

1 **FEDERAL ELECTION COMMISSION**

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3 **FIRST GENERAL COUNSEL'S REPORT**

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5 **MUR: 7519**

6 DATE COMPLAINT FILED: Oct. 18, 2018

7 DATE OF NOTIFICATIONS: Oct. 24, 2018

8 LAST RESPONSE RECEIVED: Dec. 14, 2018

9 DATE ACTIVATED: June 11, 2019

10 EXPIRATION OF SOL: Oct. 3, 2023

11 ELECTION CYCLE: 2018

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13 **COMPLAINANT:**

Anthony Kern

14  
15 **RESPONDENTS:**

Arizona Democratic Party and Rick McGuire, in his  
official capacity as treasurer

Elect Katie Hobbs for Secretary of State and Martin  
Quezada, in his official capacity as treasurer

Katie Hobbs

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21 **RELEVANT STATUTES**  
22 **AND REGULATIONS:**

52 U.S.C. § 30101(20)

52 U.S.C. § 30125(b), (f)

11 C.F.R. § 100.24(b)(3)

11 C.F.R. § 106.7

11 C.F.R. § 300.32

11 C.F.R. § 300.71

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29 **INTERNAL REPORTS**  
30 **CHECKED:**

Disclosure Reports

31  
32 **AGENCIES CHECKED:**

None

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34 **I. INTRODUCTION**

35 The Complaint in this matter alleges that the Arizona Democratic Party (“ADP”) spent  
36 over \$1.8 million in non-federal funds on federal election activity because an advertisement for a  
37 state-level candidate, Katie Hobbs, purportedly promoted and supported Kyrsten Sinema, who  
38 was a candidate for U.S. Senate in 2018. In the alternative, the Complaint argues that ADP  
39 should have allocated the cost between the federal and non-federal portions of the advertisement.

1            Respondents deny that there was any violation of the Federal Election Campaign Act, as  
2 amended (the “Act”). They contend that while the advertisement may clearly identify a federal  
3 candidate, it does not promote, support, attack, or oppose that candidate. They also argue that  
4 they were under no legal obligation to allocate the cost of the advertisement.

5            Considered in context, the advertisement makes no more than a passing mention of  
6 Sinema and could not reasonably be construed as promoting, attacking, supporting, or opposing  
7 her candidacy. As a result, there was no legal obligation for ADP to allocate the cost of the  
8 advertisement. Therefore, as set forth below, we recommend that the Commission find no  
9 reason to believe that ADP violated 52 U.S.C. § 30125(b)(1) or 11 C.F.R. § 300.32(a)(2) by  
10 using non-federal funds to promote or support Sinema, or 11 C.F.R. § 106.7 by failing to allocate  
11 the cost of the advertisement. We also recommend that the Commission find no reason to  
12 believe that, by authorizing ADP’s advertisement on her behalf, Katie Hobbs or her authorized  
13 committee, Elect Katie Hobbs for Secretary of State, violated 52 U.S.C. § 30125(f)(1) or 11  
14 C.F.R. § 300.71 by spending non-federal funds to promote or support Sinema.

## 15    **II.    FACTUAL BACKGROUND**

16            ADP is registered with the Commission as the official Arizona state party committee for  
17 the Democratic National Committee.<sup>1</sup> Hobbs was the Democratic nominee for Arizona  
18 Secretary of State in 2018, running against Republican Steve Gaynor. Sinema was the  
19 Democratic nominee for U.S. Senate from Arizona in the 2018 general election. Her opponent  
20 was Republican nominee Martha McSally.

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<sup>1</sup> See FEC Form 1, ADP Amended Statement of Organization (May 20, 2019).

1           The complaint alleges that beginning around October 3, 2018, ADP disbursed at least  
 2 \$1,833,355 for a television advertisement in support of and authorized by Hobbs. According to  
 3 the Complaint, these disbursements violated the Act because ADP used non-federal funds to  
 4 promote, attack, support, or oppose a federal candidate — specifically, the Complaint alleges  
 5 that the advertisement promoted and supported Sinema's federal candidacy.<sup>2</sup>

6           ADP's Response does not dispute the Complaint's allegations regarding the amount spent  
 7 on the ad or the timing of its dissemination, but claims that the advertisement does not promote  
 8 or support Sinema's candidacy.<sup>3</sup> ADP's Response also includes a declaration from an individual  
 9 at a political media production firm stating that he drafted the advertisement's script and that it  
 10 was not intended to promote or support Sinema.<sup>4</sup> The Response from Hobbs and her committee  
 11 likewise denies that the advertisement in any way promoted or supported Sinema, and provides a  
 12 link to the entire advertisement at issue.<sup>5</sup> The images and dialogue from the advertisement are  
 13 replicated below.<sup>6</sup>



**Man in Voting Booth:** So who can I trust for Secretary of State?

<sup>2</sup> Compl. at 1-2 (Oct. 18, 2018).

