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BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of	)	
	)	
Unknown Respondents	)	MUR 7537
Care in Action, Inc.	)	
	)	

SECOND GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

We recommend that the Commission take no further action, approve the appropriate letters, and close the file.

II. BACKGROUND

The Complaints in this matter,[1] submitted in November 2018, allege that mailings advocating against the election of Erik Paulsen, candidate for Minnesota's third congressional district, Ann Wagner, candidate for Missouri's second congressional district, and Josh Hawley, candidate for U.S. Senator from Missouri, and sent by unknown respondents in October 2018, contained express advocacy but did not include proper disclaimers.[2] One of the Complaints further alleges that internet video ("digital") ads criticizing Wagner and Paulsen and a website criticizing Paulsen also contained express advocacy but did not include proper disclaimers.[3]

On October 4, 2021, the Commission found reason to believe that Unknown Respondents violated 52 U.S.C. §§ 30120(a) and 30104(b) or (c) and (g) by failing to include disclaimers and failing to disclose independent expenditure with regard to the mailers and digital ads involving

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[1] On September 30, 2021, the Commission voted to merge MUR 7532 into MUR 7537. Certification ¶ 8.a (Oct. 4, 2021) [hereinafter Cert.].

[2] Factual and Legal Analysis ("F&LA") at 1, MUR 7537 (Unknown Respondents).

[3] *Id.* at 1-2.

Wagner and Paulsen.[4] The Commission took no action at that time as to the mailers related to Hawley.[5] The Commission made no findings as to the website criticizing Paulsen.[6]

III. INVESTIGATION

Following the Commission's findings, the Office of General Counsel ("OGC") commenced an investigation to determine the identity of the party or parties responsible for the Wagner and Paulsen mailers and digital ads, how many mailers were sent, how much the mailers and digital ads cost, when the mailers and digital ads were disseminated, and whether the responsible party or parties paid for additional communications.[7] OGC contacted the United States Postal Service ("USPS") to ascertain the holders of the bulk mailing permits appearing on the Wagner and Paulsen mailers. USPS identified Mailing.com as the holder of the permit on the Paulsen mailers and Modern Litho as the holder of the permit on the Wagner mailers. On March 29, 2022, OGC sent letters to Mailing.com and Modern Litho requesting information regarding each company's clients, as well as information about the costs of distributing the mailers.[8]

On April 5, 2022, Modern Litho, a St. Louis printing company, responded to the letter, stating that it had recently acquired Mulligan Printing and that Mulligan Printing "was the actual company that" had printed and distributed 30,860 mailers regarding Wagner for its client BerlinRosen, a communication agency.[9] The letter stated that the total cost paid for printing the

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4 Cert. ¶ 8.b, d.

5 *Id.* ¶ 8.e, f.

6 *Id.* ¶ 8.

7 *See* First Gen. Counsel's Rpt. ("First GCR") at 22 (Oct. 24, 2019), MUR 7537 (Unknown Respondents).

8 Letter from Donald E. Campbell, Att'y, FEC, to Mailing.com (Mar. 29, 2022); Letter from Donald E. Cambell, Att'y, FEC, to Modern Litho (Mar. 29, 2022).

9 Letter from Modern Litho to Donald E. Campbell, Att'y, FEC (Apr. 25, 2022).

mailers was $4,680 plus $452.98 in tax.[10] Modern Litho's letter said that it did not have information about the cost of postage, which was in addition to the cost of printing the mailers.[11] Mailing.com did not respond to OGC's letter.

