission also finds reason to believe that Common Defense PAC violated 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include compliant disclaimers on its paid Facebook communications. The Commission, however, finds no reason to believe that Common Defense PAC made excessive or prohibited coordinated in-kind contributions in violation of 52 U.S.C. §§ 30116 or 30118.

## **II. FACTUAL AND LEGAL ANALYSIS**

### **A. Factual Analysis**

Jessica King was a 2018 congressional candidate in Pennsylvania's 11th Congressional District. The King Committee was her principal campaign committee.<sup>4</sup>

Common Defense PAC is an independent expenditure-only political committee ("IEOPC") that has been registered with the Commission since 2016.<sup>5</sup> Common Defense PAC states that it partnered with Lancaster to "conduct activities in support of" Jessica King's campaign for Pennsylvania's 11th congressional district, and to oppose her opponent Lloyd Smucker.<sup>6</sup> Common Defense PAC reported making a total of \$161,064 in independent

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<sup>4</sup> King Comm. Statement of Organization (June 28, 2017); King Comm. Amended Statement of Organization (Mar. 6, 2019).

<sup>5</sup> See Common Def. PAC Statement of Organization (June 15, 2016).

<sup>6</sup> First Common Def. PAC Resp. at 2.

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 3 of 23

expenditures supporting Jessica King and \$23,335 in independent expenditures opposing King's  
opponent.<sup>7</sup>

Lancaster, which is not registered with the Commission, describes itself as a “member-  
led organization” located in Lancaster County, Pennsylvania, that works on “base-building,  
campaigning, [and] leadership development,” among other activities; Lancaster states on its  
website that it has a “partnership” with Beyond the Choir,<sup>8</sup> a section 501(c)(4) non-profit  
corporation that Common Defense PAC listed as a “Connected Organization, Affiliated  
Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1  
from 2016 through the entirety of the 2018 election cycle.<sup>9</sup> Lancaster, which did not respond to  
the Complaint, did not report making any independent expenditures.

<sup>7</sup> Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct 15, 2018); Common Def. PAC 2018 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019).

<sup>8</sup> *Our Staff*, LANCASTER STANDS UP, <https://lancasterstandsup.org/staff> (last visited Feb. 4, 2020). Lancaster does not appear to be registered as a corporation or LLC in Pennsylvania. See PA. DEP'T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/search/corpsearch> (search for “Lancaster Stands Up”) (last visited Feb. 4, 2020). Lancaster's website now includes a disclaimer indicating it is “Paid for in part by PA Stands Up State PAC,” and an entity named PA Stands Up State PAC appears to have registered with the Pennsylvania Department of State on April 1, 2019. LANCASTER STANDS UP, <https://lancasterstandsup.org> (last visited Feb. 4, 2020); PA. DEP'T OF STATE, *Committee Information: PA Stand Up State PAC*, <https://www.pavoterservices.pa.gov/ElectionInfo/CommitteeInfo.aspx?ID=16215> (last visited Feb. 4, 2020). Lancaster's website pages have had different disclaimers at different times, as discussed further below.

<sup>9</sup> See Common Def. PAC Amended Statement of Organization (Oct. 28, 2016) (also representing that Common Defense PAC is not separate segregated fund); Common Def. PAC Amended Statement of Organization (May 22, 2017) (same); First Common Def. PAC Resp. at 2 (representing that Beyond the Choir is a non-profit 501(c)(4) corporation formed in August 2016 in Pennsylvania); PA. DEP'T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/Search/corpsearch> (search for “beyond the choir”). In this matter, Common Defense PAC indicates that the two organizations are “allied,” sharing staff, office space, and other resources pursuant to an agreement for Common Defense PAC to reimburse Beyond the Choir for its share of the operating expenses. First Common Def. PAC Resp. at 2. According to Beyond the Choir's website, the non-profit formed Common Defense PAC in 2016. See *Mission*, BEYOND THE CHOIR, <https://beyondthechoir.org/mission> (last visited Feb. 4, 2019) (“Beyond the Choir Mission”). In April 2019, Common Defense PAC listed Common Defense Civic Engagement, a 501(c)(4) non-profit corporation, as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1. Common Def. PAC Amended Statement of Organization (April 11, 2019) (also representing that Common Defense PAC is not separate segregated fund); see also COMMON DEFENSE, <https://commondefense.us/> (including disclaimer at bottom stating it is “joint website of Common Defense Civic Engagement and Common Defense Action Fund” and that “Common Defense

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 4 of 23

Common Defense PAC, Beyond the Choir, and Lancaster appear to have worked closely with each other during the 2018 election cycle. Documents attached to Common Defense PAC's Response to the Supplemental Complaint appear to describe Lancaster as a "project" of both Common Defense PAC and Beyond the Choir.<sup>10</sup> Beyond the Choir states on its website that it "played a central role in supporting and sustaining" Lancaster and "provided ongoing training and significant staff time" to Lancaster; on its website, Lancaster identifies Beyond the Choir as one of its "Affiliates and Sponsors."<sup>11</sup> It is unclear whether these references to "Beyond the Choir" on Lancaster's website refer to the Beyond the Choir section 501(c)(4) non-profit corporation, or to "Common Defense/Beyond the Choir Action Fund," which was Common Defense PAC's name during the 2018 election cycle.

### 1. Alleged Failure to Report Independent Expenditures

The Complaint alleges that Common Defense PAC and Lancaster failed to report independent expenditures supporting King and opposing her opponent, relying on the Lancaster website, Facebook ads, printed materials containing express advocacy, phone banking efforts, as well as staff salary costs.<sup>12</sup> Common Defense PAC states that it paid and reported all of the costs of all public communications it produced together with Lancaster, "including ad placement on

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Civic Engagement is a 501(c)(4) organization") (last visited Feb. 4, 2020); Beyond the Choir Mission (stating "Common Defense incorporated as a separate organization to run all of the veterans organizing work incubated through Beyond the Choir" and linking to Common Defense joint website).

<sup>10</sup> Compare Common Def. PAC Resp., Ex. C (Nov. 2, 2018) ("Second Common Def. PAC Resp.") (presenting compliance training sign-in sheet with heading "Common Defense/Beyond the Choir Action Fund" and subheading "Project: Lancaster Stands Up"), with *id.*, Ex. D (presenting several "Confidentiality Agreements" signed by Lancaster volunteers describing Lancaster as "a fiscally sponsored project of Beyond the Choir . . . a 501c4 non-profit organization").

<sup>11</sup> See Beyond the Choir Mission; *Affiliates*, LANCASTER STANDS UP, <https://lancasterstandsup.org/affiliates> (last visited Feb. 4, 2020).

<sup>12</sup> Compl. at 5, Exs. A-M.

Facebook, costs of design, printing and distribution of all printed materials, and the compensation of any paid staff associated with its campaign activities.”<sup>13</sup>

Common Defense PAC acknowledges that it initially misreported \$7,863.14 in payments for independent expenditures as operating expenses (via disbursements to Beyond the Choir, with which it was “allied” and with which it shared some costs), but states that it made contact with its assigned Reports Analysis Division (“RAD”) analyst regarding potential amendments to past reports, and that it corrected the errors by filing amendments to its 2018 April and July Quarterly Reports.<sup>14</sup> Common Defense PAC’s amendments disclosed the following fifteen independent expenditures, with an aggregate value of \$7,863.14, which were misreported on the committee’s original reports as operating expenses.

Report	Support/ Oppose	Expend. Date	Dissem. Date	Amount	Payee	Description
Amend. 2018 Apr.	Smucker (O)	2/19/18	1/12/18	\$120.00	Facebook	Online Advertising
		3/26/18	1/12/18	\$709.24	Facebook	Online Advertising
		2/19/18	1/22/18	\$111.83	The Ups Store	Printing
	King (S)	2/19/18	1/24/18	\$826.61	Hotcards	Door Hangers
		3/26/18	1/31/18	\$300.00	Yoder, Josh	Printing
		3/26/18	2/9/18	\$1,400.00	The Gloo Factory	Buttons, Stickers
		3/26/18	3/6/18	\$403.50	Hotcards	Door Hangers
		3/26/18	3/7/18	\$225.00	Facebook	Online Advertising
2018 April Quarterly Total:				\$4,096.18		
Amend. 2018 July	Smucker (O)	4/15/18	4/1/18	\$262.81	Facebook	Online Advertising
		6/5/18	6/5/18	\$63.30	Toskr, Inc.	Texting Services
	King (S)	5/16/18	4/10/18	\$556.43	Hotcards	Door Hangers
		5/16/18	4/10/18	\$1,770.00	Signrocket.Com	Buttons, Stickers
		5/16/18	4/11/18	\$83.11	Yoder, Josh	Graphic Design
		6/5/18	6/5/18	\$253.18	Toskr, Inc.	Texting Services
		6/23/18	6/23/18	\$778.13	Hotcards	Door Hangers
2018 July Quarterly Total:				\$3,766.96		

<sup>13</sup> First Common Def. PAC Resp. at 2.

<sup>14</sup> *Id.*; Common Def. PAC Amended 2018 April Quarterly Report at 6 (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report at 6 (Oct. 9, 2018). RAD records show that Common Defense PAC spoke with their RAD analyst on July 18, 2018.



MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 6 of 23

1           The amendments to Common Defense PAC's reports included text entries stating:  
2           "Items related to those communications [which might meet the definition of independent  
3           expenditures], previously reported on the 2018 Q1 report are now reported on line 24 and  
4           itemized on Schedule E."<sup>15</sup> Common Defense PAC's Response denies any subsequent filing  
5           errors or omissions and asserts that Common Defense PAC properly filed 48-hour reports for all  
6           of its independent expenditures once it crossed the \$10,000 threshold for independent  
7           expenditure 48-hour reporting in connection with the 2018 Pennsylvania 11th Congressional  
8           District general election.<sup>16</sup>

9           Common Defense PAC filed three 48-hour reports between October 5-17, 2018,  
10          disclosing independent expenditures supporting King and opposing Smucker. Then, during the  
11          20 days prior to the election, Common Defense PAC filed four 24-hour reports disclosing  
12          additional, similar independent expenditures.<sup>17</sup> Common Defense PAC also included these  
13          independent expenditures on Schedule E of its regular disclosure reports.

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<sup>15</sup>          First Common Def. PAC Resp. at 2.

<sup>16</sup>          *Id.* Commission records reflect that Common Defense PAC made \$1,203.88 in independent expenditures opposing Smucker in the 2018 Republican primary election and \$5,564.65 in independent expenditures supporting King in the Democratic primary; all of the reported primary election independent expenditures were distributed before the beginning of the 24-hour reporting window. Common Defense PAC reported having made its first independent expenditures related to the 2018 general election on June 5, 2018, and reported eventually exceeding the \$10,000 aggregate threshold with a \$3,000 independent expenditure on October 3, 2018. *See* Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct. 15, 2018); Common Def. PAC 12 Day Pre-General Report, Sched. E (Oct. 25, 2018).

<sup>17</sup>          *See* Common Def. PAC 48-Hour Report (Oct. 5, 2018) (reporting independent expenditures for paid Facebook ads); Common Def. PAC Amended 48-Hour Report (Oct. 12, 2018) (same); Common Def. PAC 48-Hour Report (Oct. 17, 2018) (same); Common Def. PAC 24-Hour Report (Oct. 24, 2018) (same); Common Def. PAC 24-Hour Report (Oct. 30, 2018) (same); Common Def. PAC 24-Hour Report (Nov. 2, 2018) (same); Common Def. PAC 24-Hour Report (Nov. 5, 2018) (same). There were no reported independent expenditures made during the 20-day period preceding the 2018 Pennsylvania primary when 24-hour reports would have been required.

**2. Disclaimers**

During the 2018 election cycle, Common Defense PAC reported spending over \$184,000 on independent expenditures supporting King and opposing Smucker — of which \$6,458 was for “door hangers” and \$42,182 was for paid ads on Facebook — and an additional \$7,196 on other (*i.e.*, non-express advocacy) ads on Facebook.<sup>18</sup> The Complaints allege that some of Lancaster and Common Defense PAC’s public communications did not contain disclaimers and reproduce images of printed door hangers and Facebook posts as exhibits. At least one door hanger reproduced in the Complaint’s exhibits, however, does appear to include the allegedly missing disclaimer.<sup>19</sup> None of the Facebook ads reproduced in the Complaint and Supplemental Complaint exhibits, including those for sponsored events, contain compliant disclaimers within the ads’ text fields or images, although it appears that all of the Facebook ads reproduced in the exhibits were accompanied by Facebook-generated labels indicating that the ads were “Sponsored”; only one of these Facebook-generated labels also indicates that the ad was “paid for by Common Defense/Beyond the Choir Action Fund.”<sup>20</sup> None of the Facebook-generated

<sup>18</sup> See Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct. 15, 2018); Common Def. PAC 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019); *see also* Common Def. PAC 2017 Mid-Year Report at 64-66 (reporting seven disbursements for issue ads on Facebook totaling \$4,941); Common Def. PAC 2018 July Quarterly Report at 51, 60 (reporting two disbursements for issue ads on Facebook totaling \$1,352); Common Def. PAC 2018 October Quarterly Report at 110, 118, 127 (reporting three disbursements for issue ads on Facebook totaling \$903).

<sup>19</sup> Compare Compl., Ex. A (reproduction of a printed door hanger reading “Lets Replace Lloyd” that appears to include printed text, illegible in the reproduced image, in a box at the bottom) with Compl., Exs. H and I (identical photographs of a person holding a “We Like Jess” door hanger that appears to have no disclaimer on the side facing the camera).

<sup>20</sup> Compare Compl., Exs. B-D, G, K (showing advertisements without payor name in platform-appended label) with *id.*, Ex. I (showing an advertisement with payor name in platform-appended label); *see also* *Improving Enforcement and Transparency of Ads on Facebook*, FACEBOOK (Oct. 2, 2017), <https://newsroom.fb.com/news/2017/10/improving-enforcement-and-transparency/> (announcing plans to institute policy appending labels with “paid for by” language to paid political ads); *Shining a Light on Ads With Political Content*, FACEBOOK (May 24,

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 8 of 23

labels reproduced in the Complaints disclose the payor's permanent street address, telephone number, or website address, or state whether the communication is authorized by any candidate or candidate's committee.<sup>21</sup>

Common Defense PAC asserts that its door hangers contained disclaimers located in a box at the bottom of the printed materials stating "Paid for by Common Defense/Beyond the Choir Action Fund. Not Authorized by any candidate or candidate's committee."<sup>22</sup>

Additionally, it asserts that its Facebook advertisements were "so small in size that a disclaimer could not conveniently fit within them" and that the committee understood them to fall within the exceptions in the Commission's regulations.<sup>23</sup> Common Defense PAC further asserts that, consistent with the facts of Advisory Opinion 2010-19 (Google), all of its Facebook ads linked to the Lancaster website, which included a disclaimer meeting the requirements of 11 C.F.R. § 110.11 on every page.<sup>24</sup> Archived versions of Lancaster's website show that during the 2018

2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/> (announcing implementation of label policy).

<sup>21</sup> The Facebook Ad Library shows at least one of what appears to be an ad reproduced in the Supplemental Complaint as containing a different Facebook-generated label, with an authorization statement. *Compare* Supp. Compl. at 8 (Vets for Jess ad showing label without authorization statement), *with* Facebook Ad # 738154269870447, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=US&impression\\_search\\_field=has\\_impressions\\_lifetime&id=738154269870447&view\\_all\\_page\\_id=435178106978835](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&id=738154269870447&view_all_page_id=435178106978835) (showing same apparent ad with authorization included in label) (last visited Feb. 4, 2020). Because Facebook currently allows payors to edit the information included in the label, it is unclear whether the labels on ads included in the Facebook Ad Library are static (that is, always appearing in the Library as they originally appeared to viewers of the ad), or dynamic (that is, retroactively changing when a payor subsequently edits the information to include in the label). *See How Disclaimers Work for Ads about Social Issues, Elections or Politics*, FACEBOOK, <https://www.facebook.com/business/help/198009284345835?id=288762101909005> (last visited Feb. 4, 2020), (outlining Facebook's current policy for political ad labels); *Updates to Ads about Social Issues, Elections or Politics in the US*, FACEBOOK (Aug. 28, 2019), <https://about.fb.com/news/2019/08/updates-to-ads-about-social-issues-elections-or-politics-in-the-us/> (announcing further revisions to political ad policy).

<sup>22</sup> Common Def. PAC Resp. at 3-4 (stating that text at bottom of the "Let's Replace Lloyd" door hanger reproduced as Exhibit A to the Complaint, was, in fact, a compliant disclaimer); *id.* Ex. 2 (reproducing "We Like Jess" door hanger, shown in Exhibit H of the Complaint, in manner showing that it, too, bore disclaimer).

<sup>23</sup> *Id.* at 3 (citing disclaimer exception at 11 C.F.R. § 110.11(f)(1)(i)).

<sup>24</sup> *Id.*

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 9 of 23

election cycle, certain pages bore a disclaimer in a box at the bottom of the page stating: “Paid for by Common Defense / Beyond the Choir Action Fund. Not authorized by any candidate or candidate’s committee.”<sup>25</sup> Notwithstanding the representation that “all” of Common Defense PAC’s Facebook ads linked to the Lancaster website, the advertisements reproduced in the Complaint exhibits do not all appear to link to the Lancaster website.<sup>26</sup>

### 3. Coordination

The Complaint and Supplemental Complaint also allege that Common Defense PAC coordinated its public communications with, and thus made prohibited or excessive contributions to, the King Committee.<sup>27</sup> Specifically, the Supplemental Complaint alleges that Common Defense PAC coordinated with the King Committee because: (1) Common Defense PAC and the King Committee used a common vendor, Middle Seat Consulting LLC; (2) two King Committee employees (Becca Rast and Nicholas Martine) were previously associated with Lancaster; (3) one of these King Committee employees, Becca Rast, was married to Common Defense PAC Executive Director Jonathan Smucker; and (4) both Common Defense PAC and the King Committee based their campaign strategies on a book called “Beautiful Trouble,”

<sup>25</sup> See, e.g., [https://web.archive.org/web/20171022185052/http://www.lancasterstandsup.org/working\\_groups](https://web.archive.org/web/20171022185052/http://www.lancasterstandsup.org/working_groups) (snapshot from Oct. 22, 2017); <https://web.archive.org/web/20181201071259/https://lancasterstandsup.org> (snapshot from Dec. 1, 2018); see also Common Def. PAC Resp. at 3 (stating that Common Defense PAC paid a portion of Lancaster’s website “maintenance” costs and reported those payments as operating expenditures, but denying that Common Defense PAC paid to place content on Lancaster’s website).