<sup>3</sup> Resp. of ADP at 2 (Dec. 14, 2018).

<sup>4</sup> Resp. of ADP, Attach. ¶¶ 2-3, 8.

<sup>5</sup> Resp. of Katie Hobbs, *et al.*, at 1-2 (Nov. 14, 2018).

<sup>6</sup> A video file of the advertisement is also available



**Man in Voting Booth:** The CEO or the social worker?



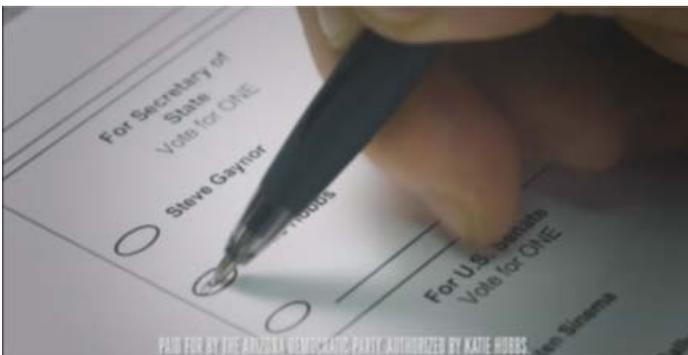
**Female Voice-Over:** In the state senate, Katie Hobbs has led the fight for better teacher pay, helping resolve the strike this year and keep Arizona from losing good teachers to neighboring states.



**Male Voice-Over:** In the corporate world, Steve Gaynor got rich by cheating his employees out of overtime pay, and his company was forced to pay tens of thousands of dollars to workers in a settlement.



**Man in Voting Booth:** So, the savvy senator or the shady CEO?



**Man in Voting Booth:** That's a no-brainer.

1 The response from ADP argues that this “30-second television advertisement clearly advocates  
 2 for the election of Katie Hobbs for Secretary of State of Arizona with no support or promotion of  
 3 any federal candidate” despite the “mockup ballot [that] appears for approximately six  
 4 seconds . . . and focuses on an individual choosing which bubble to fill in between two Secretary  
 5 of State candidates.”<sup>7</sup> The response from Hobbs and her committee argues that “at most” the  
 6 advertisement refers to the federal candidates for U.S. Senate but “does nothing to promote,  
 7 support, attack, or oppose either federal candidate.”<sup>8</sup>

### 8 **III. LEGAL ANALYSIS**

#### 9 **A. ADP’s Advertisement Does Not Appear to Constitute Federal Election** 10 **Activity**

11 The Act prohibits a state committee, candidate for state office, or the agent of a state  
 12 candidate from spending funds on public communications that refer to a clearly identified  
 13 candidate for federal office and that promote, attack, support, or oppose (“PASO”) a candidate  
 14 for that office, unless the funds are subject to the limitations, prohibitions, and reporting  
 15 requirements of the Act.<sup>9</sup> The Act and Commission regulations specify that a communication

<sup>7</sup> Resp. of ADP at 2.

<sup>8</sup> Resp. of Katie Hobbs, *et al.* at 2.

<sup>9</sup> 52 U.S.C. § 30125(b), (f), *cross-referencing id.* § 30101(20)(A)(iii) (including PASO communications in the definition of “federal election activity”); *see also* 11 C.F.R. §§ 100.24(b)(3), 300.71 (requiring that federal funds be used for PASO communications). Arizona law allows state parties to accept unlimited donations from

1 may PASO a candidate regardless of whether the communication expressly advocates a vote for  
2 or against a candidate,<sup>10</sup> but do not otherwise define the terms “promote,” “support,” “attack,” or  
3 “oppose.”<sup>11</sup> The Supreme Court has stated that the use of those words in section  
4 30101(20)(A)(iii) of the Act does not render the provision unconstitutionally vague, because they  
5 “clearly set forth the confines within which potential party speakers must act in order to avoid  
6 triggering the provision,” and they “provide explicit standards for those who apply them and give  
7 the person of ordinary intelligence a reasonable opportunity to know what is prohibited.”<sup>12</sup>