On May 5, 2022, OGC sent a letter to BerlinRosen requesting additional information regarding the Wagner mailers; OGC sought the identity of BerlinRosen's client, the number of mailers sent, and the cost of producing and mailing the mailers.[12] On June 15, 2022, BerlinRosen, responded to OGC's letter by providing the name and contact information of Care in Action, Inc., the client on whose behalf it purchased the mailers.[13] Care in Action, Inc., is a 501(c)(4) tax-exempt corporation based in New York, New York.[14] OGC notified the Commission on October 27, 2022, that the investigation had revealed the source of the mailers and digital ads, and that, consistent with previous Commission practice in complaint-generated matters involving initially unknown respondents, OGC would notify Care in Action, Inc., as a respondent and provide it with the opportunity to respond.[15] Although the information from BerlinRosen identified Care in Action, Inc., as the payor of only the Wagner mailers, OGC determined that Care in Action, Inc., was likely also the payor of the Paulsen mailers, because these were remarkably similar to the

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10 *Id.*

11 *Id.*

12 Letter from Donald E. Campbell, Att'y, FEC, to Alex Navarro-McKay, BerlinRosen (May 5, 2022).

13 Email from Jonathan Peterson, Elias Law Group LLP, to Donald E. Campbell, Att'y, FEC (June 15, 2022).

14 There is another entity named Care in Action PAC which shares the same address as Care in Action, Inc., in New York, New York. Care in Action PAC, Statement of Organization (June 8, 2020), https://docquery.fec.gov/pdf/053/202006089239638053/202006089239638053.pdf. Care in Action PAC did not register with the Commission until after the activity at issue in these matters.

15 Memorandum to Commission Regarding Unknown Respondents and Notification to Care in Action (Oct. 27, 2022), MUR 7537 (Care in Action); *see also, e.g.*, Memorandum to Commission Regarding Notification of Respondent (May 3, 2022), MUR 7464 (LZP, LLC, *et al.*) (regarding identification of and intent to notify formerly unknown respondent, Ohio Works); Memorandum to Commission Regarding Notification of Respondent (Aug. 19, 2021), MUR 7355 (Heller for Senate, *et al.*) (regarding identification of and intent to notify formerly unknown respondent, Ahern Ad, LLC); Memorandum to Commission Regarding Notification of Respondent (Jan. 19, 2016), MUR 6838 (Aossey) (regarding identification of and intent to notify formerly unknown respondent, Joseph Aossey).

Wagner mailers, and OGC also determined Care in Action, Inc., was likely the payor of both the Wagner and Paulsen digital ads, which contained the incomplete disclaimer "Paid for by Care in Action." As noted below, Care in Action, Inc., subsequently acknowledged that it was the payor of both the Wagner and Paulsen digital ads and mailers.[16] On November 2, 2022, following the earlier notice to the Commission, we sent the notification letter to Care in Action, Inc.[17]

On December 23, 2022, Care in Action, Inc., responded to the notification letter and asked that the Commission's reason to believe findings in this matter be vacated on the grounds that it was not properly notified as a respondent when the Complaints were first submitted, allegedly denying Care in Action, Inc., due process, and, further, arguing that the Commission had wrongly concluded that the mailers at issue contained express advocacy.[18] Care in Action, Inc., stated that its name was included in the MUR 7532 Complaint and thus should have been notified initially; therefore, it contends, it was not properly afforded the opportunity to initially respond.[19] The MUR 7532 Complaint, concerning the Paulsen and Wagner digital ads, and Paulsen mailers and website, named Care in Action, Inc., as a respondent because "Care in Action" was listed in the aforementioned partial disclaimers appearing on the digital ads and website; the Complaint surmised based on the similarity between the digital ads and website and mailers, that the mailers were also sent by Care in Action, Inc.[20] When the MUR 7532 Complaint was filed, OGC attempted to locate Care in Action, Inc., but was unable to identify publicly available information

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16 Letter from Laurence E. Gold, Couns. for Care in Action, to Donald E. Campbell, Att'y, FEC, at 3 (Mar. 2, 2023).

17 Letter from Charles Kitcher, Assoc. Gen. Couns. for Enforcement, FEC, to Christina Obiajulu-Skinner, Gen. Couns., Care in Action, Inc., (Nov. 2, 2022).

18 Care in Action Resp. at 1 (Dec. 27, 2022) [hereinafter Resp.].

19 *Id.* at 2.