<sup>26</sup> See, e.g., Compl., Ex. B (linking to event page at [actionnetwork.org](http://actionnetwork.org), a third-party platform); *id.*, Ex. E (linking, via URL shortener, to form hosted on third-party platform at [https://docs.google.com/forms/d/e/1FAIpQLSete9zaRVmxHBba6yhu\\_IYOPuEBUaaZK96ouXDjltRLs0MRcQ/viewform](https://docs.google.com/forms/d/e/1FAIpQLSete9zaRVmxHBba6yhu_IYOPuEBUaaZK96ouXDjltRLs0MRcQ/viewform) (last visited Feb. 4, 2020)); *id.*, Ex. I (linking to [everyaction.com](http://everyaction.com), a third-party platform); see also *FAQs: What is the Action Network?*, THE ACTION NETWORK, <https://help.actionnetwork.org/hc/en-us/articles/203117679-What-is-the-Action-Network> (last visited Feb. 4, 2020) (describing “progressive online organizing platform”); *About Us*, EVERYACTION, <https://www.everyaction.com/about> (last visited Feb. 4, 2020).

<sup>27</sup> Supp. Compl. at 2 (Oct. 9, 2019).

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 10 of 23

written by Andrew Boyd, which included contributions from Jonathan Smucker.<sup>28</sup> The Supplemental Complaint asserts that these relationships establish “a distinct possibility of deliberations” between Common Defense PAC and the King Committee.<sup>29</sup>

Common Defense PAC denies coordinating with the King Committee and asserts that it implemented a “strict firewall policy” in June 2017 that guides its interactions with vendors and “interpersonal interactions between people involved in Common Defense PAC and others in the close-knit community of Lancaster, PA.”<sup>30</sup> The internal policy, which was attached to the Response, prohibits contact between staff, consultants, and volunteers working on independent expenditures and a candidate’s campaign or their agents “on election-related matters,” and provides examples of what would constitute such improper contact.<sup>31</sup> The Response describes how the internal policy applies to Jonathan Smucker, Rast, and Martin, in light of Jonathan Smucker and Rast’s marriage, and Rast and Martin’s former roles as co-founders of Lancaster.<sup>32</sup> It also describes the circumstances surrounding Rast and Martin’s departures from Lancaster to work on the King campaign.<sup>33</sup> The Response also attaches copies of sign-in sheets for training on legal compliance regarding independent expenditures that Common Defense PAC states it

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<sup>28</sup> *Id.* at 3-5. The book, “Beautiful Trouble,” appears to be a collection of writings by ten “grassroots organizations” and 72 individual contributors, including Jonathan Smucker. *See Beautiful Trouble: A Toolbox for Revolution, edited by Andrew Boyd and Dave Mitchell*, OR BOOKS, <https://www.orbooks.com/catalog/beautiful-trouble> (last visited Feb. 4, 2020). The record includes no information indicating that Boyd worked for any of the Respondents in this matter or that he had any contact with Respondents regarding King’s election.

<sup>29</sup> Supp. Compl. at 4.

<sup>30</sup> Second Common Def. PAC Resp. at 2.

<sup>31</sup> *Id.*, Ex. A.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 11 of 23

provided to staff and volunteers in 2017 and 2018, as well as copies of 30 confidentiality agreements signed by volunteers and staff.<sup>34</sup>

he internal policy also includes a section applicable to vendors. Specifically, it states that Common Defense PAC would avoid using the same vendors being used by a candidate, and that vendors would be required to agree to abide by a firewall restricting communication between Common Defense PAC and the candidate in order to avoid coordination.<sup>35</sup> Common Defense PAC filed disclosure reports stating that it made 29 disbursements to Middle Seat for “digital services” between February 6, 2017 and December 28, 2018.<sup>36</sup> The aggregate value of these disbursements was \$199,168.14.<sup>37</sup> The King Committee reported making four disbursements to Middle Seat for “digital consulting” between November 21, 2107 and January 10, 2018.<sup>38</sup> The aggregate value of these disbursements was \$47,500.<sup>39</sup>

Common Defense PAC asserts that once it learned that Middle Seat had a contract with King’s campaign, it required Middle Seat to adopt an internal firewall policy and that, to further avoid the possibility of inadvertent coordination, Common Defense PAC ultimately decided not

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<sup>34</sup> *Id.*, Exs. B-E. The Confidentiality agreements note that they are for Lancaster staff and indicate that Lancaster is “a fiscally sponsored project of” Beyond the Choir. Although the forms, on their face, are unclear about who was sponsoring the training and providing the confidentiality agreement forms, Respondents assert that the signatories were staff and volunteers for Lancaster. *See supra* note 10.

<sup>35</sup> Second Common Def. PAC Resp., Exs. B-E.

<sup>36</sup> *See* Common Def. PAC 2017 Mid-Year Report at 70-72 (July 31, 2017); Common Def. PAC 2017 Year-End Report at 160-161 (Jan. 30, 2018); Common Def. PAC Amended 2018 April Quarterly Report at 44-45 (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report at 67-68 (Oct 9, 2018); Common Def. PAC 2018 October Quarterly Report at 133 (Oct 15, 2018); Common Def. PAC 2018 12-Day Pre-General Report at 21 (Oct 25, 2018); Common Def. PAC Amended 2018 30-Day Post-General Report at 63 (May 22, 2018); Common Def. PAC Amended 2018 Year-End Report at 61 (May 22, 2018).

<sup>37</sup> *Id.*

<sup>38</sup> *See* King Comm. Amended 2017 Year-End Report at 85 (Apr. 26, 2018); King Comm. Amended 2018 April Quarterly Report at 237 (Oct. 14, 2108).

<sup>39</sup> *Id.*

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 12 of 23

1 to use Middle Seat to produce any public communications in connection with the 2018 PA-11  
2 election.<sup>40</sup> The Response also specifically denies that Smucker shared any information with Rast  
3 and states that Jonathan Smucker developed Common Defense PAC's firewall policy, in part,  
4 specifically because he knew that Rast was discussing joining the King campaign.<sup>41</sup>

5 The Commission has information which indicates that the King Committee also had a  
6 firewall policy in place that was compliant with 11 C.F.R. § 109.21(h). The Commission is  
7 aware that King Committee employees and volunteers were trained on the firewall policy, and  
8 that all volunteers with access to non-public information signed non-disclosure agreements. The  
9 Commission has information indicates that the King Committee firewall policy was adhered to at  
10 all times, and that no information about the campaign's plans, projects, activities, or needs was  
11 ever shared with Common Defense PAC or Lancaster. The Commission has information that  
12 Rast specifically denies sharing any such information with her husband, Jonathan Smucker, and  
13 that . she had conversations with Middle Seat in which the company assured her that they had a  
14 compliant firewall policy in place which prohibited staff from working on projects for both King  
15 Committee and any IEOPC making public communications in connection with the 2018 PA-11  
16 election.<sup>42</sup>

## 17 **B. Legal Analysis**

### 18 **1. Independent Expenditure Reporting**

19 An "independent expenditure" is an expenditure for a communication that expressly

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<sup>40</sup> Second Common Def. PAC Resp. at 4. The Response did not provide a copy of the firewall policy that Lancaster asserts Middle Seat had in place or copies of any agreements signed by Middle Seat representatives.

<sup>41</sup> *Id.*



MUR 7495

Common Defense Action Fund Factual and Legal Analysis

Page 13 of 23

1 advocates the election or defeat of a clearly identified federal candidate, and is not made in  
 2 concert or cooperation with or at the request or suggestion of such candidate, the candidate's  
 3 authorized political committee, or their agents.<sup>43</sup> Under the Federal Election Campaign Act of  
 4 1971, as amended (the "Act"), nonconnected political committees, as well as other persons, must  
 5 disclose independent expenditures.<sup>44</sup> Nonconnected political committees must itemize each  
 6 independent expenditure which exceeds \$200 or which, when added to previous independent  
 7 expenditures made on behalf of (or in opposition to) the same candidate, aggregates over \$200  
 8 during a calendar year.<sup>45</sup>

9 Common Defense PAC asserts that it paid for the complained-of public communications  
 10 made under the Lancaster name, and neither the Complaint nor the public record we have  
 11 reviewed contain any information to the contrary.<sup>46</sup> Accordingly, the Commission dismisses the  
 12 allegation that Lancaster Stands Up violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by  
 13 failing to report independent expenditures.

14 Common Defense PAC acknowledges that it initially failed to itemize \$7,863.14 in  
 15 independent expenditures on its 2018 April and July Quarterly Reports and erroneously disclosed

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<sup>43</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.22(a), (b) (definition of "expressly advocating").

<sup>44</sup> *See* 52 U.S.C. § 30104.