8         The Commission has made clear on numerous occasions that mere identification of an  
9 individual as a federal candidate in a public communication — such as when a federal candidate  
10 endorses a state candidate — does not, by itself, PASO the federal candidate.<sup>13</sup> Similarly, in  
11 MUR 6684 (Gregg for Indiana), the Commission dismissed the allegation that a state  
12 gubernatorial candidate used non-federal funds to pay for an advertisement that purportedly  
13 opposed a federal candidate.<sup>14</sup> There, the Commission found that, although the advertisement  
14 included statements made by the federal candidate, the advertisement focused on the state  
15 gubernatorial election and offered no commentary regarding the federal candidacy.<sup>15</sup>

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individuals and corporations. *See* Ariz. Rev. Stat. §§ 16-912(B), 16-916(B). Thus, funds raised by ADP for non-federal purposes under Arizona law may not comply with the Act's source and amount restrictions.

<sup>10</sup> 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

<sup>11</sup> The Commission has twice proposed but not adopted definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).

<sup>12</sup> *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

<sup>13</sup> *See, e.g.*, Advisory Op. 2009-26 (Coulson) at 7 (collecting opinions); Advisory Op. 2003-25 (Weinzapfel) (determining that a communication in which a federal candidate endorsed a state candidate did not PASO that federal candidate).

<sup>14</sup> Factual & Legal Analysis at 6, MUR 6684 (Gregg for Indiana).

<sup>15</sup> *Id.*

1           By contrast, the Commission found that a communication was federal election activity  
2 that did PASO a federal candidate in a matter in which a page in a local party committee's flyer  
3 said "How Do I Vote a Straight Democratic Ticket?" accompanied by President Obama's  
4 campaign logo, as well as a page that concluded with "The Left is Right — Vote Blue" next to  
5 the Obama-Biden 2012 campaign logo.<sup>16</sup> In MUR 6019 (Dominic Caserta for Assembly), the  
6 Commission found that a local candidate's statement that "we have two outstanding Democratic  
7 candidates running for President," along with references to "Barack Obama for President" and  
8 "Hillary Clinton for President" arguably promoted Obama and Clinton as presidential  
9 candidates.<sup>17</sup> The Commission distinguished that case from past Advisory Opinions dealing  
10 with mere identification of a federal candidate by noting that those opinions "did not address the  
11 specific reference to the federal candidacy ('for President') and the statement of support that we  
12 have in this case."<sup>18</sup>

13           Here, the Complaint argues that the text "For U.S. Senate Vote for ONE" followed by  
14 Sinema's name "likely constitutes express advocacy of her candidacy" or at the very least  
15 promotes or supports her candidacy because it evokes Sinema in her capacity as a federal  
16 candidate and advocates for her election.<sup>19</sup> Although the advertisement references Sinema as a  
17 candidate, it does not contain the "statement of support" the Commission highlighted in MUR  
18 6019, above. Because the bubble next to Sinema's name remains unfilled throughout the

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<sup>16</sup> Factual & Legal Analysis at 7-10, MUR 6683 (Fort Bend County Democratic Party) (ultimately finding no reason to believe the committee violated the Act because its disbursements for the federal election activity appeared to have been made with funds subject to the limitations and prohibitions of the Act).

<sup>17</sup> Factual & Legal Analysis at 4, MUR 6019 (Dominic Caserta for Assembly).

<sup>18</sup> *Id.* at 4-5 (citing Advisory Op. 2007-34 (Jackson, Jr.), 2007-21 (Holt), and 2003-25 (Weinzapfel)).

<sup>19</sup> Compl. at 2-3 ("Sinema is invoked not as an endorser or supporter of Hobbs, but rather appears as a federal candidate *qua* federal candidate.").

1 advertisement, it is not clear whether the depicted voter intends to vote for Sinema or McSally,  
2 or even vote in the federal race at all. Nor does the communication include an image of  
3 Sinema's campaign materials or a statement of support for the Democratic Party generally.<sup>20</sup>  
4 Instead, the focus of the advertisement is on Hobbs, whose party affiliation is never mentioned,  
5 and her opponent in the Secretary of State race. No one in the advertisement utters Sinema's  
6 name.<sup>21</sup> Thus, although the advertisement identifies Sinema in her capacity as a federal  
7 candidate, the Complaint's argument that the advertisement promotes or supports her candidacy  
8 is unpersuasive.

