

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

5 **MUR 7532**

6 DATE COMPLAINT FILED: November 1, 2018

7 DATE OF LAST RESPONSE: Not Applicable

8 DATE ACTIVATED: June 26, 2019
9

10 EXPIRATION OF SOL: October 7, 2023

11 ELECTION CYCLE: 2018

12 **COMPLAINANT:** Friends of Erik Paulsen

13
14 **RESPONDENTS:** Unknown Respondents
15

16 **MUR 7537**

17 DATE COMPLAINT FILED: November 6, 2018

18 DATE OF LAST RESPONSE: Not Applicable

19 DATE ACTIVATED: June 26, 2019
20

21 EXPIRATION OF SOL: October 1, 2023

22 ELECTION CYCLE: 2018

23 **COMPLAINANT:** Raymond Bozarth

24
25 **RESPONDENTS:** Unknown Respondents
26

27 **RELEVANT STATUTES**
28 **AND REGULATIONS:**

29 52 U.S.C. § 30101(4), (17), (22), (23)

30 52 U.S.C. § 30104(b), (c), (g)

31 52 U.S.C. § 30120(a)

32 11 C.F.R. § 100.5

33 11 C.F.R. § 100.17

34 11 C.F.R. § 100.22

35 11 C.F.R. § 100.26

36 11 C.F.R. § 100.27

37 11 C.F.R. § 104.4

38 11 C.F.R. § 109.10

39 11 C.F.R. § 110.11

40 **INTERNAL REPORTS CHECKED:** Disclosure reports

41 **FEDERAL AGENCIES CHECKED:** None
42

1 **I. INTRODUCTION**

2 These two complaints involve virtually identical advertisements criticizing two different
3 congressional candidates. The Complaint in MUR 7532 alleges that unknown respondents,
4 possibly an organization named Care in Action,¹ sent a mailing on or before October 17, 2018,
5 advocating the defeat of former Rep. Erik Paulsen.² The mailer did not include a disclaimer or
6 any information identifying who authorized or paid for it.³ The Complaint also alleges that
7 internet video (“digital”) ads and a website criticizing Paulsen, which are very similar to the
8 mailer, did not contain proper disclaimers.⁴

9 In MUR 7537, the Complaint alleges that numerous mailings distributed in October 2018
10 that criticized Republican candidate Ann Wagner—mailers very similar to those at issue in MUR
11 7532—lacked disclaimers.⁵ The MUR 7537 Complaint also alleges different mailers regarding
12 another federal candidate, Josh Hawley, lacked disclaimers.

13 The Paulsen and Wagner communications should have contained proper disclaimers and
14 been reported to the Commission because they are public communications containing express
15 advocacy. Therefore, we recommend that the Commission find reason to believe that Unknown

¹ A search of the FEC disclosure database indicates that Care in Action has never filed an independent expenditure report.

² MUR 7532 Compl. at 1-2 (Nov. 1, 2018). Paulsen was the incumbent congressman and Republican candidate for Minnesota’s third congressional district seat in the U.S. House in 2018. Paulsen lost in the November 6, 2018 general election. Paulsen is also the Complainant in MUR 7532.

³ *Id.*, Ex. A.

⁴ *Id.* at 1-2; Ex. B-E.

⁵ MUR 7537 Compl. at 1 (Nov. 6, 2018). Wagner was re-elected in the November 6, 2018 general election to represent Missouri’s second congressional district seat in the U.S. House with 51.1% of the vote; Josh Hawley, who was the attorney general of Missouri at the time of the election, was elected in the November 6, 2018 general election to represent Missouri in the U.S. Senate with 51.4% of the vote. One mailer criticizing Hawley appears to promote another 2018 Senate candidate, Japheth Campbell, who received 1.12% of the vote. *Id.*, Ex. A.

1 Respondents in MURs 7532 and 7537 violated 52 U.S.C. §§ 30120(a) and 30104(b) or (c), and
2 (g). We also recommend that the Commission merge MUR 7532 into MUR 7537.

3 There is insufficient information to determine if the Hawley mailers were created and
4 disseminated by the same entity responsible for the Paulsen and Wagner mailers. Further, the
5 Hawley mailers do not appear to contain express advocacy. However, the Hawley mailers seem to
6 be professionally produced, carry a U.S. Postal Service bulk mail permit, and likely exceed \$1,000
7 in costs. Therefore, it is possible that they were created and distributed by a political committee.
8 The available information is insufficient to determine whether the unknown respondent is a
9 political committee and, thus, we recommend that the Commission take no action at this time as to
10 that issue.

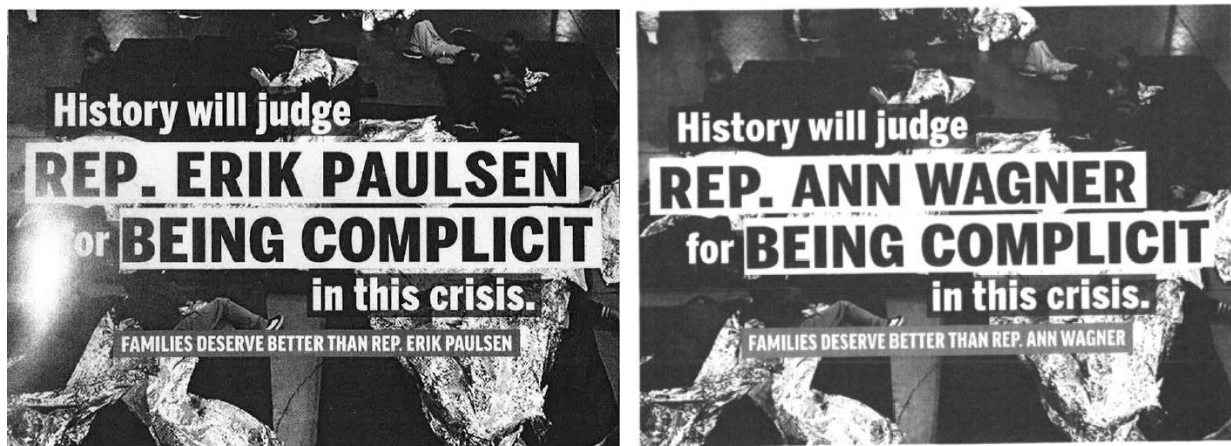
11 **II. FACTUAL BACKGROUND**

12 **A. Materials Opposing Erik Paulsen and Ann Wagner**

13 **1. Paulsen Mailer (MUR 7532) and Wagner Mailer (MUR 7537)**

14 The mailers attached to the Complaints show that unknown respondents disseminated
15 nearly identical mailers targeting federal candidates Paulsen and Wagner. The front of each
16 mailer shows a photo of children lying on mats in a large room.⁶

⁶ MUR 7532 Compl., Ex. A; MUR 7537 Compl., Ex. C.



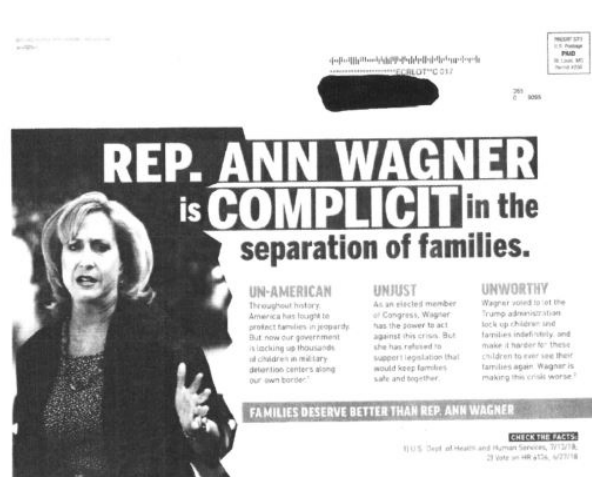
1
 2
 3 As shown below, the backs of the Paulsen and Wagner mailers read “REP.
 4 [CANDIDATE] is COMPLICIT in the separation of families,” and list three categories: “UN-
 5 AMERICAN,” “UNJUST,” AND “UNWORTHY.”⁷ The text of the mailers is virtually the
 6 same.⁸ Neither mailer contains a disclaimer.⁹ Both mailers were sent via bulk mail with no return
 7 address.¹⁰

⁷ *Id.*

⁸ *Id.* The mailers read: “UN-AMERICAN: Throughout history, America has fought to protect families in jeopardy. But now our government is locking up thousands of children in military detention centers along our own border;” “UNJUST: As an elected member of Congress, [Paulsen/Wagner] has the power to act against this crisis. But he/she has refused to introduce or support legislation to keep families safe and together;” and “UNWORTHY: [Paulsen/Wagner] voted to let the Trump administration lock up children and families indefinitely, and make it harder for those children to ever see their families again. [Paulsen/Wagner] is making this crisis worse.”

⁹ *Id.*

¹⁰ *Id.* The Paulsen mailer’s postmark, set apart in a box, reads: “PRSR STANDARD U.S. POSTAGE PAID 85040 PERMIT NO. 2691.” The address label bears the imprint “SCH 5-DIGIT 55344 FSSC” (indicating “5-Digit Scheme,” “Carrier Route — Periodicals and Marketing Mail basic FSS (Flats Sequencing System)), *see* https://about.usps.com/postal-bulletin/2016/pb22457/html/updt1_003.htm, and features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices, *see* <https://postalpro.usps.com/mailing/intelligent-mail-barcode>. The Wagner mailer’s postmark, set apart in a box, reads: “PRSR STD U.S. POSTAGE PAID St. Louis, MO, PERMIT NO. 256.” The address label bears the imprint “ECRLT **C 017” (indicating “Enhanced Carrier Route — Marketing Mail basic), and features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices.



