



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 17, 2021

VIA EMAIL: herrerar@ballardspahr.com

Roy Herrera
Ballard Spahr LLP
1 East Washington Street
Phoenix, AZ 85004

RE: MUR 7519
Elect Katie Hobbs for Secretary of
State and Martin Quezada in his
official capacity as treasurer
Katie Hobbs

Dear Mr Herrera:

On October 24, 2018, the Federal Election Commission notified your clients, Elect Katie Hobbs for Secretary of State and Martin Quezada in his official capacity as treasurer and Katie Hobbs, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 10, 2021, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe your clients violated 52 U.S.C. § 30125(f)(1) or 11 C.F.R. § 300.71. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Amanda Andrade, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Jin Lee".

Jin Lee

Acting Assistant General Counsel

Enclosure
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1 **FEDERAL ELECTION COMMISSION**
2
3 **FACTUAL AND LEGAL ANALYSIS**
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7 RESPONDENTS: Arizona Democratic Party and MUR 7519
8 Rick McGuire in his
9 official capacity as treasurer,
10 Elect Katie Hobbs for Secretary
11 of State and Martin Quezada
12 in his official capacity
13 as treasurer, and
14 Katie Hobbs
15
16

17 **I. INTRODUCTION**

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

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

27 The advertisement makes no more than a passing mention of Sinema and could not
28 reasonably be construed as promoting, attacking, supporting, or opposing her candidacy. As a
29 result, there was no legal obligation for ADP to allocate the cost of the advertisement.

30 Therefore, as set forth below, the Commission finds no reason to believe that ADP violated 52
31 U.S.C. § 30125(b)(1) or 11 C.F.R. § 300.32(a)(2) by using non-federal funds to promote or
32 support Sinema, or 11 C.F.R. § 106.7 by failing to allocate the cost of the advertisement. The

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1 Commission also finds no reason to believe that, by authorizing ADP's advertisement on her
2 behalf, Katie Hobbs or her authorized committee, Elect Katie Hobbs for Secretary of State,
3 violated 52 U.S.C. § 30125(f)(1) or 11 C.F.R. § 300.71 by spending non-federal funds to
4 promote or support Sinema.

5 **II. FACTUAL BACKGROUND**

6 ADP is registered with the Commission as the official Arizona state party committee for
7 the Democratic National Committee.¹ Hobbs was the Democratic nominee for Arizona
8 Secretary of State in 2018, running against Republican Steve Gaynor. Sinema was the
9 Democratic nominee for U.S. Senate from Arizona in the 2018 general election. Her opponent
10 was Republican nominee Martha McSally.

11 The complaint alleges that beginning around October 3, 2018, ADP disbursed at least
12 \$1,833,355 for a television advertisement in support of and authorized by Hobbs. According to
13 the Complaint, these disbursements violated the Act because ADP used non-federal funds to
14 promote, attack, support, or oppose a federal candidate — specifically, the Complaint alleges
15 that the advertisement promoted and supported Sinema's federal candidacy.²

16 ADP's Response does not dispute the Complaint's allegations regarding the amount spent
17 on the ad or the timing of its dissemination, but claims that the advertisement does not promote
18 or support Sinema's candidacy.³ ADP's Response also includes a declaration from an individual
19 at a political media production firm stating that he drafted the advertisement's script and that it

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

² Compl. at 1-2 (Oct. 18, 2018).

³ Resp. of ADP at 2 (Dec. 14, 2018).

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1 was not intended to promote or support Sinema.⁴ The Response from Hobbs and her committee
 2 likewise denies that the advertisement in any way promoted or supported Sinema, and provides a
 3 link to the entire advertisement at issue.⁵ The images and dialogue from the advertisement are
 4 replicated below.



Man in Voting Booth: So who can I trust for Secretary of State?
 [3 seconds]



Man in Voting Booth: The CEO or the social worker?
 [3 seconds]



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.
 [8 seconds]

⁴ Resp. of ADP, Attach. ¶¶ 2-3, 8.

