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November 13, 2018

Via E-mail (cela@fec.gov)

Federal Election Commission
Office of Complaints Examination & Legal
Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 7519

Dear Ms. Ross:

This firm represents Elect Katie Hobbs for Secretary of State, an Arizona state candidate committee. I write in response to the October 12, 2018 complaint lodged by Anthony Kern, which my client received on October 29, 2018. We appreciate this opportunity to respond to Mr. Kern's complaint.

The Advertisement

The advertisement at issue is a 30-second television advertisement wherein a voter is deciding who to vote for in the Arizona Secretary of State race.¹ For an approximate total of five seconds over the course of the 30-second advertisement, the voter's pen hovers over the portion of the ballot for Arizona Secretary of State as he decides for whom to vote. After hearing positive information about Katie Hobbs and negative information about Steve Gaynor, the voter fills in the bubble for Katie Hobbs.

As the voter decides for whom the vote in the Arizona Secretary of State race, the section of the ballot for U.S. Senator is partially visible, showing the names of federal candidates Martha McSally and Kyrsten Sinema. The bubbles next to the federal candidates are not filled in, and the screen centers on the Arizona Secretary of State selection.

¹ The video is available at:

https://www.dropbox.com/s/ry7lgp0zhp8gpfw/iVote_TwoWays_V008.mp4?dl=0

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The disclosure at the end of the advertisement indicates that it was paid for by the Arizona Democratic Party and authorized by Katie Hobbs.

The Advertisement Does Not Promote, Attack, Support, or Oppose a Federal Candidate

Federal law requires that a state political party’s expenditures or disbursements for “Federal election activity” be made “from funds subject to the limitations, prohibitions, and reporting requirements of this Act.” 52 U.S.C. § 30125(b)(1). “Federal election activity” is defined, in relevant part, as

A public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) **and** that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)

52 U.S.C. § 30101(20)(A)(iii) (emphasis added).

The Commission has made clear and reiterated, in numerous advisory opinions, that “[u]nder the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate.” Advisory Opinion 2003-25 (Weinzapfel); *see also* Advisory Opinions 2007-34 (Jackson); 2007-21 (Holt), 2006-10 (Echostar).

The reason is plain under ordinary principles of statutory construction. In order to constitute federal election activity, the statute requires that the communication **both** refer to a clearly identified candidate for federal office **and** that it promote, support, attack, or oppose that candidate. 52 U.S.C. § 30101(20)(A)(iii). When Congress uses two distinct terms, we assume it did so “because it intended each term to have a particular, nonsuperfluous meaning.” *See Bailey v. United States*, 516 U.S. 137, 146, 116 S. Ct. 501, 507 (1995).

The communication here *at most* refers to a clearly identified federal candidate by incidentally making visible the candidates for U.S. Senator. It does nothing to promote, support, attack, or oppose either federal candidate. It had to do both in order to constitute federal election activity.

The examples cited by the complaint are inapposite. The communication at issue MUR 6019 stated that “we have two outstanding Democratic candidates running for President” and made repeated references to “Barack Obama for President.” MUR 6019 (In re Dominic Caserta for Assembly Committee, et al.), Factual & Legal Analysis at 4. And the communication in MUR 6683 expressly told voters to re-elect a federal candidate, told voters how to “vote a straight Democratic ticket” accompanied by the Obama campaign’s

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logo, and concluded with a message that “the left is right – vote Blue” next to an Obama-Biden 2012 campaign logo. MUR 6683 (In re Fort Bend County Democratic Party, et al.), Factual & Legal Analysis at 7.

Plainly, such facts are absent here. No part of the advertisement encourages (expressly or otherwise) a vote for or against any federal candidate. The bubble for the federal U.S. Senate candidates on the ballot are left blank. And when viewed in context of the information the voter in the video considers about Katie Hobbs and Steve Gaynor, it is apparent that the voter’s decision (and the focus of the video) centers on the race for Arizona Secretary of State. No mention is made of the federal candidates.

The words “promote,” “oppose,” attack,” and “support” are clear, and they “provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’” *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). It is readily apparent from a simple viewing of the advertisement (even if just the single screenshot) that the advertisement in no way promotes, opposes, attacks, or supports any federal candidate. The complaint is meritless.

Very truly yours,

/s/ *Roy Herrera*

Roy Herrera

RH/cr



**FEDERAL ELECTION COMMISSION
Washington, DC 20463**

Statement of Designation of Counsel

Provide one form for each Respondent/Witness

Note: You May E-Mail Form to: CELA@fec.gov

CASE: MUR 7519

Name of Counsel: Roy Herrera and Daniel Arellano

Firm: Ballard Spahr LLP

Address: 1 East Washington Street, Phoenix, Arizona 85004

Telephone: (602) 798-5430 **Fax:** (602) 798-5595

The above named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

11/13/2018

Signature

Treasurer

Title

RESPONDENT: Elect Katie Hobbs for Secretary of State
(Committee Name/Company Name/Individual Named In Notification Letter)

MAILING ADDRESS:

530 E. McDowell Road, Apt. 107-407, Phoenix, Arizona 85004

Telephone:(H): (W): 518-338-5999

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person receiving the notification or the person with respect to whom the investigation is made.