3 The MUR 7532 Complaint also states that “[u]pon information and belief, the public
 4 communication was paid for and prepared by Care in Action,” alleging “[t]he content of the mailer
 5 matched in substance and style to content presented in two digital political advertisements
 6 published on Facebook.com by a group called ‘Reunify Families Now.’”¹¹

7 2. Paulsen and Wagner Internet Video Ads (MUR 7532)

8 The Reunify Families Now ads are identical, except for references to either Paulsen or
 9 Wagner. Specifically, the dates of publication, format, language, text, and images used in both the
 Paulsen and Wagner internet video ads (except for references to the candidate) are the same.

¹¹ MUR 7532 Compl. at 1, ¶ 3. An initial notification was sent to an entity in Florida named Care in Action USA, but the available information indicates that the Florida organization is a different entity than the one indicated in the Complaint. A rescission letter was mailed on November 16, 2018. This Office was not able to find an address for the entity identified in the Complaint as Care in Action.

MURs 7532 and 7537 (Unknown Respondents)
 First General Counsel's Report
 Page 6 of 23

1

The image displays four screenshots of Facebook advertisements for 'Reunify Families Now', sponsored by Care in Action. The ads are arranged in a 2x2 grid. Each ad features a video thumbnail with a play button icon. The top-left ad targets Rep. Erik Paulsen, with a text overlay: 'ERIK PAULSEN VOTED TO DETAIN FAMILIES INDEFINITELY'. Below the thumbnail is the headline 'Families deserve better than Rep. Erik Paulsen' and a 'Learn More' button. The top-right ad targets Rep. Ann Wagner, with a text overlay: 'ANN WAGNER VOTED TO DETAIN FAMILIES INDEFINITELY'. Below the thumbnail is the headline 'Families deserve better than Rep. Ann Wagner' and a 'Learn More' button. The bottom-left ad features a portrait of Erik Paulsen with the text overlay: 'ERIK PAULSEN'S REPUBLICAN PARTY TOOK CHILDREN FROM PARENTS'. Below the thumbnail is the headline 'Families deserve better than Rep. Erik Paulsen.' and a 'Learn More' button. The bottom-right ad features a portrait of Ann Wagner with the text overlay: 'ANN WAGNER'S REPUBLICAN PARTY TOOK CHILDREN FROM PARENTS'. Below the thumbnail is the headline 'Families deserve better than Rep. Ann Wagner' and a 'Learn More' button. All ads include the 'Reunify Families Now' logo and the text 'Sponsored · Paid for by Care in Action'.

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The MUR 7532 Complaint attaches screenshots of Facebook ads, Ad Archives, and charts of Ad Performance statistics related to Reunify Families Now, and alleges that the internet video ads failed to include contact information for Care in Action, and does not state whether the communications are authorized by any candidate or candidate's committee.¹² The image at the top of the October 7 ad reads "Reunify Families Now; Sponsored · Paid for by Care in Action,"

¹² *Id.*, Ex. B-E, *Id.* at 1-2. See *supra* at 6. See also: https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=%22Reunify%20Families%20Now%22.

1 and the bottom of the ad links to www.paulsenfailedfamilies.com and
 2 www.wagnerfailedfamilies.com.¹³ The October 7 ad is transcribed here:

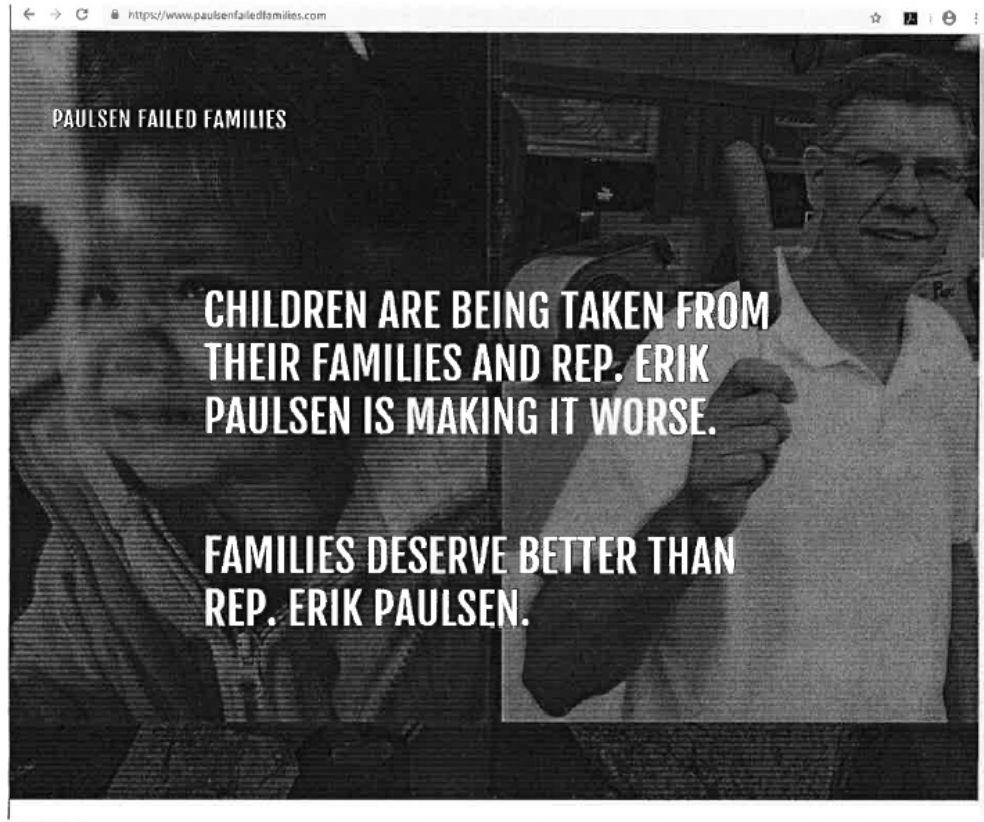
3 (image): headshot of Paulsen/Wagner
 4 (voiceover) "If [Paulsen/Wagner] won't speak up when children are in pain..."
 5 (text): Rep. [Erik Paulsen/Ann Wagner]
 6 (text in red): SILENT when children are in pain
 7
 8 (image): Young family of four — man, woman, girl, infant — walking in the park
 9 (voiceover) "What makes you think [he'd/she'd] speak up for yours?"
 10 (text): What makes you think [he'd/she'd] speak up for yours?
 11
 12 (image): crying toddler behind glass
 13 (voiceover) "Our children are in pain, taken from their parents by our own government."
 14 (text): Children taken from their parents
 15
 16 (image): image of crying child; frame rips open to reveal headshot of Paulsen/Wagner
 17 (voiceover) "And [Erik Paulsen/Ann Wagner] is complicit."
 18 (text): [Erik Paulsen/Ann Wagner] is complicit
 19
 20 (image): video of children behind fence
 21 (voiceover) "[He/She] even voted to lock families up indefinitely..."
 22 (text): [Erik Paulsen/Ann Wagner] voted to detain families indefinitely
 23
 24 (image): alternate video of different children behind fence
 25 (voiceover) "...and make it harder for children to be reunited with their families."
 26 (text): [Erik Paulsen/Ann Wagner] keeping families apart
 27
 28 (image): headshot of Paulsen/ Wagner
 29 (voiceover) "Families deserve better than [Congressman Erik Paulsen/Congresswoman
 30 Ann Wagner]."
 31 (text): Families deserve better than [Paulsen/Wagner]
 32 (text): Paid for by Care in Action.
 33
 34 There are also October 12, 2018, internet videos allegedly posted by the "Reunify Families
 35 Now" Facebook account each bearing photos of Paulsen or Wagner.¹⁴ The October 12 ad is
 36 transcribed here:

¹³ *Id.* The URL <http://www.paulsenfailedfamilies.com> and <http://www.wagnerfailedfamilies.com> do not link to currently active websites, and are not accessible via the Archive.org Wayback Machine search feature.

1 (image): *Split screen — video of children behind fence (L)/headshot of the candidate (R)*
 2 (voiceover) “[Erik Paulsen’s/Ann Wagner’s] Republican Party took small children away
 3 from their parents.”
 4 (text): [Erik Paulsen’s/Ann Wagner’s] Republican Party **took children from parents**
 5 (voiceover) “They locked children in prisons.”
 6 (text): [Erik Paulsen’s/Ann Wagner’s] Republican Party **locked children in prisons**
 7
 8 (image): *headshot of Paulsen/Wagner*
 9 (voiceover) “And what did [Erik Paulsen/Ann Wagner] do?”
 10 (text): What did [**Erik Paulsen/Ann Wagner**] do?
 11
 12 (image): *video of jail door closing superimposed over American flag*
 13 (voiceover) “[He/She] voted to let the government lock up children and their families
 14 indefinitely.”
 15 (text): [Erik Paulsen/Ann Wagner] **voted to lock up families indefinitely**
 16
 17 (image): *videos of American military scenes (D-Day, Vietnam) superimposed over*
 18 *American flag*
 19 (voiceover) “Throughout history, Americans have taken a brave stand against human rights
 20 abuses and crimes against children.”
 21 (text): Americans stand against **human rights abuses**
 22
 23 (image): *headshot of Paulsen/Wagner*
 24 (voiceover) “By letting his/her party lock up children, [Erik Paulsen/Ann Wagner] has
 25 betrayed our American values.”
 26 (text): [Erik Paulsen/Ann Wagner] betrayed **American values**
 27 (voiceover) “Families deserve better than [Erik Paulsen/Ann Wagner].”
 28 (text): [Erik Paulsen/Ann Wagner] betrayed **American families**
 29 (text): Paid for by Care in Action.
 30
 31 Finally, the MUR 7532 Complaint attaches a screenshot of the website
 32 www.paulsenfailedfamilies.com (now unavailable), that displays a photo of Paulsen.¹⁵

¹⁴ *Id.*, Ex. B-D. The October 12 ad screenshot that is attached to the Complaint reads “What did Erik Paulsen do?” *Id.*, Ex. B. *See also*: https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=%22Reunify%20Families%20Now%22.