<sup>45</sup> 52 U.S.C. § 30104(b)(6)(B)(iii). Independent expenditures of \$200 or less must be subtotaled and reported as unitemized expenditures. In addition to a political committee's regular reporting obligations, when a committee makes or contracts to make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours before, the date of an election, the Act requires the Committee to file an additional report describing those expenditures within 24 hours. *See* 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). Further, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more outside of that 20-day period, up to and including the 20th day, must file a report describing those expenditures within 48 hours. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

<sup>46</sup> Although Lancaster did not file a response, the Complaint does not identify any payments alleged to have been made by Lancaster and there is no publicly available information which contradicts Common Defense PAC's assertion that it paid for all costs related to the public communications that it distributed under Lancaster's name.



MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 14 of 23

those expenditures as operating expenses on the reports filed with the Commission.<sup>47</sup> The available information indicates, however, that Common Defense PAC properly disclosed subsequent independent expenditures on both its regular reports and on 24- and 48-hour reports the committee filed.<sup>48</sup> Although Common Defense PAC properly amended its reports to correctly disclose these expenditures, it initially misreported the disbursements as operating expenses.<sup>49</sup> Accordingly, the Commission finds reason to believe that Common Defense Action Fund and Perry O'Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by misreporting independent expenditures.

## 2. Disclaimers

A disclaimer identifying who paid for a communication and, where applicable, whether a communication was authorized by a candidate is required on, among other communications, all “public communications” made by a political committee and all “public communications” made by any person that expressly advocate the election or defeat of a clearly identified candidate.<sup>50</sup> The term “public communication” includes “communications placed for a fee on another person’s Web site.”<sup>51</sup> Thus, disclaimer requirements apply to “all potential forms of advertising” placed for a fee online, including “banner advertisements, streaming video, popup

<sup>47</sup> First Common Def. PAC Resp. at 2-3.

<sup>48</sup> *See supra* notes 16-18.

<sup>49</sup> Although the amended reports were filed after Common Defense PAC was notified of the Complaint, Common Defense PAC asserts that it became aware of the misreported independent expenditures during the summer of 2018 and reached out to its RAD analyst to discuss amending its reports. Common Defense PAC states that it “was in the process of gathering information for these amendments when it learned of the Complaint.” First Common Def. PAC Resp. at 2.

<sup>50</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1)-(2).

<sup>51</sup> 11 C.F.R. § 100.26.

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 15 of 23

advertisements, and directed search results.”<sup>52</sup> If the communication “is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.”<sup>53</sup> The disclaimer must be presented in a clear and conspicuous manner; more specifically, for any printed public communication, the disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication, in a printed box, and with a reasonable degree of color contrast between the background and the printed statement.<sup>54</sup>

Here, it appears that the door hangers submitted in the Complaints and Responses contained disclaimers in printed boxes that identified Common Defense PAC as having paid for the communications and indicated that the communications were not authorized by any candidate or candidate’s committee.<sup>55</sup> However, it appears that the Facebook ads, which Common Defense PAC admits purchasing and which, as communications placed for a fee on another person’s website by a political committee, are all subject to the disclaimer requirement, regardless of the content of the communications, lacked the required disclaimers.<sup>56</sup> While it does appear that some of Common Defense PAC’s paid Facebook ads were accompanied by Facebook-generated labels indicating that Common Defense PAC paid for the ads, the communications did not themselves include any disclaimers and, in any event, the Facebook-generated labels did not

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<sup>52</sup> See Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

<sup>53</sup> 11 C.F.R. § 110.11(b)(3).

<sup>54</sup> *Id.* § 110.11(c).

<sup>55</sup> See Compl., Exs. A, H, I; First Common Def. PAC Resp., Ex. 2.

<sup>56</sup> See Compl., Exs. B-E, G, I, K; Supp. Compl. at 11-15.

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 16 of 23

1 always include the payor’s name and never included additional information that the Act and  
2 Commission regulations stipulate for compliant disclaimers, such as an authorization statement  
3 and the payor’s address, phone, or website.<sup>57</sup>

4 In Advisory Opinion 2017-12 (Take Back Action Fund) (“AO 2017-12”), the  
5 Commission concluded that the requester was required to include all of the disclaimer  
6 information required by 52 U.S.C. § 30120(a) on its paid Facebook Image and Video  
7 advertising.<sup>58</sup> Prior to that advisory opinion, the Commission had received requests regarding  
8 whether small, character-limited internet advertisements could be exempt from the disclaimer  
9 requirements under the small items exception at 11 C.F.R. § 110.11(f)(1)(i) or the impracticable  
10 exception at 11 C.F.R. § 110.11(f)(1)(ii),<sup>59</sup> though the Commission has never approved of the  
11 application of either exception to internet ads by the required four affirmative votes. Although  
12 Common Defense PAC argues that it complied with the Act’s disclaimer requirements by linking  
13 to Lancaster’s website, pursuant to the guidance in Advisory Opinion 2010-19 (Google), the  
14 record indicates that most of the ads did not, in fact, link to Lancaster’s website. Moreover, the

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<sup>57</sup> See *supra* notes 20-21 (detailing the possibly conflicting label information as reproduced in Exhibits to the Complaints and in the Facebook Ad Library). Most of Common Defense PAC’s reported disbursements for Facebook advertisements occurred after Facebook began appending payor names to paid ad postings but before Facebook allowed users to generate their own information to include in the labels.

<sup>58</sup> See AO 2017-12 (addressing Facebook “Image” and “Video” ads, the former of which appear to be the same type of ad product as the complained-of communications in this matter); *see also* Concurrence of Comm’r Weintraub at 1, AO 2017-12; Concurrence of Comm’rs Hunter, Goodman & Petersen at 1-2, AO 2017-12 (concluding that disclaimers would be required on Facebook Image and Video ads in cases where the specific circumstances were substantially similar to those laid out in the request).

<sup>59</sup> See Advisory Op. Req. at 1, AO 2011-09 (Facebook) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Op. Req., AO 2013-18 (Revolution Messaging) (concerning application of exceptions to mobile banner ads); *see also* Advisory Op. 2010-19 (Google) (concluding that Google’s proposed AdWords program, in which 95-character text-only ads that would link to the payor’s own website with a full disclaimer, “under the circumstances described . . . [was] not in violation of the Act or Commission regulations,” but not answering whether Google AdWords ads would qualify for the small items or impracticable exception).

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 17 of 23

1 Google AdWords ad product discussed in Advisory Opinion 2010-19, which included a limited  
2 number of text characters and no images or videos, is materially distinguishable from the ad  
3 products purchased by Common Defense PAC, which are, instead, very similar or identical to  
4 the Facebook ad products for which the Commission, in AO 2017-12, concluded that disclaimers  
5 are required.<sup>60</sup> Because the Commission has never determined that one of the regulatory  
6 exceptions applies to Facebook advertisements, even those created under Facebook's previous  
7 and more restrictive size- and character-count parameters,<sup>61</sup> and because the Commission's most  
8 recent guidance, which pre-dates any of Common Defense PAC's Facebook ad purchases,  
9 unequivocally stated that a payor "must include all of the disclaimer information specified by 52  
10 U.S.C. § 30120(a)" on Facebook Image advertising, the paid Facebook advertisements at issue in  
11 this matter appear to be public communications requiring disclaimers under the Act and  
12 Commission regulations.<sup>62</sup>

13 Common Defense PAC appears to have paid for and included compliant disclaimers on  
14 the complained-of door hangers but, while it appears to have paid for numerous Facebook ads  
15 (including those under the Lancaster name), those public communications on Facebook contain  
16 no disclaimers. Accordingly, the Commission finds reason to believe that Common Defense  
17 Action Fund and Perry O'Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30120  
18 and 11 U.S.C. § 110.11 by failing to include proper disclaimers on its paid Facebook  
19 communications.

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<sup>60</sup> See also Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12,864, 12,868 (Mar. 26, 2018) (quoting comment from Facebook s representing that Facebook has expanded its advertising platform beyond what was offered at the time of its advisory opinion request in 2011, allowing users to create advertisements with larger images and more text).

<sup>61</sup> See Advisory Op. Req., AO 2011-09 (Facebook).

<sup>62</sup> AO 2017-12.

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 18 of 23

### 3. Coordination

“An independent expenditure-only political committee ‘may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.’”<sup>63</sup> Under the Act, “coordinated” means made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate or a candidate’s authorized committee.<sup>64</sup> The Commission’s regulations provide a three-part test for determining when a communication is a “coordinated communication,” which is treated as an in-kind contribution.<sup>65</sup> To be considered coordinated, the communication must: (1) be paid for by a third party; (2) satisfy one of five “content” standards listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of five “conduct” standards listed in 11 C.F.R. § 109.21(d).<sup>66</sup> All three prongs must be satisfied for a communication to be considered a “coordinated communication.”<sup>67</sup>

Here, Common Defense PAC admits to paying for communications that expressly advocated for Jess King or opposed her opponent, Lloyd Smucker,<sup>68</sup> and Common Defense PAC disclosed over \$184,000 of such expenditures in reports filed with the Commission.<sup>69</sup> Thus, the

<sup>63</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2 (quoting Advisory Op. 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011))); *see also* 52 U.S.C. §§ 30116(a), (f), 30118(a); Advisory Op. 2011-11 (Commonsense Ten) at 2-3.