9 Accordingly, we recommend that the Commission find no reason to believe that ADP  
10 violated 52 U.S.C. § 30125(b)(1) or 11 C.F.R. § 300.32(a)(2) by using non-federal funds for  
11 federal election activity, and no reason to believe that Katie Hobbs and Elect Katie Hobbs for  
12 Secretary of State violated 52 U.S.C. § 30125(f)(1) or 11 C.F.R. § 300.71 by spending non-  
13 federal funds in that manner.

#### 14 **B. ADP Was Not Required to Allocate Expenses for the Advertisement**

15 The Complaint also argues that even if the advertisement does not PASO Sinema, ADP  
16 was nonetheless required to allocate a portion of the cost to its federal account.<sup>22</sup> Under  
17 Commission regulations, state parties such as ADP "that make expenditures and disbursements  
18 in connection with both Federal and non-Federal elections for activities that are not Federal  
19 election activities . . . may use only funds subject to the prohibitions and limitations of the Act,  
20 or they may allocate such expenditures and disbursements between their Federal and their non-

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<sup>20</sup> Compare Factual & Legal Analysis, MUR 6683.

<sup>21</sup> The mockup ballot in the advertisement misspells Sinema's first name as "Krysten" rather than Kyrsten.

<sup>22</sup> Compl. at 4.

1 Federal accounts.”<sup>23</sup> However, the Commission’s regulations on allocation are clear that only  
2 certain expenses may be allocated: administrative expenses, exempt party activities that are not  
3 federal election activities, fundraising expenses, and voter drive activities that are neither federal  
4 election activities nor party exempt activities.<sup>24</sup>

5 The Complaint does not allege any such allocable activities. Rather, it alleges that ADP  
6 made, and Hobbs and her committee approved, a public communication that clearly identified  
7 and supported a federal candidate. But if that were true, the advertisement would constitute  
8 federal election activity, and would need to have been paid for entirely by funds subject to the  
9 limitations, prohibitions, and reporting requirements of the Act.<sup>25</sup>

10 As discussed above, however, the advertisement does not appear to constitute federal  
11 election activity. The Complaint has not otherwise alleged facts demonstrating that ADP made  
12 any expenditures or disbursements in connection with a federal election that would need to be  
13 allocated, and Commission regulations explicitly permit state parties to use non-federal funds for  
14 non-Federal activity.<sup>26</sup> Therefore, we recommend that the Commission find no reason to believe  
15 that ADP violated 11 C.F.R. § 106.7 by failing to allocate the cost of the advertisement.

### 16 **III. RECOMMENDATIONS**

- 17 1. Find no reason to believe that Arizona Democratic Party and Rick McGuire, in his  
18 official capacity as treasurer, violated 52 U.S.C. § 30125(b)(1) or 11 C.F.R.  
19 § 300.32(a)(2) by using non-federal funds to promote or support a federal candidate;
- 20 2. Find no reason to believe that Elect Katie Hobbs for Secretary of State and Martin  
21 Quezada, in his official capacity as treasurer, and Katie Hobbs violated 52 U.S.C.

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<sup>23</sup> 11 C.F.R. § 106.7(b).

<sup>24</sup> *See id.*; *Campaign Guide for Political Party Committees* at 101-02 (Aug. 2013).

<sup>25</sup> *See* 11 C.F.R. § 300.33(c).

<sup>26</sup> *See id.* § 300.32(d).

1 § 30125(f)(1) or 11 C.F.R. § 300.71 by using non-federal funds to promote or support  
2 a federal candidate;

3 3. Find no reason to believe that Arizona Democratic Party and Rick McGuire, in his  
4 official capacity as treasurer, violated 11 C.F.R. § 106.7 by failing to allocate the  
5 costs of the advertisement between federal and non-federal accounts;

6 4. Approve the attached Factual and Legal Analysis;

7 5. Approve the appropriate letters; and

8 6. Close the file.

9 Lisa J. Stevenson  
10 Acting General Counsel

11  
12 October 9, 2019

13 Date

Charles Kitcher  
14 Charles Kitcher  
15 Acting Associate General Counsel  
16 for Enforcement

Jin Lee  
17  
18 Jin Lee  
19 Acting Assistant General Counsel  
20 for Enforcement

Amanda Andrade  
21 Amanda Andrade  
22 Attorney

23  
24  
25  
26  
27  
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