¹⁵ *Id.*, Ex. F. Because the MUR 7532 Complaint only addresses materials opposing Erik Paulsen, it does not include screenshots of the website www.wagnerfailedfamilies.com.



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2 The website also lists three columns criticizing Paulsen, similar to those on the back of
3 mailer.¹⁶ In addition to using the same language as the mailer attached to the Complaint, the
4 website states: “Disclaimer: Paid for by Care in Action. Independent expenditure, not approved
5 by any candidate or candidate’s committee.”¹⁷

¹⁶ *Id.*

¹⁷ *Id.*

← → ↻ https://www.pausenfailedfamilies.com ☆ [] [] [] []

THOUSANDS OF FAMILIES SEPARATED

The Trump administration has separated thousands of children from their parents and locked them up in military detention facilities. And there are still no plans for how all these children will be reunited with their parents.

YET PAULSEN HAS DONE NOTHING


As an elected member of Congress, Paulsen has the power to act against this crisis. But he refuses to introduce or support legislation to keep families safe and together.

AND EVEN VOTED TO MAKE DETENTION EASIER

Paulsen voted to let the administration lock up children and families indefinitely, and make it harder for these children to ever see their families again. Instead of working to end this crisis, Paulsen is making it worse.

1

← → ↻ https://www.pausenfailedfamilies.com ☆ [] [] [] []



CHECK THE FACTS

¹ U.S. Dept. of Health and Human Services, 7/13/18

² Vote on HR 6136, 6/27/18

DISCLAIMER

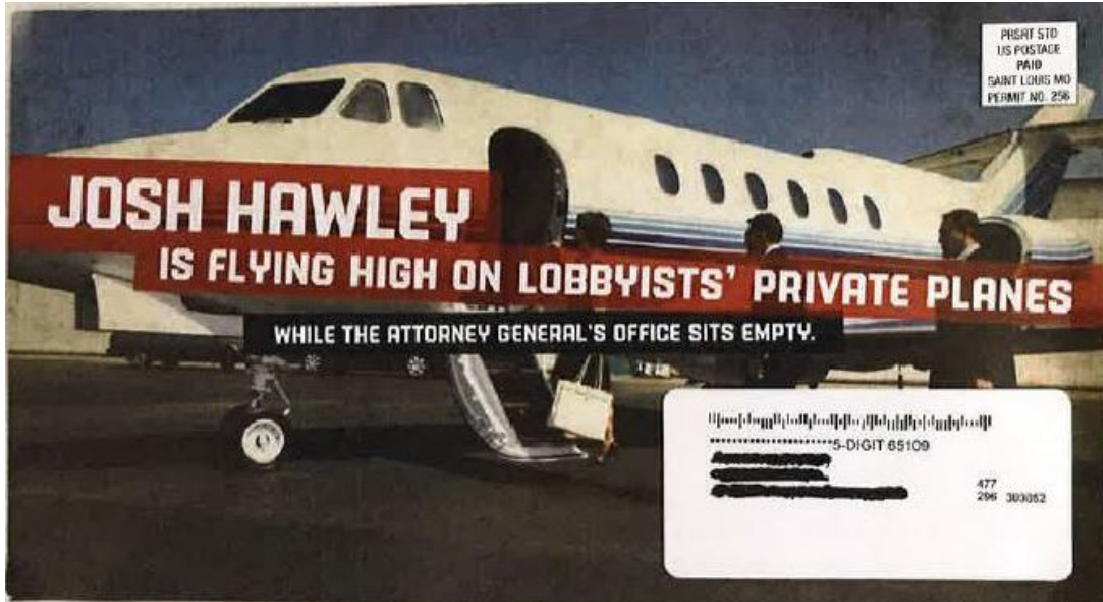
PAID FOR BY CARE IN ACTION. INDEPENDENT EXPENDITURE, NOT APPROVED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE.

2

3

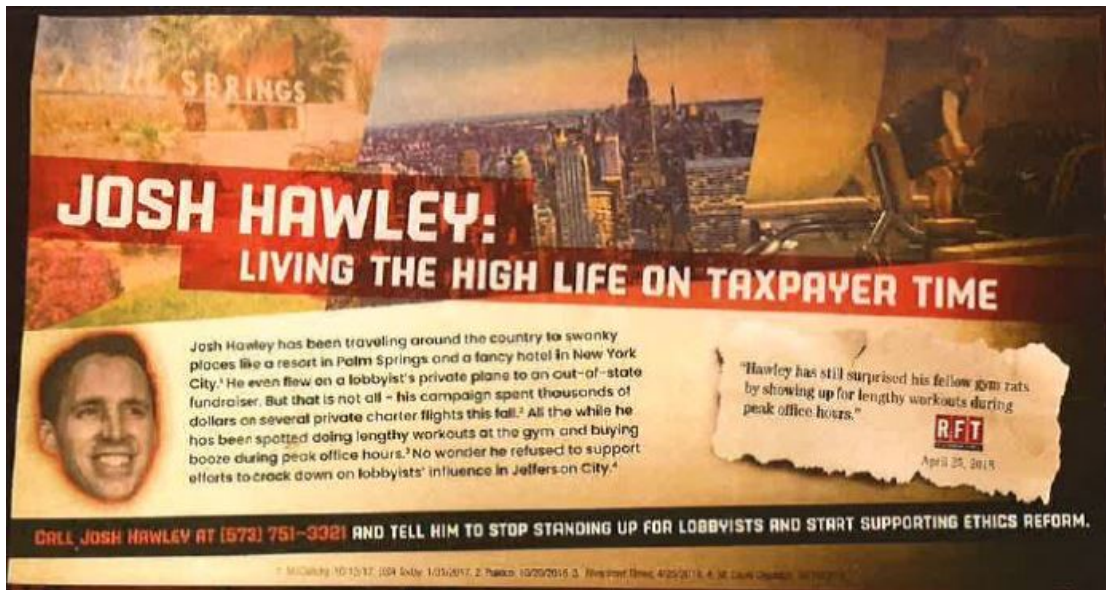
1 **B. Materials Opposing Josh Hawley (MUR 7537)**