<sup>64</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

<sup>65</sup> 11 C.F.R. § 109.21(a)-(b).

<sup>66</sup> *Id.* The five types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>67</sup> *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

<sup>68</sup> *See* 11 C.F.R. § 109.21(c)(3) (including in content prong communications that expressly advocate, as defined at 11 C.F.R. § 100.22).

<sup>69</sup> *See supra* note 18.

MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 19 of 23

1 payment and content prongs of the coordinated communication analysis are satisfied. As to the  
2 conduct prong, the Supplemental Complaint alleges generally that there was coordination  
3 between Common Defense PAC and the King Committee, and more specifically contends that  
4 (a) certain King campaign staff members previously worked for Lancaster, and (b) Common  
5 Defense PAC and the King Committee used a common vendor, Middle Seat.

6 Under the Commission's regulations, the conduct prong may be satisfied where the payor  
7 employed a person who had been an employee or independent contractor of the candidate during  
8 the previous 120 days and that former employee or independent contractor conveyed to the payor  
9 material information about the campaign's plans, projects, activities or needs, or used  
10 information gained from past work with the candidate that was material to creating, producing,  
11 or distributing the communication.<sup>70</sup>

12 Here, the Complaint does not provide any information identifying specific conduct by the  
13 former Lancaster employees to suggest that they shared information with Common Defense PAC  
14 about the King campaign's plans, and we have not located any other information so suggesting.  
15 Indeed, the Complaint itself merely states that there is "a distinct possibility of deliberations"  
16 between Lancaster/Common Defense PAC and the King Committee through Rast, Martin,  
17 Smucker, and Boyd.<sup>71</sup> Additionally, although the Commission's regulation contemplates  
18 situations involving conduct by a former employee or independent contractor of the candidate,  
19 the available record here indicates that Rast and Martin did the opposite: they left an outside  
20 group to join the candidate's committee. Moreover, the former employee conduct prong does

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<sup>70</sup> 11 C.F.R. § 109.21(d)(5).

<sup>71</sup> Supp. Compl. at 4. Boyd does not appear to have been employed by or connected with any of the Respondents and does not appear to have been involved in any way with the communications and disbursements at issue; his only connection to this matter appears to be that Jonathan Smucker contributed to his book in 2012.

MUR 7495

Common Defense Action Fund Factual and Legal Analysis

Page 20 of 23

1 not regulate persons, like Smucker and Boyd, who are not alleged to have ever been employed  
2 by the candidate's committee. Furthermore, Respondents deny any coordination involving Rast  
3 and Martin, and state that the King Committee had written policies in place to prevent  
4 communication between campaign workers and IEOPCs. Common Defense PAC submitted a  
5 copy of an internal policy, a memorandum regarding "2018 Election Cycle — Internal Firewall  
6 Policies," in support of its argument that there was no coordination. Absent any available  
7 information about specific conduct by the King campaign's former employees that could  
8 constitute coordination, the existence and stated reliance upon this firewall policy between  
9 Common Defense PAC's independent expenditure operations staff and staff who have contact  
10 with campaign committees sufficiently indicates that Common Defense PAC did not coordinate  
11 with the King Committee through "former employees" Rast, Martin, Smucker, or Boyd.

12 The coordinated communication conduct prong can also be satisfied by use of a  
13 "common vendor." The common vendor conduct standard is satisfied if all of the following  
14 conditions are satisfied: (1) the person paying for the communication uses a commercial  
15 vendor<sup>72</sup> to "create, produce, or distribute" the communication; (2) that vendor, including any  
16 owner, officer, or employee, has provided certain delineated services to the candidate identified  
17 in the communication (or that candidate's opponent) during the 120 days preceding the  
18 communication;<sup>73</sup> and (3) the vendor uses or conveys to the payor information about the

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<sup>72</sup> "Commercial vendor" means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services. 11 C.F.R. § 116.1(c).

<sup>73</sup> The relevant services are: (A) development of media strategy, including the selection or purchasing of advertising slots; (B) selection of audiences; (C) polling; (D) fundraising; (E) developing the content of a public communication; (F) producing a public communication; (G) identifying voters or developing voter lists, mailing lists, or donor lists; (H) selecting personnel, contractors or subcontractors; or (I) consulting or otherwise providing political or media advice. *Id.* § 109.21(d)(4)(ii).



MUR 7495

Common Defense Action Fund Factual and Legal Analysis

Page 21 of 23

1 candidate's (or that candidate's opponent's) "plans, projects, activities, or needs," or uses or  
2 conveys to the payor information previously used by the vendor in providing services to the  
3 candidate (or that candidate's opponent), and that information is material to the creation,  
4 production, or distribution of the communication.<sup>74</sup> Under a "safe harbor" provision, the  
5 common vendor conduct standard is not satisfied if a commercial vendor has established and  
6 implemented a written firewall policy that meets certain requirements, so long as material  
7 information is not shared.<sup>75</sup>

8 Here, the Complaint alleges coordination via a common vendor by reference to reports  
9 filed with the Commission showing that Common Defense PAC made disbursements to digital  
10 media vendor Middle Seat after the King Committee made disbursements to the same vendor.  
11 The Complaint does not allege any specific facts which, if true, would indicate that Middle Seat  
12 used or conveyed to the Common Defense PAC non-public information about the campaign's  
13 "plans, projects, activities, or needs," that was material to the creation, production, or distribution  
14 of the communications paid for by Common Defense PAC. But an allegation of coordination  
15 based solely on the existence of a common vendor, without regard to that vendor's use or  
16 conveyance of information, does not satisfy the requirements of the common vendor conduct

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<sup>74</sup> *Id.* § 109.21(d)(4)(i)-(iii). The common vendor conduct standard is not satisfied if the information used was obtained from a publicly available source. *Id.* § 109.21(d)(4)(iii).

<sup>75</sup> *Id.* § 109.21(h). A firewall policy satisfies this safe harbor if it (1) is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or that candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee; and (2) is described in a written policy distributed to all relevant employees, consultants and clients. *Id.* § 109.21(h)(1)-(2). This safe harbor does not apply if specific information indicates that, despite the firewall policy, material information about the candidate's campaign plans, projects, activities, or needs was used or conveyed to the person paying for the communication. *Id.* § 109.21(h).



MUR 7495  
Common Defense Action Fund Factual and Legal Analysis  
Page 22 of 23

1 standard; the Commission has explained that this standard “does not presume coordination from  
2 the mere presence of a common vendor.”<sup>76</sup>

3 Moreover, Common Defense PAC’s Response included a copy of its internal policy  
4 designed to prevent inadvertent coordination through common vendors, which states that  
5 Common Defense PAC would avoid using the same vendors being used by a candidate, and that  
6 vendors would be required to agree to abide by a firewall restricting communication between  
7 Common Defense PAC and the candidate in order to avoid coordination.<sup>77</sup> The Commission has  
8 information that the King Committee had a similar internal policy in place to avoid coordinated  
9 communications. Common Defense PAC asserts that it discussed the issue with Middle Seat and  
10 received assurances that Middle Seat maintained its own firewall which prohibited employees  
11 from performing work for both a campaign and an IEOPC supporting the candidate. Despite  
12 receiving assurances that Middle Seat had a compliant firewall in place, Common Defense PAC  
13 asserts that it went a step further to avoid the possibility of inadvertent coordination, ultimately  
14 deciding not to use Middle Seat to produce any of its independent expenditure communications  
15 in connection with the 2018 PA-11 election.

16 In light of the available record, Respondents’ specific denials, and the facts indicating  
17 that Middle Seat represented to both Common Defense PAC and King Committee that it  
18 maintained a compliant firewall policy, the available information fails to give rise to a reasonable  
19 inference that the conduct prong was satisfied through the use of a Middle Seat as a common  
20 vendor.

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<sup>76</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. at 437.

<sup>77</sup> Second Common Def. PAC Resp., Ex. A.

MUR 7495

Common Defense Action Fund Factual and Legal Analysis

Page 23 of 23

1           Accordingly, because the available information does not support a reasonable inference  
2   that the conduct prong was satisfied, and thus does not support a reasonable inference that a  
3   violation occurred, the Commission finds no reason to believe that Common Defense Action  
4   Fund and Perry O'Brien, in his official capacity as treasurer, violated 52 U.S.C. § 30118 by  
5   making prohibited in-kind contributions in the form of coordinated communications.

**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Lancaster Stands Up

MUR 7495

**I. INTRODUCTION**

During the 2018 election cycle, Common Defense Action Fund (“Common Defense PAC”), an independent expenditure-only political committee, and Lancaster Stands Up (“Lancaster”), a “member-led organization,” supported the Democratic candidate in Pennsylvania’s 11th Congressional District election, Jess King. The Complaint and the Supplemental Complaint allege that Lancaster failed to properly report independent expenditures supporting King and opposing her opponent, Lloyd Smucker, and that many of their public communications did not contain the required disclaimers.<sup>1</sup> The Supplemental Complaint also alleges that Lancaster coordinated their activities with, and thus made prohibited or excessive contributions to, Friends of Jess King and Juser Rangoonwala in his official capacity as treasurer (“King Committee”).<sup>2</sup>

The available information does not indicate that Lancaster paid for any public communications expressly advocating for King or opposing her opponent. Accordingly, as set forth below, the Commission dismisses the allegations that Lancaster violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) or 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to report independent expenditures or by failing to include compliant disclaimers on communications. The Commission also finds no reason to believe that Lancaster made excessive or prohibited coordinated in-kind contributions in violation of 52 U.S.C. §§ 30116 or 30118.