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

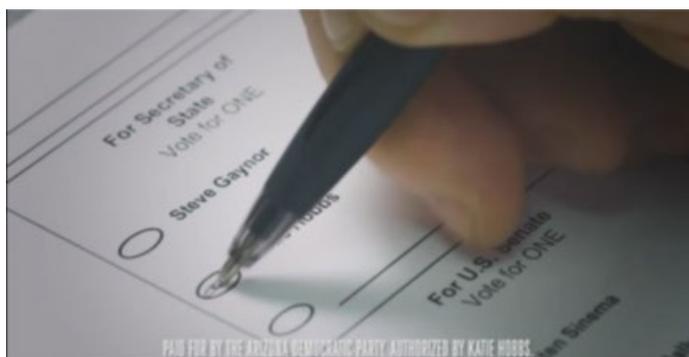
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Male Voice-Over: In the corporate world, Steve Gaynor got rich by cheating his employees out of overtime pay, and his company was forced to pay tens of thousands of dollars to workers in a settlement.
 [10 seconds]



Man in Voting Booth: So, the savvy senator or the shady CEO?
 [3 seconds]



Man in Voting Booth: That's a no-brainer.
 [3 seconds]

- 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.”⁶ The response from Hobbs and her committee argues that “at most” the

⁶ Resp. of ADP at 2.

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1 advertisement refers to the federal candidates for U.S. Senate but “does nothing to promote,
 2 support, attack, or oppose either federal candidate.”⁷

3 **III. LEGAL ANALYSIS**

4 **A. ADP’s Advertisement Does Not Appear to Constitute Federal Election** 5 **Activity**

6 The Act prohibits a state committee, candidate for state office, or the agent of a state
 7 candidate from spending funds on public communications that refer to a clearly identified
 8 candidate for federal office and that promote, attack, support, or oppose (“PASO”) a candidate
 9 for that office, unless the funds are subject to the limitations, prohibitions, and reporting
 10 requirements of the Act.⁸ The Act and Commission regulations specify that a communication
 11 may PASO a candidate regardless of whether the communication expressly advocates a vote for
 12 or against a candidate,⁹ but do not otherwise define the terms “promote,” “support,” “attack,” or
 13 “oppose.” The Supreme Court has stated that the use of those words in section 30101(20)(A)(iii)
 14 of the Act does not render the provision unconstitutionally vague, because they “clearly set forth
 15 the confines within which potential party speakers must act in order to avoid triggering the
 16 provision,” and they “provide explicit standards for those who apply them and give the person of
 17 ordinary intelligence a reasonable opportunity to know what is prohibited.”¹⁰

18 The Commission has made clear on numerous occasions that mere identification of an
 19 individual as a federal candidate in a public communication — such as when a federal candidate

⁷ Resp. of Katie Hobbs, *et al.* at 2.

⁸ 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).]

⁹ 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

¹⁰ *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

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1 endorses a state candidate — does not, by itself, PASO the federal candidate.¹¹ Similarly, in
2 MUR 6684 (Gregg for Indiana), the Commission dismissed the allegation that a state
3 gubernatorial candidate used non-federal funds to pay for an advertisement that purportedly
4 opposed a federal candidate.¹² There, the Commission found that, although the advertisement
5 included statements made by the federal candidate, the advertisement focused on the state
6 gubernatorial election and offered no commentary regarding the federal candidacy.¹³

7 By contrast, the Commission found that a communication was federal election activity
8 that did PASO a federal candidate in a matter in which a page in a local party committee’s flyer
9 said “How Do I Vote a Straight Democratic Ticket?” accompanied by President Obama’s
10 campaign logo, as well as a page that concluded with “The Left is Right — Vote Blue” next to
11 the Obama-Biden 2012 campaign logo.¹⁴ In MUR 6019 (Dominic Caserta for Assembly), the
12 Commission found that a local candidate’s statement that “we have two outstanding Democratic
13 candidates running for President,” along with references to “Barack Obama for President” and
14 “Hillary Clinton for President” arguably promoted Obama and Clinton as presidential
15 candidates.¹⁵ The Commission distinguished that case from past Advisory Opinions dealing
16 with mere identification of a federal candidate by noting that those opinions “did not address the

¹¹ 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).

¹² Factual & Legal Analysis at 6, MUR 6684 (Gregg for Indiana).

¹³ *Id.*

¹⁴ 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).