2 Images of the first mailer opposing Hawley are reproduced below:¹⁸



3

4

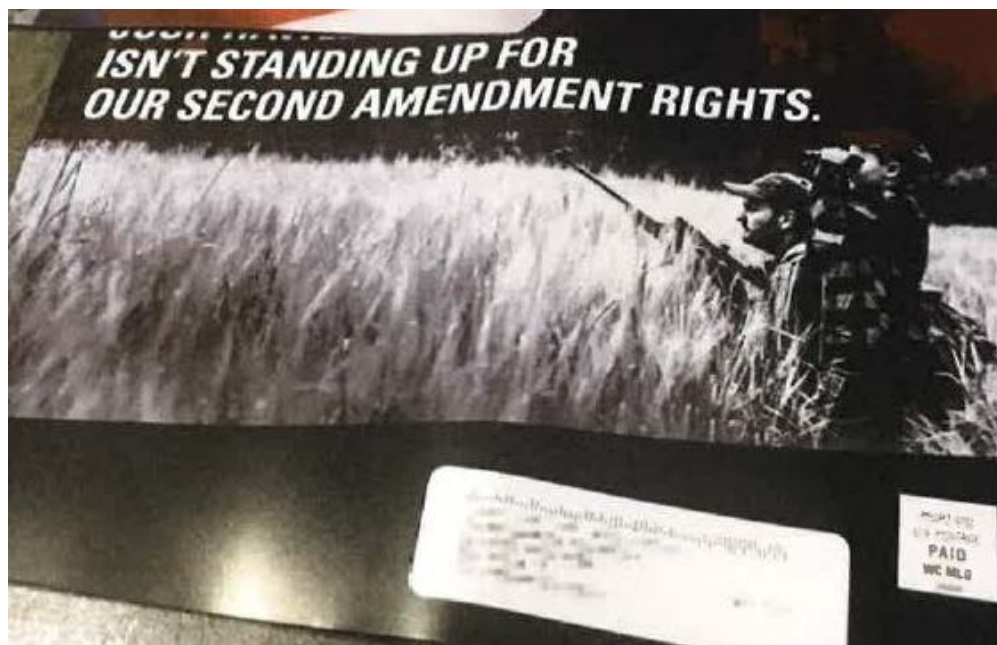


5

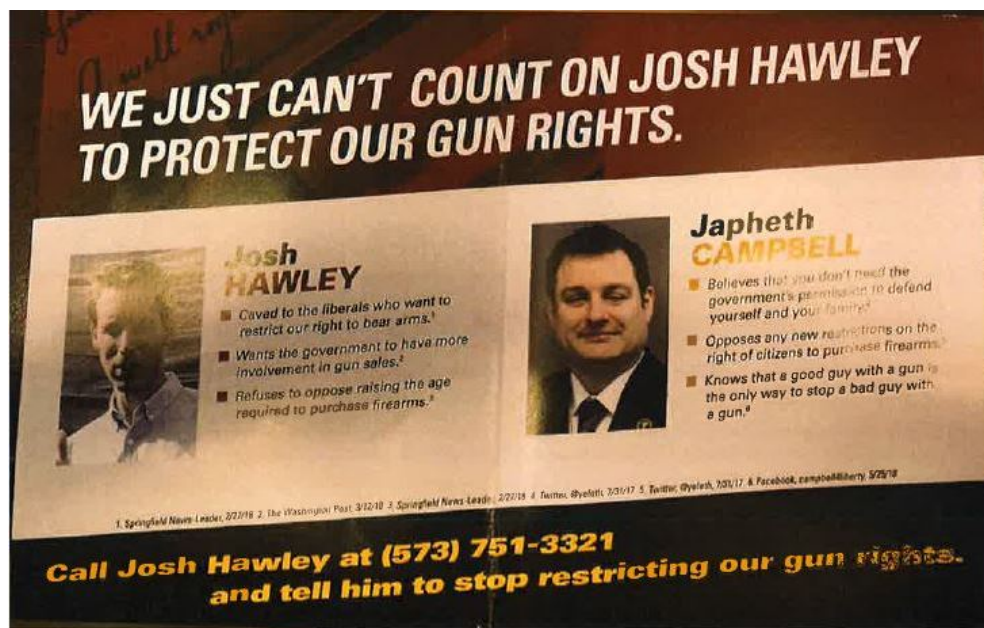
¹⁸ MUR 7537 Compl., Ex. D.

1 The mailer concludes: "Call Josh Hawley at (573) 751-3327 and tell him to stop standing up for
 2 lobbyists and start supporting ethics reform."¹⁹

3 Images of the second Hawley mailer appear below.²⁰



4
5



6

¹⁹ *Id.*

²⁰ *Id.*, Ex. A, B.

1 The text on the back of the mailer reads as follows.

Josh HAWLEY

- Caved to the liberals who want to restrict our right to bear arms.
- Wants the government to have more involvement in gun sales.
- Refuses to oppose raising the age required to purchase firearms.

Japheth CAMPBELL

- Believes that you don't need the government's permission to defend yourself and your family.
- Opposes any new restrictions on the right of citizens to purchase firearms.
- Knows that a good guy with a gun is the only way to stop a bad guy with a gun.

2 Both Hawley mailers were sent via bulk mail with no return address.²¹ A third mailer
 3 appears in the Complaint next to the second Hawley mailer, but only the front is shown, with no
 4 reference to Hawley or any other candidate.²²



5
6

²¹ The first mailer's postmark, set apart in a box, reads: "PRSR STD U.S. POSTAGE **PAID** SAINT LOUIS, MO, PERMIT NO. 256." This appears to be the same indicia as the postmark on the Ann Wagner mailer, *see* MUR 7537 Compl. Ex. C, indicating that they may have been mailed from the same shipping source, although there are no other similarities in the content of the Hawley and Wagner mailings. The address label bears the imprint "5-DIGIT 65109" and features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices, *see* <https://postalpro.usps.com/mailing/intelligent-mail-barcode>. The second mailer's postmark is also set apart in a box, but the image attached to the Complaint is less clear. The legible text reads: "PRSR STD U.S. POSTAGE **PAID** WC MLG." The address label is not legible on the image attached to the Complaint for the second mailer, but it clearly features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices.

²² MUR 7537 Compl. Ex. B. Neither the postmark nor the address label of this third mailer are legible.

1 **III. LEGAL ANALYSIS**

2 **A. Disclaimers**

3 The Federal Election Campaign Act of 1971, as amended (the “Act”), requires that
4 whenever a political committee makes a disbursement for the purpose of financing any
5 communication through any mailing, or any other type of general public political advertising, such
6 communication must clearly state who paid for the communication.²³ A communication
7 authorized and paid for by a candidate, an authorized committee of a candidate, or an agent of
8 either, must clearly state that the communication was paid for by the authorized political
9 committee.²⁴ A communication authorized by a candidate, an authorized committee of a
10 candidate, or an agent of either but paid for by another person, must clearly state that the
11 communication was paid for by such person but authorized by the political committee.²⁵

12 The Act also requires that all public communications that expressly advocate the election
13 or defeat of a clearly identified candidate include a disclaimer.²⁶ “Public communications”
14 include “mass mailings,” which are mailings of more than 500 pieces of mail of an identical or
15 substantially similar nature within any 30-day period.²⁷ “Public communications” also include
16 communications over the Internet that have been placed for a fee on another person’s Web site.”²⁸

17 Where required, disclaimers must be “presented in a clear and conspicuous manner, to give
18 the reader, observer, or listener adequate notice of the identity of the person or political committee

²³ 52 U.S.C. § 30120(a).

²⁴ 52 U.S.C. § 30120(a)(1).

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

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

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

²⁸ 11 C.F.R. § 100.26.

1 that paid for, and where required, that authorized the communication.”²⁹ If a communication is
 2 not authorized by a candidate’s authorized committee, it must clearly state the name and
 3 permanent address, telephone number or website address of the person who paid for the
 4 communication and state that the communication is not authorized by any candidate or candidate’s
 5 committee.³⁰

6 The Complaints allege that the Paulsen, Wagner, and Hawley mailers violated the Act’s
 7 disclaimer requirements.³¹ The Paulsen, Wagner, and Hawley mailers appear to constitute public
 8 communications because they appear professionally produced and carry a U.S. Postal Service
 9 (“USPS”) bulk mail permit and, therefore, likely exceeded 500 pieces for each mailing.³² The
 10 mailers, however, do not include any disclaimers.³³

11 Additionally, the MUR 7532 Complaint alleges that the internet videos related to Paulsen
 12 violated 11 C.F.R. § 110.11(b)(3).³⁴ The Paulsen videos, and the nearly identical Wagner videos,
 13 also appear to constitute public communications because they each advocate the defeat of a clearly
 14 identified candidate, and the available information indicates they were internet communications

²⁹ 11 C.F.R. § 110.11(c). For printed communications, disclaimers must be clear and conspicuous, be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other contents of the communication, and must clearly state who paid for the communication. *Id.* § 110.11(c)(2).

³⁰ *Id.* § 110.11(b)(3).

³¹ MUR 7532 Compl. at 1-2; MUR 7537 Compl. at 1

³² Neither Complaint specifies the number of mailings, but the MUR 7532 Complaint does categorize the Paulsen mailer as a “public communication.” MUR 7532 Compl. at 1. It is clear that at least 200 copies of the mailers were distributed because the bulk mail permit imprints indicate that the mailers were sent by Standard Mail, and USPS requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. MUR 7532 Compl., Ex. A, MUR 7537 Compl., Ex. A-D. *See* <https://pe.usps.com/businessmail101?ViewName=StandardMail>. (Last visited September 4, 2019).

³³ MUR 7532 Compl., Ex. A; MUR 7537 Compl., Ex. A-D.

³⁴ MUR 7532 Compl. at 1-2. The internet video ads are designated as “Sponsored,” *see id.*, Ex. B-E, indicating that they were placed for a fee on another person’s Web site. *See* 11 C.F.R. § 100.26. Additionally, the “Money spent” statistic in the Facebook Ad Performance analytics for each ad indicates that each ad cost between \$500-999. *Id.*, Ex. D-E.

1 that were placed for a fee on another person's Web site. Although the videos contained the
2 disclaimer "Paid for by Care in Action," they failed to state the name and permanent address,
3 telephone number, or website address of the person who paid for the communication, and failed to
4 state whether or not the political advertisement was authorized by any candidate or candidate's
5 committee.

6 **1. The Paulsen and Wagner Communications Required Disclaimers Because They**
7 **Contain Express Advocacy**
8

9 Commission regulations provide that a communication expressly advocates the election or
10 defeat of a clearly identified candidate when it uses certain phrases or uses campaign slogans or
11 individual words, "which in context can have no other reasonable meaning than to urge the
12 election or defeat of one or more clearly identified candidate(s)."³⁵ Commission regulations also
13 state, a communication constitutes express advocacy if "[w]hen taken as a whole and with limited
14 reference to external events, such as the proximity to the election, [the communication] could only
15 be interpreted by a reasonable person as containing advocacy of the election or defeat of one or
16 more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is
17 unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds
18 could not differ as to whether it encourages actions to elect or defeat one or more clearly identified
19 candidate(s) or encourages some other kind of action."³⁶

³⁵ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (July 6, 1995) ("Express Advocacy E&J"); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

³⁶ 11 C.F.R. § 100.22(b).

1 In its explanation and justification for section 11 C.F.R. §100.22(b), the Commission
2 stated, “communications discussing or commenting on a candidate’s character, qualifications or
3 accomplishments are considered express advocacy under new section 100.22(b) if, in context, they
4 can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in
5 question.”³⁷ In MUR 5024R, the Commission concluded that, in context, the brochures
6 constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions of the
7 brochure, including the phrase “Tell Tom Kean Jr....New Jersey Needs New Jersey Leaders,”
8 were “unmistakable, unambiguous and suggestive of only one meaning” — to vote against Tom
9 Kean.³⁸ In MURs 5511/5525, the Commission concluded that attacks on John Kerry’s character,
10 fitness for public office, and capacity to lead, including phrases such as “JOHN KERRY
11 CANNOT BE TRUSTED” and “unfit for command” were “unmistakable, unambiguous and
12 suggestive of only one meaning” — and had no reasonable meaning other than to encourage
13 actions to defeat him in the upcoming election.³⁹ Similarly, in MUR 5831, the Commission
14 concluded that, in context, the ad attacking Bob Casey’s qualifications and stating “Can we really
15 risk Bob Casey learning on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b),
16 because the electoral portions were “unmistakable, unambiguous and suggestive of only one
17 meaning” — to vote against Bob Casey.⁴⁰ The Commission concluded that outside the context of
18 the upcoming election, these advertisements were virtually meaningless.⁴¹

³⁷ EA E&J, 60 Fed. Reg. at 35,295.