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<sup>1</sup> Compl. at 4-5 (Sept. 11, 2018); Supp. Compl. at 2 (Oct. 5, 2019).

<sup>2</sup> Supp. Compl. at 2-5.

MUR 7495  
Lancaster Stands Up Factual and Legal Analysis  
Page 2 of 6

## II. FACTUAL AND LEGAL ANALYSIS

### A. Factual Analysis

Jessica King was a 2018 congressional candidate in Pennsylvania’s 11th Congressional District. The King Committee was her principal campaign committee.<sup>3</sup>

Common Defense PAC is an independent expenditure-only political committee (“IEOPC”) that has been registered with the Commission since 2016.<sup>4</sup> During the 2018 election cycle, Common Defense PAC partnered with Lancaster to conduct activities in support of Jessica King’s campaign for Pennsylvania’s 11th congressional district, and to oppose her opponent Lloyd Smucker. Common Defense PAC reported making a total of \$161,064 in independent expenditures supporting Jessica King and \$23,335 in independent expenditures opposing King’s opponent.<sup>5</sup>

Lancaster, which is not registered with the Commission, describes itself as a “member-led organization” located in Lancaster County, Pennsylvania, that works on “base-building, campaigning, [and] leadership development,” among other activities; Lancaster states on its website that it has a “partnership” with Beyond the Choir,<sup>6</sup> a section 501(c)(4) non-profit

<sup>3</sup> King Comm. Statement of Organization (June 28, 2017); King Comm. Amended Statement of Organization (Mar. 6, 2019).

<sup>4</sup> See Common Def. PAC Statement of Organization (June 15, 2016).

<sup>5</sup> Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct 15, 2018); Common Def. PAC 2018 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019).

<sup>6</sup> *Our Staff*, LANCASTER STANDS UP, <https://lancasterstandsup.org/staff> (last visited Feb. 4, 2020). Lancaster does not appear to be registered as a corporation or LLC in Pennsylvania. See PA. DEP’T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/search/corpsearch> (search for “Lancaster Stands Up”) (last visited Feb. 4, 2020). Lancaster’s website now includes a disclaimer indicating it is “Paid for in part by PA Stands Up State PAC,” and an entity named PA Stands Up State PAC appears to have registered with the Pennsylvania Department of State on April 1, 2019. LANCASTER STANDS UP, <https://lancasterstandsup.org> (last visited Feb. 4, 2020); PA. DEP’T OF STATE, *Committee Information: PA Stand Up State PAC*,

MUR 7495  
Lancaster Stands Up Factual and Legal Analysis  
Page 3 of 6

corporation that Common Defense PAC listed as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1 from 2016 through the entirety of the 2018 election cycle.<sup>7</sup> Lancaster, which did not respond to the Complaint, did not report making any independent expenditures.

Common Defense PAC, Beyond the Choir, and Lancaster appear to have worked closely with each other during the 2018 election cycle. Beyond the Choir states on its website that it “played a central role in supporting and sustaining” Lancaster and “provided ongoing training and significant staff time” to Lancaster; on its website, Lancaster identifies Beyond the Choir as one of its “Affiliates and Sponsors.”<sup>8</sup> It is unclear whether these references to “Beyond the Choir” on Lancaster’s website refer to the Beyond the Choir section 501(c)(4) non-profit corporation, or to “Common Defense/Beyond the Choir Action Fund,” which was Common Defense PAC’s name during the 2018 election cycle.

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<https://www.pavoterservices.pa.gov/ElectionInfo/CommitteeInfo.aspx?ID=16215> (last visited Feb. 4, 2020). Lancaster’s website pages have had different disclaimers at different times, as discussed further below.

<sup>7</sup> See Common Def. PAC Amended Statement of Organization (Oct. 28, 2016) (also representing that Common Defense PAC is not separate segregated fund); Common Def. PAC Amended Statement of Organization (May 22, 2017) (same); First Common Def. PAC Resp. at 2 (representing that Beyond the Choir is a non-profit 501(c)(4) corporation formed in August 2016 in Pennsylvania); PA. DEP’T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/Search/corpsearch> (search for “beyond the choir”). In this matter, Common Defense PAC indicates that the two organizations are “allied,” sharing staff, office space, and other resources pursuant to an agreement for Common Defense PAC to reimburse Beyond the Choir for its share of the operating expenses. First Common Def. PAC Resp. at 2. According to Beyond the Choir’s website, the non-profit formed Common Defense PAC in 2016. See *Mission*, BEYOND THE CHOIR, <https://beyondthechoir.org/mission> (last visited Feb. 4, 2019) (“Beyond the Choir Mission”). In April 2019, Common Defense PAC listed Common Defense Civic Engagement, a 501(c)(4) non-profit corporation, as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1. Common Def. PAC Amended Statement of Organization (April 11, 2019) (also representing that Common Defense PAC is not separate segregated fund); see also COMMON DEFENSE, <https://commondefense.us/> (including disclaimer at bottom stating it is “joint website of Common Defense Civic Engagement and Common Defense Action Fund” and that “Common Defense Civic Engagement is a 501(c)(4) organization”) (last visited Feb. 4, 2020); Beyond the Choir Mission (stating “Common Defense incorporated as a separate organization to run all of the veterans organizing work incubated through Beyond the Choir” and linking to Common Defense joint website).

<sup>8</sup> See Beyond the Choir Mission; *Affiliates*, LANCASTER STANDS UP, <https://lancasterstandsup.org/affiliates> (last visited Feb. 4, 2020).

MUR 7495  
Lancaster Stands Up Factual and Legal Analysis  
Page 4 of 6

1           The Complaint alleges that Lancaster failed to report independent expenditures  
2     supporting King and opposing her opponent, relying on the Lancaster website, Facebook ads,  
3     printed materials containing express advocacy, phone banking efforts, as well as staff salary  
4     costs.<sup>9</sup> Though Lancaster did not respond, the available information suggests that Common  
5     Defense PAC paid and reported all of the costs of the communications at issue, and there is no  
6     information indicating that Lancaster paid for any public communications expressly advocating  
7     for King or opposing her opponent.

## 8           **B. Legal Analysis**

### 9           **1. Independent Expenditure Reporting and Disclaimers**

10          An “independent expenditure” is an expenditure for a communication that expressly  
11     advocates the election or defeat of a clearly identified federal candidate, and is not made in  
12     concert or cooperation with or at the request or suggestion of such candidate, the candidate’s  
13     authorized political committee, or their agents.<sup>10</sup> Under the Federal Election Campaign Act of  
14     1971, as amended (the “Act”), nonconnected political committees, as well as other persons, must  
15     disclose independent expenditures.<sup>11</sup> Nonconnected political committees must itemize each  
16     independent expenditure which exceeds \$200 or which, when added to previous independent  
17     expenditures made on behalf of (or in opposition to) the same candidate, aggregates over \$200

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<sup>9</sup> Compl. at 5, Exs. A-M.

<sup>10</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.22(a), (b) (definition of “expressly advocating”).

<sup>11</sup> *See* 52 U.S.C. § 30104.

MUR 7495  
Lancaster Stands Up Factual and Legal Analysis  
Page 5 of 6

during a calendar year.<sup>12</sup>

Despite the Complaints' inclusion of screenshots of Lancaster-"sponsored" Facebook posts, there is insufficient information to indicate that Lancaster made or failed to report any independent expenditures during the 2018 election cycle. Rather, the record suggests that Common Defense PAC paid for the complained-of public communications made under the Lancaster name, and neither the Complaint nor the public record we have reviewed contain any information to the contrary.<sup>13</sup> Accordingly, the Commission dismisses the allegation that Lancaster Stands Up violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.4(b) by failing to report independent expenditures and violated 52 U.S.C. § 30120 and 11 U.S.C. § 110.11 by failing to include proper disclaimers on public communications containing express advocacy.

## 2. Coordination

"An independent expenditure-only political committee 'may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.'"<sup>14</sup> Under the Act, "coordinated" means made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate or a candidate's authorized

<sup>12</sup> 52 U.S.C. § 30104(b)(6)(B)(iii). Independent expenditures of \$200 or less must be subtotaled and reported as unitemized expenditures. In addition to a political committee's regular reporting obligations, when a committee makes or contracts to make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours before, the date of an election, the Act requires the Committee to file an additional report describing those expenditures within 24 hours. *See* 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). Further, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more outside of that 20-day period, up to and including the 20th day, must file a report describing those expenditures within 48 hours. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

<sup>13</sup> Although Lancaster did not file a Response, the Complaint does not identify any payments alleged to have been made by Lancaster and disclosure reports filed by Common Defense PAC indicate that the PAC likely paid for all costs related to the public communications at issue in this matter.

<sup>14</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2 (quoting Advisory Op. 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011))); *see also* 52 U.S.C. §§ 30116(a), (f), 30118(a); Advisory Op. 2011-11 (Commonsense Ten) at 2-3.