20 MUR 7532 Compl. at 1-2.

regarding the organization. There are limited records concerning OGC's early attempts to locate Care in Action, Inc. Care in Action, Inc., contends "that information could easily have been obtained by OGC with a brief Internet search conducted in early November 2018" and cites public information available in October 2018.[21]

Care in Action, Inc., argues that had it been notified at the outset in November 2018 and provided with the chance to respond at that time, it would have successfully argued that the mailers at issue do not contain express advocacy and therefore do not require disclaimers or disclosure.[22] In the alternative to vacating the reason to believe findings, Care in Action, Inc., requests that the Commission exercise its prosecutorial discretion to dismiss the matter given the amount of time that has passed since the Complaints were filed.[23]

On February 17, 2023, OGC replied to Care in Action, Inc.'s letter, explaining that the Act and the Commission's regulations provide no provision whereby a party may request that the Commission reconsider its findings.[24] OGC's reply letter to Care in Action, Inc., also included questions regarding the production and dissemination of the Paulsen and Wagner mailers and the amount paid for them, as well as the cost to place the digital ads, and requested that Care in Action, Inc., promptly submit answers to the questions.[25]

On February 24, 2023, OGC met with counsel for Care in Action, Inc., and Care in Action, Inc.'s internal General Counsel via videoconference to discuss the matter. OGC again asked the questions that accompanied the letter of February 17, 2023, regarding the scope of the mailers and

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21 Resp. at 3.

22 *Id.* at 1.

23 *Id.* at 11.

24 Letter from Donald E. Campbell, Att'y, FEC, to Laurence E. Gold & Renata E.B. Strause, Couns. for Care in Action (Feb. 17, 2023).

25 *Id.*

digital ads and the amount spent on production and dissemination. Care in Action, Inc., declined to provide detailed information, stating only in general terms that the amount at issue was more than $10,000 and less than $1,000,000. OGC requested that Care in Action, Inc., respond to the questions in writing within a week of the meeting.

On March 3, 2023, Care in Action, Inc., sent a further response letter stating that while it agrees that there is no statute or regulatory provision that specifically allows for a request to vacate the Commission's findings, there is likewise no provision setting forth how the Commission must proceed regarding an unknown respondent that was later identified but did not have the opportunity to answer the allegations.[26] Care in Action, Inc., reiterated that it was identified in the MUR 7532 Complaint as a potential respondent prior to the Commission's findings and therefore should have been notified and given a chance to respond; further, when subsequently notified of the Complaint after the reason to believe finding, Care in Action, Inc., stated that it was not provided with procedural information regarding the enforcement process concerning formerly unknown respondents.[27] Care in Action, Inc.'s letter argues that there has been "ambiguity" in the Commission's prior practice of treating previously unknown respondents and cites to MUR 6920 (American Conservative Union), as example of the Commission making a "fresh" reason to believe finding for a previously-unidentified respondent.[28] Care in Action, Inc., thus argues that its current position should "be that of a respondent that has been notified of a complaint against it and given an opportunity to respond *before* the Commission considered whether or not to find

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[26] Letter from Laurence Gold & Renata E.B. Strause, Couns. for Care in Action, to Donald E. Campbell, Att'y, FEC (Mar. 2, 2023) at 3. Care in Action has requested that OGC provide copies of its December 23, 2022 and March 3, 2023 letters to the Commission at the time that OGC presents its recommendations to the Commission, and we are accordingly attaching them to this Report.

[27] *Id.*

[28] *Id.* at 2.

RTB in the first place."[29] Care in Action, Inc., admits that it funded and disseminated the mailers and digital ads in question, but declines to answer specific questions regarding the activity, specifically the amount at issue.[30] Care in Action, Inc., argues that in light of the alleged denial of due process resulting from the delay in timely notification, as well as the approaching statute of limitations expiration, the Commission should exercise its prosecutorial discretion and dismiss this matter.[31]

III. LEGAL ANALYSIS

The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that all public communications that expressly advocate the election or defeat of a clearly identified candidate must include a disclaimer.[32] "Public communications" include "mass mailings," which are mailings of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period.[33] "Public communications" also include communications over the internet that have been placed for a fee on another person's website.[34]

Where required, disclaimers must be "presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for, and where required, that authorized the communication."[35] If a communication is

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29 *Id.*

30 *Id.* at 3 ("[W]e already acknowledged it in our December 23 letter: Care in Action paid for the communications in question and did so through an engagement with BerlinRosen Ltd. However, Care in Action respectfully declines to respond to the remainder of your questions at this time . . . .").