³⁸ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

³⁹ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

⁴⁰ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

⁴¹ *Id.*

1 The available information indicates that the Paulsen and Wagner mailers, and the similar
2 internet video ads, contained express advocacy under 11 C.F.R. § 100.22(b). The mailers clearly
3 identify federal candidates Paulsen and Wagner, and contain attacks on their character and fitness
4 very similar to those the Commission has found to be express advocacy under § 100.22(b).
5 Specifically, the ads call both Paulsen and Wagner “unjust,” “unworthy,” and “un-American” and
6 state that Paulsen and Wagner “ha[ve] betrayed American values,” they do not “deserve to speak
7 for...families” and “Families deserve better than” Paulsen and Wagner.⁴² Additionally, the
8 mailers were sent in late October 2018, close to the November 6, 2018, general election, and the
9 videos were made available online less than a month before the general election. The content of
10 the statements, along with their timing,⁴³ have an unmistakable, unambiguous meaning: vote
11 against Paulsen and Wagner in the upcoming election. Because the Paulsen and Wagner
12 communications advocate the defeat of federal candidates, those communications constitute
13 express advocacy, and should have contained disclaimers. Accordingly, we recommend that the
14 Commission find reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a) with
15 regard to the Paulsen and Wagner communications.

16 The Hawley mailers in MUR 7537 clearly identify Josh Hawley, a federal candidate and
17 then-Attorney General of Missouri, and were distributed in October 2018, close to the November
18 6, 2018, general election. However, the Hawley mailers appear to encourage the reader to contact
19 Hawley in his then-current role as Attorney General, thus, they can be reasonably interpreted as
20 something other than calling for his defeat in his federal election.

⁴² *See supra* at 4-6.

⁴³ Commission regulations specify that the “proximity to the election” is a permissible external event to consider when determining whether a communication has a reasonable, non-electoral meaning. *See* 11 C.F.R. § 100.22(b); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (“Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.”).

2. The Communications May Have Been Paid for by a Political Committee

Notwithstanding whether the mailers and internet video ads contained express advocacy, if they were paid for by a political committee, the Act and Commission regulations require the communications to include disclaimers.⁴⁴ The Act and Commission regulations define a “political committee” as “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”⁴⁵ In *Buckley v. Valeo*,⁴⁶ the Supreme Court observed that the term “political committee” “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”⁴⁷

The Paulsen and Wagner communications all contain the same general content and used similar phrases and images, so it is reasonable to conclude that the Paulsen and Wagner communications were produced by the same sponsor.⁴⁸ Furthermore, the record contains sufficient information to infer that the sponsors of the Paulsen and Wagner mailers and videos exceeded the \$1,000 statutory threshold.⁴⁹ There is, however, insufficient information at this point

⁴⁴ 52 U.S.C. § 30120(a).

⁴⁵ *Id.* § 30101(4)(A); 11 C.F.R. § 100.5. *See also* Political Committee Status, 72 Fed. Reg. 5596, 5597 (Feb. 7, 2007) (Supplemental Explanation and Justification) (“Supplemental E&J”) (“When applied to communications made independently of a candidate or a candidate's committee, the term ‘expenditure’ includes only ‘expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.’ *Buckley v. Valeo*, 424 U.S. 1, 44, 80 (1976).”)

⁴⁶ 424 U.S. 1 (1976).

⁴⁷ *Id.* at 79.

⁴⁸ MUR 7532 Compl., Ex. A-F; MUR 7537 Compl., Ex. C.

⁴⁹ The Facebook analytics for each internet video ad indicate that each ad cost between \$500-999, which would total an expenditure of \$2,000-\$3,996. MUR 7532 Compl., Ex. D-E. *See also* https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=%22Reunify%20Families%20Now%22.

1 to determine whether the sponsor's major purpose was the nomination or election of a federal
2 candidate. Accordingly, we recommend that the Commission take no action at this time as to the
3 allegations that Unknown Respondents violated 52 U.S.C. § 30120(a) with regard to the Paulsen
4 and Wagner communications on the basis that the sponsor may have been a political committee.⁵⁰
5 The Hawley mailers appear to have been produced by a separate entity than the party responsible
6 for the Paulsen and Wagner mailers. Additionally, the Hawley mailers seem to be professionally
7 produced, carry a U.S. Postal Service bulk mail permit, and likely exceed \$1,000 in costs.
8 However, like the Paulsen and Wagner communications, there is insufficient information in the
9 record to determine whether the major purpose of the Hawley mailers' sponsor was the
10 nomination or election of a federal candidate. Therefore, we recommend that the Commission
11 take no action at this time as to the allegations that separate Unknown Respondents violated 52
12 U.S.C. § 30120(a) with regard to the Hawley mailers on the basis that the sponsor may have been
13 a political committee.

14 **B. Reporting**

15 Political committees, whether authorized by any candidate or not, must disclose
16 disbursements as part of their regular reporting to the Commission.⁵¹ Political committees that
17 make independent expenditures, whether authorized by any candidate or not, must also disclose
18 these expenditures to the Commission as part of their regular reporting.⁵² Any person other than a
19 political committee that makes expenditures that expressly advocate the election or defeat of a

⁵⁰ See also 11 C.F.R. § 110.11(a)-(c).

⁵¹ 52 U.S.C. § 30104(b)(4)(G), (H)(v). An organization that is not controlled by a candidate that (1) exceeds the \$1,000 aggregate expenditure threshold and (2) it has as its "major purpose" the nomination or election of federal candidates would also have to register and file disclosure reports with the Commission.

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

1 federal candidate that exceed \$250 must file an independent expenditure report with the
2 Commission pursuant to 52 U.S.C. § 30104(c).⁵³ Additionally, political committees and other
3 persons that make independent expenditures aggregating \$1,000 or more made after the 20th day,
4 but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-
5 hour notice.⁵⁴

6 The available information indicates that the Paulsen and Wagner mailers and their
7 associated internet video ads constituted express advocacy, and expenditures for the mailers and
8 ads exceeded \$250. Therefore, whether these communications were made by a political
9 committee or through independent expenditures, they should have been disclosed to the
10 Commission. Accordingly, we recommend that the Commission find reason to believe that
11 Unknown Respondents violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures
12 made in connection with the Paulsen and Wagner mailers and internet video ads. Also, because
13 the mailers appear to have been distributed in October 2018,⁵⁵ potentially 20 days before the
14 election on November 6, 2018, and appeared to cost over \$1,000, 24-hour notices would likely
15 have been required. Accordingly, we recommend that the Commission find reason to believe that
16 Unknown Respondents violated 52 U.S.C. § 30104(g) with respect to the Paulsen and Wagner
17 communications.

⁵³ The Act defines “independent expenditure” as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 52 U.S.C. § 30101(17).

⁵⁴ See 52 U.S.C. § 30104(g)(1)(A). Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. See 11 C.F.R. §§ 104.4(c), 109.10(d).

⁵⁵ See MUR 7532 Compl. at 1-2; MUR 7537 Compl. at 1.

1 The available information indicates that the Hawley mailers did not constitute express
2 advocacy, even if the expenditures for the mailers may have exceeded \$250. Therefore, these
3 communications were only required to have been disclosed to the Commission if they were made
4 by a political committee. There is, however, insufficient information in the record to determine
5 whether the sponsor was a political committee, therefore, we recommend that the Commission
6 take no action at this time as to the possibility that Unknown Respondents violated 52 U.S.C.
7 § 30104(b) or (c) and 52 U.S.C. § 30104(g) by failing to report expenditures made in connection
8 with the Hawley mailers.

9 **IV. PROPOSED INVESTIGATION**

10 During an investigation, we intend to identify the parties responsible for the
11 communications at issue in the two complaints, how many mailers were sent, how much they cost,
12 when they were disseminated, and whether the responsible parties sponsored additional
13 communications. We have asked the USPS offices to identify the holders of the bulk mail
14 permits, but USPS has not yet provided that information.⁵⁶ Although we intend to conduct the
15 investigation through informal means, we recommend the Commission authorize compulsory
16 process if informal means fail.

17 **V. RECOMMENDATIONS**

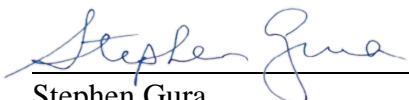
- 18 1. Merge MUR 7532 into MUR 7537;
- 19
- 20 2. Find reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a), with
21 regard to the Paulsen and Wagner mailers and internet video ads on the basis that the
22 communications contained express advocacy.
- 23

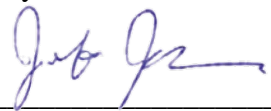
⁵⁶ Representatives at the USPS offices have stated either that the permit number is not currently registered, or that they could not give out the permit holder's information without the permit holder's consent.