MUR 7495  
Lancaster Stands Up Factual and Legal Analysis  
Page 6 of 6

committee.<sup>15</sup> The Commission’s regulations provide a three-part test for determining when a communication is a “coordinated communication,” which is treated as an in-kind contribution.<sup>16</sup> To be considered coordinated, the communication must: (1) be paid for by a third party; (2) satisfy one of five “content” standards listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of five “conduct” standards listed in 11 C.F.R. § 109.21(d).<sup>17</sup> All three prongs must be satisfied for a communication to be considered a “coordinated communication.”<sup>18</sup>

Because the available information generally indicates that Lancaster did not pay for the communications at issue in this matter, the payment prong is not satisfied as to Lancaster. Thus, the Commission finds no reason to believe that Lancaster Stands Up violated 52 U.S.C. § 30118 by making prohibited in-kind contributions in the form of coordinated communications.

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<sup>15</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

<sup>16</sup> 11 C.F.R. § 109.21(a)-(b).

<sup>17</sup> *Id.* The five types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>18</sup> *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).



**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Friends of Jess King and Juzer Rangoonwala MUR 7495  
in his official capacity as treasurer

**I. INTRODUCTION**

During the 2018 election cycle, Common Defense Action Fund (“Common Defense PAC”), an independent expenditure-only political committee, and Lancaster Stands Up (“Lancaster”), a “member-led organization,” supported the Democratic candidate in Pennsylvania’s 11th Congressional District election, Jess King. The Supplemental Complaint alleges that Common Defense PAC and Lancaster coordinated their public communications with, and thus made prohibited or excessive contributions to, Friends of Jess King and Juzer Rangoonwala in his official capacity as treasurer (“King Committee”).<sup>1</sup>

The King Committee denies the Complaints’ coordination allegations.<sup>2</sup> As set forth below, the Commission finds no reason to believe that the King Committee accepted, excessive or prohibited coordinated in-kind contributions in violation of 52 U.S.C. §§ 30116 or 30118.

**II. FACTUAL AND LEGAL ANALYSIS****A. Factual Analysis**

Jessica King was a 2018 congressional candidate in Pennsylvania’s 11th Congressional District. The King Committee was her principal campaign committee.<sup>3</sup>

Common Defense PAC is an independent expenditure-only political committee (“IEOPC”) that has been registered with the Commission since 2016.<sup>4</sup> During the 2018 election

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<sup>1</sup> Supp. Compl. at 2-5 (Oct. 5, 2019).

<sup>2</sup> King Comm. Resp. at 1 (May 29, 2019).

<sup>3</sup> King Comm. Statement of Organization (June 28, 2017); King Comm. Amended Statement of Organization (Mar. 6, 2019).

MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 2 of 9

cycle, Common Defense PAC partnered with Lancaster to conduct activities in support of Jessica King’s campaign for Pennsylvania’s 11th congressional district, and to oppose her opponent Lloyd Smucker. Common Defense PAC reported making a total of \$161,064 in independent expenditures supporting Jessica King and \$23,335 in independent expenditures opposing King’s opponent.<sup>5</sup>

Lancaster, which is not registered with the Commission, describes itself as a “member-led organization” located in Lancaster County, Pennsylvania, that works on “base-building, campaigning, [and] leadership development,” among other activities; Lancaster states on its website that it has a “partnership” with Beyond the Choir,<sup>6</sup> a section 501(c)(4) non-profit corporation that Common Defense PAC listed as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1 from 2016 through the entirety of the 2018 election cycle.<sup>7</sup> Lancaster, which did not respond to the Complaint, did not report making any independent expenditures.

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<sup>4</sup> See Common Def. PAC Statement of Organization (June 15, 2016).

<sup>5</sup> Common Def. PAC Amended 2018 April Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC Amended 2018 July Quarterly Report, Sched. E (Oct. 9, 2018); Common Def. PAC 2018 October Quarterly Report, Sched. E (Oct 15, 2018); Common Def. PAC 2018 12 Day Pre-General Report, Sched. E (Oct. 25, 2018); Common Def. PAC Amended 2018 30 Day Post-General Report, Sched. E (May 22, 2019).

<sup>6</sup> *Our Staff*, LANCASTER STANDS UP, <https://lancasterstandsup.org/staff> (last visited Feb. 4, 2020). Lancaster does not appear to be registered as a corporation or LLC in Pennsylvania. See PA. DEP’T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/search/corpsearch> (search for “Lancaster Stands Up”) (last visited Feb. 4, 2020). Lancaster’s website now includes a disclaimer indicating it is “Paid for in part by PA Stands Up State PAC,” and an entity named PA Stands Up State PAC appears to have registered with the Pennsylvania Department of State on April 1, 2019. LANCASTER STANDS UP, <https://lancasterstandsup.org> (last visited Feb. 4, 2020); PA. DEP’T OF STATE, *Committee Information: PA Stand Up State PAC*, <https://www.pavoterservices.pa.gov/ElectionInfo/CommitteeInfo.aspx?ID=16215> (last visited Feb. 4, 2020). Lancaster’s website pages have had different disclaimers at different times, as discussed further below.

<sup>7</sup> See Common Def. PAC Amended Statement of Organization (Oct. 28, 2016) (also representing that Common Defense PAC is not separate segregated fund); Common Def. PAC Amended Statement of Organization (May 22, 2017) (same); First Common Def. PAC Resp. at 2 (representing that Beyond the Choir is a non-profit 501(c)(4) corporation formed in August 2016 in Pennsylvania); PA. DEP’T OF STATE, *Business Entity Search*, <https://www.corporations.pa.gov/Search/corpsearch> (search for “beyond the choir”). In this matter, Common Defense PAC indicates that the two organizations are “allied,” sharing staff, office space, and other resources

MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 3 of 9

The Complaint and Supplemental Complaint allege that Common Defense PAC and Lancaster coordinated their public communications with, and thus made prohibited or excessive contributions to, the King Committee.<sup>8</sup> Specifically, the Supplemental Complaint alleges that Common Defense PAC and Lancaster coordinated with the King Committee because:

(1) Common Defense PAC and the King Committee used a common vendor, Middle Seat Consulting LLC; (2) two King Committee employees (Becca Rast and Nicholas Martine) were previously associated with Lancaster; (3) one of these King Committee employees, Becca Rast, was married to Common Defense PAC Executive Director Jonathan Smucker; and (4) both Common Defense PAC and the King Committee based their campaign strategies on a book called “Beautiful Trouble,” written by Andrew Boyd, which included contributions from Jonathan Smucker.<sup>9</sup> The Supplemental Complaint asserts that these relationships establish “a distinct possibility of deliberations” between Lancaster/Common Defense PAC and the King Committee.<sup>10</sup>

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pursuant to an agreement for Common Defense PAC to reimburse Beyond the Choir for its share of the operating expenses. First Common Def. PAC Resp. at 2. According to Beyond the Choir’s website, the non-profit formed Common Defense PAC in 2016. *See Mission*, BEYOND THE CHOIR, <https://beyondthechoir.org/mission> (last visited Feb. 4, 2019) (“Beyond the Choir Mission”). In April 2019, Common Defense PAC listed Common Defense Civic Engagement, a 501(c)(4) non-profit corporation, as a “Connected Organization, Affiliated Committee, Joint Fundraising Representative, or Leadership PAC Sponsor” on its FEC Form 1. Common Def. PAC Amended Statement of Organization (April 11, 2019) (also representing that Common Defense PAC is not separate segregated fund); *see also* COMMON DEFENSE, <https://commondefense.us/> (including disclaimer at bottom stating it is “joint website of Common Defense Civic Engagement and Common Defense Action Fund” and that “Common Defense Civic Engagement is a 501(c)(4) organization”) (last visited Feb. 4, 2020); Beyond the Choir Mission (stating “Common Defense incorporated as a separate organization to run all of the veterans organizing work incubated through Beyond the Choir” and linking to Common Defense joint website).

<sup>8</sup> Supp. Compl. at 2 (Oct. 9, 2019).

<sup>9</sup> *Id.* at 3-5. The book, “Beautiful Trouble,” is described by its publisher as a collection of writings by “ten grassroots groups and dozens of seasoned artists and activists,” and includes a contribution by Jonathan Smucker. *See Beautiful Trouble: A Toolbox for Revolution*, OR BOOKS, <https://www.orbooks.com/catalog/beautiful-trouble> (last visited Feb. 4, 2020). The record includes no information indicating that Boyd worked for any of the Respondents in this matter or that he had any contact with Respondents regarding King’s election.

<sup>10</sup> Supp. Compl. at 4.