31 *Id.*

32 52 U.S.C. § 30120(a); *see* 11 C.F.R. § 110.11(a)(2).

33 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

34 11 C.F.R. § 100.26.

35 *Id.* § 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).

not authorized by a candidate's authorized committee, it must clearly state the name and permanent address, telephone number or website address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.[36]

Any person other than a political committee that makes expenditures that expressly advocate the election or defeat of a federal candidate that exceed $250 must file an independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).[37] Additionally, political committees and other persons that make independent expenditures aggregating $1,000 or more made after the 20th day, but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-hour notice.[38]

Here, the Commission found reason to believe that Unknown Respondents created and distributed mailers and digital ads which expressly advocated against the election of Paulsen and Wagner without providing disclaimers regarding who paid for the communications and without disclosing the costs of the mailers and digital ads, which were independent expenditures, thereby violating the Act's disclaimer and disclosure requirements.[39]

On balance, we recommend that the Commission exercise its prosecutorial discretion to take no further action and close the file. While the investigation successfully identified Care in Action, Inc., as the payor of the mailers and digital ads involving Wagner and Paulsen, the

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[36] *Id.* § 110.11(b)(3).

[37] 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).

[38] *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).

[39] Cert. ¶ 8.b, d.

available record contains only limited information regarding the amount that Care in Action, Inc., spent on these communications. The only confirmed spending totals $4,680, which represents the amount that Care in Action, Inc., through BerlinRosen, paid Mulligan Printing for printing the mailers attacking Wagner. We do not have any information regarding the amount of postage paid for the Wagner mailer, or any of the costs related to the Paulsen mailers or the Paulsen and Wagner digital ads. Care in Action, Inc., itself has only stated in general terms that its spending on the mailers and digital ads was more than $10,000 but less than $1,000,000. Further investigation would be necessary to determine the precise amount spent. Given that Care in Action, Inc., declined to provide the information voluntarily and the relevant vendors have either not responded or were reluctant to provide this information to date, we assess that a subpoena would be necessary to obtain this spending information. Yet, we calculate that the statute of limitations for seeking monetary penalty expired on October 31, 2023.[40] In light of the Commission's limited resources, the statute of limitations, and the information developed from the investigation to date, we recommend that the Commission exercise its prosecutorial discretion to decline to continue pursuing this matter and instead take no further action and close the file.[41]

V. RECOMMENDATIONS

1. Take no further action;

2. Approve the appropriate letters; and

[40] Respondents executed a 30-day tolling agreement that extended the statute of limitations until October 31, 2023.

[41] *Heckler v. Chaney*, 470 U.S. 821 (1985). We note that the five-year statute of limitations at 28 U.S.C. § 2462 does not necessarily bar pursuit of potential injunctive relief, such as requiring Care in Action to disclose its unreported independent expenditures arising out of the mailers and digital ads. *See, e.g.*, *Campaign Legal Center v. FEC*, No. 22-CV-3319, 2023 WL 6276634, at *13 (D.D.C. Sept. 26, 2023) (observing that "[s]ome courts in this District have held that while 28 U.S.C. § 2462 may protect [parties] from being assessed a civil fine, penalty or forfeiture for conduct in violation of the FECA that occurred five years before the Complaint was filed, this general statute of limitation provides no such shield from declaratory or injunctive relief" while "other courts within this District and beyond have come to the opposite conclusion" (internal quotation marks omitted) (collecting cases)). If, contrary to this report's recommendations, the Commission prefers to attempt to vindicate the Act's disclosure interests through further proceedings, we will prepare the necessary subpoenas.

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December 23, 2022

By USPS & Email

Mr. Charles Kitcher
Associate General Counsel
for Enforcement
Federal Election Commission
1050 First St., NE
Washington, DC 20463

Re: MUR 7537, Care in Action, Inc.