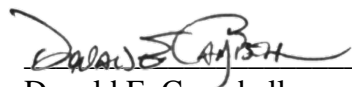
- 1 3. Take no action at this time as to the allegations that Unknown Respondents violated 52
- 2 U.S.C. § 30120(a) with regard to the Paulsen and Wagner mailers and internet video ads
- 3 on the basis that the sponsor may have been a political committee.
- 4
- 5 4. Find reason to believe that Unknown Respondents violated 52 U.S.C. § 30104(b) or
- 6 (c), and (g) with regard to the Paulsen and Wagner mailers and internet video ads on
- 7 the basis that the communications contained express advocacy.
- 8
- 9 5. Take no action at this time regarding the allegations that Unknown Respondents violated
- 10 52 U.S.C. § 30120(a) with regard to the Hawley mailers on the basis that the sponsor may
- 11 have been a political committee.
- 12
- 13 6. Take no action at this time regarding the possibility that Unknown Respondents violated
- 14 52 U.S.C. § 30104(b) or (c), and (g) with regard to the Hawley mailers on the basis that the
- 15 sponsor may have been a political committee.
- 16
- 17 7. Authorize the use of compulsory process, as necessary.
- 18
- 19 8. Approve the attached Factual and Legal Analysis.⁵⁷
- 20
- 21 9. Approve the appropriate letters.
- 22

Lisa J. Stevenson
Acting General Counsel

26
27 10.21.19
28 Date


Stephen Gura
Deputy Associate General Counsel


Jeff S. Jordan
Assistant General Counsel


Donald E. Campbell
Attorney

41 Attachment
42 Factual and Legal Analysis

⁵⁷ We intend to send the Factual and Legal Analysis to the parties responsible for the mailers and internet video ads once we learn their identities.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENTS: Unknown Respondents

MUR: 7537

4
5 **I. INTRODUCTION**

6 Two separate complaints filed with the Commission involve virtually identical
7 advertisements criticizing two different congressional candidates.¹ The Complaint in MUR 7532
8 alleges that unknown respondents, possibly an organization named Care in Action,² sent a
9 mailing on or before October 17, 2018, advocating the defeat of former Rep. Erik Paulsen.³ The
10 mailer did not include a disclaimer or any information identifying who authorized or paid for it.⁴
11 The Complaint also alleges that internet video (“digital”) ads and a website criticizing Paulsen,
12 which are very similar to the mailer, did not contain proper disclaimers.⁵

13 In MUR 7537, the Complaint alleges that numerous mailings distributed in October 2018
14 that criticized Republican candidate Ann Wagner—mailers very similar to those at issue in MUR
15 7532—lacked disclaimers.⁶

16 The Paulsen and Wagner communications should have contained proper disclaimers and
17 been reported to the Commission because they are public communications containing express

¹ The Commission merged MUR 7532 into MUR 7537.

² A search of the FEC disclosure database indicates that Care in Action has never filed an independent expenditure report.

³ MUR 7532 Compl. at 1-2 (Nov. 1, 2018). Paulsen was the incumbent congressman and Republican candidate for Minnesota’s third congressional district seat in the U.S. House in 2018. Paulsen lost in the November 6, 2018 general election. Paulsen is also the Complainant in MUR 7532.

⁴ *Id.*, Ex. A.

⁵ *Id.* at 1-2; Ex. B-E.

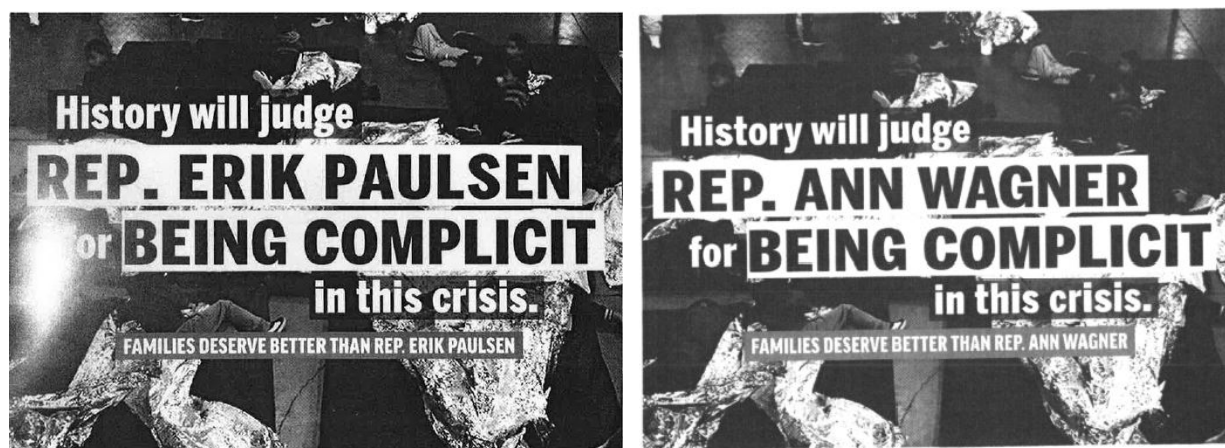
⁶ MUR 7537 Compl. at 1 (Nov. 6, 2018). Wagner was re-elected in the November 6, 2018 general election to represent Missouri’s second congressional district seat in the U.S. House with 51.1% of the vote.

1 advocacy. Therefore, the Commission finds reason to believe that Unknown Respondents in
 2 MURs 7532 and 7537 violated 52 U.S.C. §§ 30120(a) and 30104(b) or (c), and (g).

3 **II. FACTUAL BACKGROUND**

4 **A. Mailers Opposing Paulsen (MUR 7532) and Wagner (MUR 7537)**

5 The mailers attached to the Complaints show that unknown respondents disseminated
 6 nearly identical mailers targeting federal candidates Paulsen and Wagner. The front of each
 7 mailer shows a photo of children lying on mats in a large room.⁷



10 As shown below, the backs of the Paulsen and Wagner mailers read “REP.
 11 [CANDIDATE] is COMPLICIT in the separation of families,” and list three categories: “UN-
 12 AMERICAN,” “UNJUST,” AND “UNWORTHY.”⁸ The text of the mailers is virtually the

⁷ MUR 7532 Compl., Ex. A; MUR 7537 Compl., Ex. C.

⁸ *Id.*

1 same.⁹ Neither mailer contains a disclaimer.¹⁰ Both mailers were sent via bulk mail with no
 2 return address.¹¹



3
 4 The MUR 7532 Complaint also states that “[u]pon information and belief, the public
 5 communication was paid for and prepared by Care in Action,” alleging “[t]he content of the mailer
 6 matched in substance and style to content presented in two digital political advertisements
 7 published on Facebook.com by a group called ‘Reunify Families Now.’”¹²

8

⁹ *Id.* The mailers read: “UN-AMERICAN: Throughout history, America has fought to protect families in jeopardy. But now our government is locking up thousands of children in military detention centers along our own border;” “UNJUST: As an elected member of Congress, [Paulsen/Wagner] has the power to act against this crisis. But he/she has refused to introduce or support legislation to keep families safe and together;” and “UNWORTHY: [Paulsen/Wagner] voted to let the Trump administration lock up children and families indefinitely, and make it harder for those children to ever see their families again. [Paulsen/Wagner] is making this crisis worse.”

¹⁰ *Id.*

¹¹ *Id.* The Paulsen mailer’s postmark, set apart in a box, reads: “PRSR STANDARD U.S. POSTAGE PAID 85040 PERMIT NO. 2691.” The address label bears the imprint “SCH 5-DIGIT 55344 FSSC” (indicating “5-Digit Scheme,” “Carrier Route — Periodicals and Marketing Mail basic FSS (Flats Sequencing System)), see https://about.usps.com/postal-bulletin/2016/pb22457/html/updt1_003.htm, and features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices, see <https://postalpro.usps.com/mailing/intelligent-mail-barcode>. The Wagner mailer’s postmark, set apart in a box, reads: “PRSR STD U.S. POSTAGE PAID St. Louis, MO, PERMIT NO. 256.” The address label bears the imprint “ECRLT **C 017” (indicating “Enhanced Carrier Route — Marketing Mail basic), and features an Intelligent Mail barcode above the address, indicating the mail was prepared for automation prices.

¹² MUR 7532 Compl. at 1, ¶ 3.

1 **B. Internet Video Ads Opposing Paulsen and Wagner (MUR 7532)**

2 The Reunify Families Now ads are identical, except for references to either Paulsen or
 3 Wagner. Specifically, the dates of publication, format, language, text, and images used in both
 4 the Paulsen and Wagner internet video ads (except for references to the candidate) are the same.

5

The image displays four screenshots of Facebook video advertisements. Each ad is sponsored by 'Reunify Families Now' and is paid for by 'Care in Action'. The top two ads target Rep. Erik Paulsen and Rep. Ann Wagner, respectively, with the text: 'If Rep. Erik Paulsen won't fight to protect children from being ripped away from their parents, he doesn't deserve to speak for Minnesota families.' and 'If Rep. Ann Wagner won't fight to protect children from being ripped away from their parents, she doesn't deserve to speak for Missouri families.' The bottom two ads target the same candidates with the text: 'Throughout history, Americans have stood up against human rights abuses and crimes against children. By letting his party take children and babies from their parents and lock them in prisons, Erik Paulsen has betrayed American values.' and 'Throughout history, Americans have stood up against human rights abuses and crimes against children. By letting her party take children and babies from their parents and lock them in prisons, Ann Wagner has betrayed American values.' All ads feature a video player with a play button and a 'Learn More' button. The URLs 'WWW.PAULSENFAILEDFAMILIES.COM' and 'WWW.WAGNERFAILEDFAMILIES.COM' are also visible.