1           The King Committee filed a Response requesting that the Commission dismiss the  
2   allegations that the committee illegally coordinated with Common Defense PAC.<sup>11</sup> In a sworn  
3   affidavit attached to the Response, Becca Rast, King’s campaign manager, states that the King  
4   Committee had a firewall policy in place that was compliant with 11 C.F.R. § 109.21(h).<sup>12</sup> Rast  
5   attests that all committee employees and volunteers were trained on the firewall policy, and that  
6   all volunteers with access to non-public information signed non-disclosure agreements.<sup>13</sup> She  
7   further attests that the firewall policy was adhered to at all times, and that no information about  
8   the campaign’s plans, projects, activities, or needs was ever shared with Common Defense PAC  
9   or Lancaster.<sup>14</sup> Rast specifically denies sharing any such information with her husband,  
10   Jonathan Smucker.<sup>15</sup> Lastly, Rast attests that in her role as campaign manager, she had  
11   conversations with Middle Seat in which the company assured her that they had a compliant  
12   firewall policy in place which prohibited staff from working on projects for both King  
13   Committee and any IEOPC making public communications in connection with the 2018 PA-11  
14   election.<sup>16</sup>

## 15           **B. Legal Analysis**

16           “An independent expenditure-only political committee ‘may not make contributions to  
17   candidates or political party committees, including in-kind contributions such as coordinated

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<sup>11</sup> King Comm. Resp. at 1.

<sup>12</sup> *Id.*, Attach. 1 at 1 (“Rast Affidavit”).

<sup>13</sup> Rast Affidavit at 1-2.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* Jonathan Smucker, through counsel, also specifically denies sharing any such information. Second Common Def. PAC Resp. at 4.

<sup>16</sup> Rast Affidavit at 2-3.

MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 5 of 9

communications.”<sup>17</sup> Under the Act, “coordinated” means made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate or a candidate’s authorized committee.<sup>18</sup> The Commission’s regulations provide a three-part test for determining when a communication is a “coordinated communication,” which is treated as an in-kind contribution.<sup>19</sup> To be considered coordinated, the communication must: (1) be paid for by a third party; (2) satisfy one of five “content” standards listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of five “conduct” standards listed in 11 C.F.R. § 109.21(d).<sup>20</sup> All three prongs must be satisfied for a communication to be considered a “coordinated communication.”<sup>21</sup>

Here, Common Defense PAC’s disclosure reports indicate that the PAC paid for over \$184,000 of public communications that expressly advocated for Jess King or opposed her opponent, Lloyd Smucker.<sup>22</sup> Thus, the payment and content prongs of the coordinated communication analysis are satisfied as to Common Defense PAC. As to the conduct prong, the Supplemental Complaint alleges generally that there was coordination between Common Defense PAC or Lancaster and the King Committee, and more specifically contends that (a)

<sup>17</sup> Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2 (quoting Advisory Op. 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011))); *see also* 52 U.S.C. §§ 30116(a), (f), 30118(a); Advisory Op. 2011-11 (Commonsense Ten) at 2-3.

<sup>18</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

<sup>19</sup> 11 C.F.R. § 109.21(a)-(b).

<sup>20</sup> *Id.* The five types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>21</sup> *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

<sup>22</sup> *See* 11 C.F.R. § 109.21(c)(3) (including in content prong communications that expressly advocate, as defined at 11 C.F.R. § 100.22); *see also supra* note 14.

MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 6 of 9

1 certain King campaign staff members previously worked for Lancaster, and (b) Common  
2 Defense PAC and the King Committee used a common vendor, Middle Seat.

3 Under the Commission's regulations, the conduct prong may be satisfied where the payor  
4 employed a person who had been an employee or independent contractor of the candidate during  
5 the previous 120 days and that former employee or independent contractor conveyed to the payor  
6 material information about the campaign's plans, projects, activities or needs, or used  
7 information gained from past work with the candidate that was material to creating, producing,  
8 or distributing the communication.<sup>23</sup>

9 Here, the Complaint does not provide any information identifying specific conduct by the  
10 former Lancaster employees to suggest that they shared information with Common Defense PAC  
11 about the King campaign's plans, and we have not located any other information so suggesting.  
12 Indeed, the Complaint itself merely states that there is "a distinct possibility of deliberations"  
13 between Lancaster/Common Defense PAC and the King Committee through Rast, Martin,  
14 Smucker, and Boyd.<sup>24</sup> Additionally, although the Commission's regulation contemplates  
15 situations involving conduct by a former employee or independent contractor of the candidate,  
16 the available record here indicates that Rast and Martin did the opposite: they left an outside  
17 group to join the candidate's committee. Moreover, the former employee conduct prong does  
18 not regulate persons, like Smucker and Boyd, who are not alleged to have ever been employed  
19 by the candidate's committee. Furthermore, Respondents deny any coordination involving Rast  
20 and Martin, and state that the King Committee had written policies in place to prevent

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<sup>23</sup> 11 C.F.R. § 109.21(d)(5).

<sup>24</sup> Supp. Compl. at 4. Boyd does not appear to have been employed by or connected with any of the Respondents and does not appear to have been involved in any way with the communications and disbursements at issue; his only connection to this matter appears to be that Jonathan Smucker contributed to his book in 2012.

MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 7 of 9

1 communication between campaign workers and IEOPCs. Absent any available information  
2 about specific conduct by the King campaign's former employees that could constitute  
3 coordination, the existence and stated reliance upon these internal policies indicate that the King  
4 Committee did not coordinate with Common Defense PAC through "former employees" Rast,  
5 Martin, Smucker, or Boyd.

6 The coordinated communication conduct prong can also be satisfied by use of a  
7 "common vendor." The common vendor conduct standard is satisfied if all of the following  
8 conditions are satisfied: (1) the person paying for the communication uses a commercial  
9 vendor<sup>25</sup> to "create, produce, or distribute" the communication; (2) that vendor, including any  
10 owner, officer, or employee, has provided certain delineated services to the candidate identified  
11 in the communication (or that candidate's opponent) during the 120 days preceding the  
12 communication;<sup>26</sup> and (3) the vendor uses or conveys to the payor information about the  
13 candidate's (or that candidate's opponent's) "plans, projects, activities, or needs," or uses or  
14 conveys to the payor information previously used by the vendor in providing services to the  
15 candidate (or that candidate's opponent), and that information is material to the creation,  
16 production, or distribution of the communication.<sup>27</sup> Under a "safe harbor" provision, the  
17 common vendor conduct standard is not satisfied if a commercial vendor has established and

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<sup>25</sup> "Commercial vendor" means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services. 11 C.F.R. § 116.1(c).

<sup>26</sup> The relevant services are: (A) development of media strategy, including the selection or purchasing of advertising slots; (B) selection of audiences; (C) polling; (D) fundraising; (E) developing the content of a public communication; (F) producing a public communication; (G) identifying voters or developing voter lists, mailing lists, or donor lists; (H) selecting personnel, contractors or subcontractors; or (I) consulting or otherwise providing political or media advice. *Id.* § 109.21(d)(4)(ii).

<sup>27</sup> *Id.* § 109.21(d)(4)(i)-(iii). The common vendor conduct standard is not satisfied if the information used was obtained from a publicly available source. *Id.* § 109.21(d)(4)(iii).



implemented a written firewall policy that meets certain requirements, so long as material information is not shared.<sup>28</sup>

Here, the Complaint alleges coordination via a common vendor by reference to reports filed with the Commission showing that Common Defense PAC made disbursements to digital media vendor Middle Seat after the King Committee made disbursements to the same vendor. The Complaint does not allege any specific facts which, if true, would indicate that Middle Seat used or conveyed to the Common Defense PAC non-public information about the campaign's "plans, projects, activities, or needs," that was material to the creation, production, or distribution of the communications paid for by Common Defense PAC. But an allegation of coordination based solely on the existence of a common vendor, without regard to that vendor's use or conveyance of information, does not satisfy the requirements of the common vendor conduct standard; the Commission has explained that this standard "does not presume coordination from the mere presence of a common vendor."<sup>29</sup>

Moreover, the Rast's affidavit attests that the King Committee had an internal policy in place to avoid coordinated communications and that Middle Seat likely maintained its own firewall which prohibited employees from performing work for both a campaign and an IEOPC supporting the candidate.<sup>30</sup> Additionally, information provided to the Commission indicates that

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<sup>28</sup> *Id.* § 109.21(h). A firewall policy satisfies this safe harbor if it (1) is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or that candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee; and (2) is described in a written policy distributed to all relevant employees, consultants and clients. *Id.* § 109.21(h)(1)-(2). This safe harbor does not apply if specific information indicates that, despite the firewall policy, material information about the candidate's campaign plans, projects, activities, or needs was used or conveyed to the person paying for the communication. *Id.* § 109.21(h).

<sup>29</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. at 437.

<sup>30</sup> Rast Affidavit at 2-3.



MUR 7495  
Friends of Jess King Factual and Legal Analysis  
Page 9 of 9

1 Common Defense PAC likely did not use Middle Seat to produce any of its independent  
2 expenditure communications in connection with the 2018 PA-11 election.

3 In light of the available record, Respondents' specific denials, and the facts indicating  
4 that Middle Seat both maintained a compliant firewall policy and did not produce any  
5 communications for Common Defense PAC in connection with King's election, the available  
6 information fails to give rise to a reasonable inference that the conduct prong was satisfied  
7 through the use of a Middle Seat as a common vendor. Accordingly, because the available  
8 information does not support a reasonable inference that the conduct prong was satisfied, and  
9 thus does not support a reasonable inference that a violation occurred, the Commission finds no  
10 reason to believe that Friends of Jess King and Juzer Rangoonwala, in his official capacity as  
11 treasurer, violated 52 U.S.C. § 30116 by accepting prohibited in-kind contributions.