¹⁵ Factual & Legal Analysis at 4, MUR 6019 (Dominic Caserta for Assembly).

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1 specific reference to the federal candidacy ('for President') and the statement of support that we
2 have in this case."¹⁶

3 Here, the Complaint argues that the text "For U.S. Senate Vote for ONE" followed by
4 Sinema's name "likely constitutes express advocacy of her candidacy" or at the very least
5 promotes or supports her candidacy because it evokes Sinema in her capacity as a federal
6 candidate and advocates for her election.¹⁷ Although the advertisement references Sinema as a
7 candidate, it does not contain the "statement of support" the Commission highlighted in MUR
8 6019, above. Because the bubble next to Sinema's name remains unfilled throughout the
9 advertisement, it is not clear whether the depicted voter intends to vote for Sinema or McSally,
10 or even vote in the federal race at all. Nor does the communication include an image of
11 Sinema's campaign materials or a statement of support for the Democratic Party generally.¹⁸
12 Instead, the focus of the advertisement is on Hobbs, whose party affiliation is never mentioned,
13 and her opponent in the Secretary of State race. No one in the advertisement utters Sinema's
14 name.¹⁹ Although the advertisement identifies Sinema in her capacity as a federal candidate, a
15 viewer may not have even noticed Sinema's name due to its lack of prominence on the screen, its
16 slightly blurred nature, and the short amount of time it flashed on the screen. Thus, it is
17 reasonable to conclude that the advertisement does not promote or support her candidacy.

18 Accordingly, the Commission finds no reason to believe that ADP violated 52 U.S.C.
19 § 30125(b)(1) or 11 C.F.R. § 300.32(a)(2) by using non-federal funds for federal election

¹⁶ *Id.* at 4-5 (citing Advisory Op. 2007-34 (Jackson, Jr.), 2007-21 (Holt), and 2003-25 (Weinzapfel)).

¹⁷ 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.").

¹⁸ *Compare* Factual & Legal Analysis, MUR 6683.

¹⁹ The mockup ballot in the advertisement misspells Sinema's first name as "Krysten" rather than Kyrsten.

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1 activity, and no reason to believe that Katie Hobbs and Elect Katie Hobbs for Secretary of State
2 violated 52 U.S.C. § 30125(f)(1) or 11 C.F.R. § 300.71 by spending non-federal funds in that
3 manner.

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

5 The Complaint also argues that even if the advertisement does not PASO Sinema, ADP
6 was nonetheless required to allocate a portion of the cost to its federal account.²⁰ Under
7 Commission regulations, state parties such as ADP “that make expenditures and disbursements
8 in connection with both Federal and non-Federal elections for activities that are not Federal
9 election activities . . . may use only funds subject to the prohibitions and limitations of the Act,
10 or they may allocate such expenditures and disbursements between their Federal and their non-
11 Federal accounts.”²¹ However, the Commission’s regulations on allocation are clear that only
12 certain expenses may be allocated: administrative expenses, exempt party activities that are not
13 federal election activities, fundraising expenses, and voter drive activities that are neither federal
14 election activities nor party exempt activities.²²

15 The Complaint does not allege any such allocable activities. Rather, it alleges that ADP
16 made, and Hobbs and her committee approved, a public communication that clearly identified
17 and supported a federal candidate. But if that were true, the advertisement would constitute
18 federal election activity, and would need to have been paid for entirely by funds subject to the
19 limitations, prohibitions, and reporting requirements of the Act.²³

²⁰ Compl. at 4.

²¹ 11 C.F.R. § 106.7(b).

²² *See id.*

²³ *See* 11 C.F.R. § 300.33(c).

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1 As discussed above, however, the advertisement does not constitute federal election
2 activity. The Complaint has not otherwise alleged facts demonstrating that ADP made any
3 expenditures or disbursements in connection with a federal election that would need to be
4 allocated, and Commission regulations explicitly permit state parties to use non-federal funds for
5 non-Federal activity.²⁴ Therefore, the Commission finds no reason to believe that ADP violated
6 11 C.F.R. § 106.7 by failing to allocate the cost of the advertisement.

²⁴ *See id.* § 300.32(d).