6

7

8 The MUR 7532 Complaint attaches screenshots of Facebook ads, Ad Archives, and
 9 charts of Ad Performance statistics related to Reunify Families Now, and alleges that the internet
 video ads failed to include contact information for Care in Action, and does not state whether the

1 communications are authorized by any candidate or candidate’s committee.¹³ The image at the
 2 top of the October 7 ad reads “Reunify Families Now; Sponsored · Paid for by Care in Action,”
 3 and the bottom of the ad links to www.paulsenfailedfamilies.com and
 4 www.wagnerfailedfamilies.com.¹⁴ The October 7 ad is transcribed here:

5 (image): headshot of Paulsen/Wagner
 6 (voiceover) “If [Paulsen/Wagner] won’t speak up when children are in pain...”
 7 (text): Rep. [Erik Paulsen/Ann Wagner]
 8 (text in red): SILENT when children are in pain
 9

10 (image): Young family of four — man, woman, girl, infant — walking in the park
 11 (voiceover) “What makes you think [he’d/she’d] speak up for yours?”
 12 (text): What makes you think [he’d/she’d] speak up for yours?
 13

14 (image): crying toddler behind glass
 15 (voiceover) “Our children are in pain, taken from their parents by our own government.”
 16 (text): Children taken from their parents
 17

18 (image): image of crying child; frame rips open to reveal headshot of Paulsen/Wagner
 19 (voiceover) “And [Erik Paulsen/Ann Wagner] is complicit.”
 20 (text): [Erik Paulsen/Ann Wagner] is complicit
 21

22 (image): video of children behind fence
 23 (voiceover) “[He/She] even voted to lock families up indefinitely...”
 24 (text): [Erik Paulsen/Ann Wagner] voted to detain families indefinitely
 25

26 (image): alternate video of different children behind fence
 27 (voiceover) “...and make it harder for children to be reunited with their families.”
 28 (text): [Erik Paulsen/Ann Wagner] keeping families apart
 29

30 (image): headshot of Paulsen/ Wagner
 31 (voiceover) “Families deserve better than [Congressman Erik Paulsen/Congresswoman
 32 Ann Wagner].”
 33 (text): Families deserve better than [Paulsen/Wagner]
 34 (text): Paid for by Care in Action.
 35

¹³ *Id.*, Ex. B-E, *Id.* at 1-2. *See supra* at 4. *See also*:
https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=%22Reunify%20Families%20Now%22.

¹⁴ *Id.* The URL <http://www.paulsenfailedfamilies.com/> and <http://www.wagnerfailedfamilies.com/> do not link to currently active websites, and are not accessible via the Archive.org Wayback Machine search feature.

1 There are also October 12, 2018, internet videos allegedly posted by the “Reunify
 2 Families Now” Facebook account each bearing photos of Paulsen or Wagner.¹⁵ The October 12

3 ad is transcribed here:

4 (image): *Split screen — video of children behind fence (L)/headshot of the candidate (R)*
 5 (voiceover) “[Erik Paulsen’s/Ann Wagner’s] Republican Party took small children away
 6 from their parents.”

7 (text): [Erik Paulsen’s/Ann Wagner’s] Republican Party **took children from parents**

8 (voiceover) “They locked children in prisons.”

9 (text): [Erik Paulsen’s/Ann Wagner’s] Republican Party **locked children in prisons**

10

11 (image): *headshot of Paulsen/Wagner*

12 (voiceover) “And what did [Erik Paulsen/Ann Wagner] do?”

13 (text): What did [**Erik Paulsen/Ann Wagner**] do?”

14

15 (image): *video of jail door closing superimposed over American flag*

16 (voiceover) “[He/She] voted to let the government lock up children and their families
 17 indefinitely.”

18 (text): [Erik Paulsen/Ann Wagner] **voted to lock up families indefinitely**

19

20 (image): *videos of American military scenes (D-Day, Vietnam) superimposed over*
 21 *American flag*

22 (voiceover) “Throughout history, Americans have taken a brave stand against human
 23 rights abuses and crimes against children.”

24 (text): Americans stand against **human rights abuses**

25

26 (image): *headshot of Paulsen/Wagner*

27 (voiceover) “By letting his/her party lock up children, [Erik Paulsen/Ann Wagner] has
 28 betrayed our American values.”

29 (text): [Erik Paulsen/Ann Wagner] betrayed **American values**

30 (voiceover) “Families deserve better than [Erik Paulsen/Ann Wagner].”

31 (text): [Erik Paulsen/Ann Wagner] betrayed **American families**

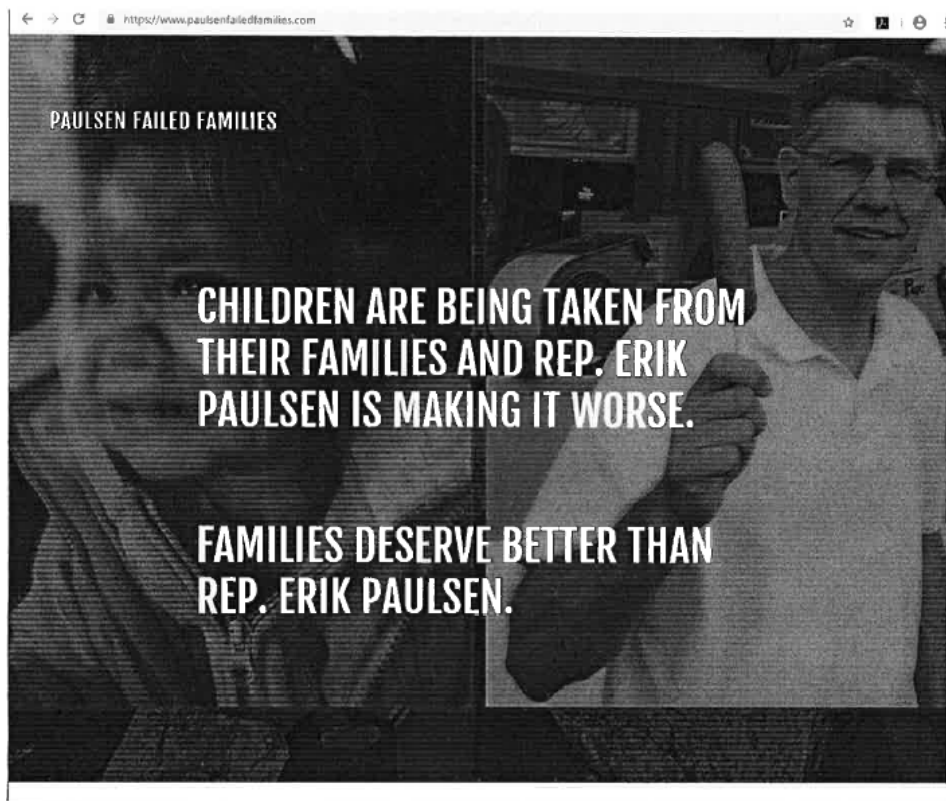
32 (text): Paid for by Care in Action.

33

¹⁵ *Id.*, Ex. B-D. The October 12 ad screenshot that is attached to the Complaint reads “What did Erik Paulsen do?” *Id.*, Ex. B. *See also*:

https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=%22Reunify%20Families%20Now%22.

- 1 Finally, the MUR 7532 Complaint attaches a screenshot of the website
2 www.paulsenfailedfamilies.com (now unavailable), that displays a photo of Paulsen.¹⁶



- 3
4 The website also lists three columns criticizing Paulsen, similar to those on the back of
5 mailer.¹⁷ In addition to using the same language as the mailer attached to the Complaint, the
6 website states: “Disclaimer: Paid for by Care in Action. Independent expenditure, not approved
7 by any candidate or candidate’s committee.”¹⁸

¹⁶ *Id.*, Ex. F. Because the MUR 7532 Complaint only addresses materials opposing Erik Paulsen, it does not include screenshots of the website www.wagnerfailedfamilies.com.

¹⁷ *Id.*

¹⁸ *Id.*

← → ↻ https://www.paulsenfailedfamilies.com ☆ 📄 🗑 ⋮

THOUSANDS OF FAMILIES SEPARATED

The Trump administration has separated thousands of children from their parents and locked them up in military detention facilities. And there are still no plans for how all these children will be reunited with their parents.

YET PAULSEN HAS DONE NOTHING

As an elected member of Congress, Paulsen has the power to act against this crisis. But he refuses to introduce or support legislation to keep families safe and together.


AND EVEN VOTED TO MAKE DETENTION EASIER

Paulsen voted to let the administration lock up children and families indefinitely, and make it harder for these children to ever see their families again. Instead of working to end this crisis, Paulsen is making it worse.

1

2

← → ↻ https://www.paulsenfailedfamilies.com ☆ 📄 🗑 ⋮



CHECK THE FACTS

- ↳ U.S. Dept. of Health and Human Services, 7/13/18
- ↳ Vote on HR 6136. 6/27/18

DISCLAIMER

PAID FOR BY CARE IN ACTION. INDEPENDENT EXPENDITURE, NOT APPROVED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE.

3

4

1 **III. LEGAL ANALYSIS**

2 **A. Disclaimers**

3 The Federal Election Campaign Act of 1971, as amended (the “Act”), requires that
4 whenever a political committee makes a disbursement for the purpose of financing any
5 communication through any mailing, or any other type of general public political advertising, such
6 communication must clearly state who paid for the communication.¹⁹ A communication
7 authorized and paid for by a candidate, an authorized committee of a candidate, or an agent of
8 either, must clearly state that the communication was paid for by the authorized political
9 committee.²⁰ A communication authorized by a candidate, an authorized committee of a
10 candidate, or an agent of either but paid for by another person, must clearly state that the
11 communication was paid for by such person but authorized by the political committee.²¹

12 The Act also requires that all public communications that expressly advocate the election or
13 defeat of a clearly identified candidate include a disclaimer.²² “Public communications” include
14 “mass mailings,” which are mailings of more than 500 pieces of mail of an identical or
15 substantially similar nature within any 30-day period.²³ “Public communications” also include
16 communications over the Internet that have been placed for a fee on another person’s Web site.”²⁴

17 Where required, disclaimers must be “presented in a clear and conspicuous manner, to give
18 the reader, observer, or listener adequate notice of the identity of the person or political committee

¹⁹ 52 U.S.C. § 30120(a).

²⁰ 52 U.S.C. § 30120(a)(1).

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

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

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

²⁴ 11 C.F.R. § 100.26.

1 that paid for, and where required, that authorized the communication.”²⁵ If a communication is not
2 authorized by a candidate’s authorized committee, it must clearly state the name and permanent
3 address, telephone number or website address of the person who paid for the communication and
4 state that the communication is not authorized by any candidate or candidate’s committee.²⁶

5 The Complaints allege that the Paulsen and Wagner mailers violated the Act’s disclaimer
6 requirements.²⁷ The Paulsen and Wagner mailers appear to constitute public communications
7 because they appear professionally produced and carry a U.S. Postal Service (“USPS”) bulk mail
8 permit and, therefore, likely exceeded 500 pieces for each mailing.²⁸ The mailers, however, do not
9 include any disclaimers.²⁹

10 Additionally, the MUR 7532 Complaint alleges that the internet videos related to Paulsen
11 violated 11 C.F.R. § 110.11(b)(3).³⁰ The Paulsen videos, and the nearly identical Wagner videos,
12 also appear to constitute public communications because they each advocate the defeat of a
13 clearly identified candidate, and the available information indicates they were internet

²⁵ 11 C.F.R. § 110.11(c). For printed communications, disclaimers must be clear and conspicuous, be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other contents of the communication, and must clearly state who paid for the communication. *Id.* § 110.11(c)(2).

²⁶ *Id.* § 110.11(b)(3).

²⁷ MUR 7532 Compl. at 1-2; MUR 7537 Compl. at 1

²⁸ Neither Complaint specifies the number of mailings, but the MUR 7532 Complaint does categorize the Paulsen mailer as a “public communication.” MUR 7532 Compl. at 1. It is clear that at least 200 copies of the mailers were distributed because the bulk mail permit imprints indicate that the mailers were sent by Standard Mail, and USPS requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. MUR 7532 Compl., Ex. A, MUR 7537 Compl., Ex. C. *See* <https://pe.usps.com/businessmail101?ViewName=StandardMail>. (Last visited September 4, 2019).

²⁹ MUR 7532 Compl., Ex. A; MUR 7537 Compl., Ex. C.

³⁰ MUR 7532 Compl. at 1-2. The internet video ads are designated as “Sponsored,” *see id.*, Ex. B-E, indicating that they were placed for a fee on another person’s Web site. *See* 11 C.F.R. § 100.26. Additionally, the “Money spent” statistic in the Facebook Ad Performance analytics for each ad indicates that each ad cost between \$500-999. *Id.*, Ex. D-E.

1 communications that were placed for a fee on another person’s Web site. Although the videos
2 contained the disclaimer “Paid for by Care in Action,” they failed to state the name and
3 permanent address, telephone number, or website address of the person who paid for the
4 communication, and failed to state whether or not the political advertisement was authorized by
5 any candidate or candidate’s committee.

6 **The Paulsen and Wagner Communications Required Disclaimers Because They**
7 **Contain Express Advocacy**

8
9 Commission regulations provide that a communication expressly advocates the election or
10 defeat of a clearly identified candidate when it uses certain phrases or uses campaign slogans or
11 individual words, “which in context can have no other reasonable meaning than to urge the
12 election or defeat of one or more clearly identified candidate(s).”³¹ Commission regulations also
13 state, a communication constitutes express advocacy if “[w]hen taken as a whole and with limited
14 reference to external events, such as the proximity to the election, [the communication] could only
15 be interpreted by a reasonable person as containing advocacy of the election or defeat of one or
16 more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is
17 unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds
18 could not differ as to whether it encourages actions to elect or defeat one or more clearly identified
19 candidate(s) or encourages some other kind of action.”³²

³¹ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “Smith for Congress” and “Bill McKay in ‘94,” have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (July 6, 1995) (“Express Advocacy E&J”); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when “it provides, in effect, an explicit directive” to vote for the named candidates).

³² 11 C.F.R. § 100.22(b).

1 In its explanation and justification for section 11 C.F.R. §100.22(b), the Commission
2 stated, “communications discussing or commenting on a candidate’s character, qualifications or
3 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
4 they can have no other reasonable meaning than to encourage actions to elect or defeat the
5 candidate in question.”³³ In MUR 5024R, the Commission concluded that, in context, the
6 brochures constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral
7 portions of the brochure, including the phrase “Tell Tom Kean Jr....New Jersey Needs New
8 Jersey Leaders,” were “unmistakable, unambiguous and suggestive of only one meaning” — to
9 vote against Tom Kean.³⁴ In MURs 5511/5525, the Commission concluded that attacks on John
10 Kerry’s character, fitness for public office, and capacity to lead, including phrases such as “JOHN
11 KERRY CANNOT BE TRUSTED” and “unfit for command” were “unmistakable, unambiguous
12 and suggestive of only one meaning” — and had no reasonable meaning other than to encourage
13 actions to defeat him in the upcoming election.³⁵ Similarly, in MUR 5831, the Commission
14 concluded that, in context, the ad attacking Bob Casey’s qualifications and stating “Can we really
15 risk Bob Casey learning on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b),
16 because the electoral portions were “unmistakable, unambiguous and suggestive of only one
17 meaning” — to vote against Bob Casey.³⁶ The Commission concluded that outside the context of
18 the upcoming election, these advertisements were virtually meaningless.³⁷

³³ EA E&J, 60 Fed. Reg. at 35,295.

³⁴ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

³⁵ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

³⁶ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

³⁷ *Id.*

1 The available information indicates that the Paulsen and Wagner mailers, and the similar
2 internet video ads, contained express advocacy under 11 C.F.R. § 100.22(b). The mailers clearly
3 identify federal candidates Paulsen and Wagner, and contain attacks on their character and fitness
4 very similar to those the Commission has found to be express advocacy under § 100.22(b).
5 Specifically, the ads call both Paulsen and Wagner “unjust,” “unworthy,” and “un-American” and
6 state that Paulsen and Wagner “ha[ve] betrayed American values,” they do not “deserve to speak
7 for...families” and “Families deserve better than” Paulsen and Wagner.³⁸ Additionally, the
8 mailers were sent in late October 2018, close to the November 6, 2018, general election, and the
9 videos were made available online less than a month before the general election. The content of
10 the statements, along with their timing,³⁹ have an unmistakable, unambiguous meaning: vote
11 against Paulsen and Wagner in the upcoming election. Because the Paulsen and Wagner
12 communications advocate the defeat of federal candidates, those communications constitute
13 express advocacy, and should have contained disclaimers. Accordingly, the Commission finds
14 reason to believe that Unknown Respondents violated 52 U.S.C. § 30120(a) with regard to the
15 Paulsen and Wagner communications.

16 **B. Reporting**

17 Political committees, whether authorized by any candidate or not, must disclose
18 disbursements as part of their regular reporting to the Commission.⁴⁰ Political committees that

³⁸ *See supra* at 2-4.

³⁹ Commission regulations specify that the “proximity to the election” is a permissible external event to consider when determining whether a communication has a reasonable, non-electoral meaning. *See* 11 C.F.R. § 100.22(b); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (“Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.”).

⁴⁰ 52 U.S.C. § 30104(b)(4)(G), (H)(v). An organization that is not controlled by a candidate that (1) exceeds the \$1,000 aggregate expenditure threshold and (2) it has as its “major purpose” the nomination or election of federal candidates would also have to register and file disclosure reports with the Commission.

1 make independent expenditures, whether authorized by any candidate or not, must also disclose
2 these expenditures to the Commission as part of their regular reporting.⁴¹ Any person other than a
3 political committee that makes expenditures that expressly advocate the election or defeat of a
4 federal candidate that exceed \$250 must file an independent expenditure report with the
5 Commission pursuant to 52 U.S.C. § 30104(c).⁴² Additionally, political committees and other
6 persons that make independent expenditures aggregating \$1,000 or more made after the 20th day,
7 but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-
8 hour notice.⁴³

9 The available information indicates that the Paulsen and Wagner mailers and their
10 associated internet video ads constituted express advocacy, and expenditures for the mailers and
11 ads exceeded \$250. Therefore, whether these communications were made by a political
12 committee or through independent expenditures, they should have been disclosed to the
13 Commission. Accordingly, the Commission finds reason to believe that Unknown Respondents
14 violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures made in connection with the
15 Paulsen and Wagner mailers and internet video ads. Also, because the mailers appear to have
16 been distributed in October 2018,⁴⁴ potentially 20 days before the election on November 6, 2018,
17 and appeared to cost over \$1,000, 24-hour notices would likely have been required. Accordingly,

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

⁴² The Act defines “independent expenditure” as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 52 U.S.C. § 30101(17).

⁴³ See 52 U.S.C. § 30104(g)(1)(A). Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. See 11 C.F.R. §§ 104.4(c), 109.10(d).

⁴⁴ See MUR 7532 Compl. at 1-2; MUR 7537 Compl. at 1.

MUR 7537 (Unknown Respondents)
Factual and Legal Analysis
Page 15 of 15

- 1 the Commission finds reason to believe that Unknown Respondents violated 52 U.S.C.
- 2 § 30104(g) with respect to the Paulsen and Wagner communications.