Dear Mr. Kitcher:

We write on behalf of Care in Action, Inc. ("Care in Action") in response to your November 2, 2022, letter regarding the October 2021 action taken by the Federal Election Commission ("FEC" or the "Commission") based on complaints filed before the 2018 general election by Friends of Erik Paulsen Committee and Raymond Bozarth, Executive Director of the Missouri Republican Party. By finding reason to believe ("RTB") that "Unknown Respondents" may have violated the Federal Election Campaign Act ("FECA" or the "Act"), the Commission improperly deprived Care in Action – which had been *named as the respondent* in one of the complaints and could have been identified as a respondent in the other through no more than a Google news search – of the "opportunity to demonstrate … that no action should be taken" against it that it was owed under the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.6(a)(1).

If Care in Action had been afforded that statutorily guaranteed opportunity, it would have argued that no violation of the Act occurred because the mailers and digital advertisements in question did not contain express advocacy. Now, more than four years after the complaints were submitted and a year after the Commission voted RTB, Care in Action is instead in the disadvantaged position of asking the Commission to vacate its RTB finding and instead find *no* RTB in this matter on those grounds. Alternatively, Care in Action seeks the dismissal of this matter as an exercise of the Commission's prosecutorial discretion.[1]

[1] We also ask that a copy of this letter be provided to the Commissioners along with the Office of General Counsel's recommendation in connection with the information that Care in Action was the source of the mailers and digital ads at issue in this matter. While we assume that is the Office's intent, your letter did not state as much directly and we find nothing in the Commission's regulations or guidance that establishes the procedures applicable to the highly unusual situation Care in Action finds itself in.

I. The Commission Should Vacate Its "Reason To Believe" Finding

For either of two reasons, the Commission should vacate its RTB finding that Care in Action violated the Act. First, the Commission's action failed to comply with its own procedures as dictated by the Act and the regulations, denying Care in Action the due process they guarantee. Second, the finding erroneously concluded that Care in Action's 2018 communications contained express advocacy.

A. The Commission Failed to Comply with the Act and Its Regulations, Denying Due Process To and Prejudicing Care in Action

1. Care in Action Was *Not* an "Unknown Respondent"

This matter is the consolidation of proceedings arising from two complaints – one filed by Friends of Erik Paulsen Committee on October 25, 2018 (the "Paulsen Complaint") and one filed by Raymond Bozarth, Executive Director of the Missouri Republican Party, on November 5, 2018 (the "MRP Complaint"). The Paulsen Complaint – notably, the first-filed of the two – named Care in Action as a respondent and cited to the fact that "Paid for by Care in Action" appeared on the digital advertisements and on the website to which they linked. It appears that the Office of General Counsel ("OGC") received the Paulsen Complaint on November 1, 2018; as such, OGC was required to notify Care in Action that the complaint had been filed no later than November 6, 2018. 11 C.F.R. § 111.5(a). While the Paulsen Complaint did not provide the Commission with contact information for Care in Action, a complainant has no obligation to do so, *see* 11 C.F.R. § 111.4; and, that information could easily have been obtained by OGC with a brief Internet search conducted in early November 2018. Indeed, *an October 30, 2018 article in the St. Louis Post-Dispatch identified Care in Action as the source of the mailer referencing Rep. Wagner, quoted Care in Action spokesperson Andy Macdonald as acknowledging Care in Action's sponsorship of the ads, and linked to Care in Action's website.*[2] That same Internet search also would have yielded some or all of the following results:

- an October 25, 2018, article in the St. Louis Post-Dispatch attributing the mailer referencing Rep. Ann Wagner to Care in Action and reporting on statements made by Rep. Wagner's campaign about the mailer and the digital advertisements at issue in the FLA;[3]
- an article in the *Huffington Post*, published the day before OGC received the Paulsen Complaint, which focused entirely on Care in Action's efforts in the Georgia gubernatorial election and named Georgia state senator Nikema Williams as Care in Action's Georgia state director;[4]
- an October 17, 2018, article in *Politico* about Care in Action's efforts in the Georgia gubernatorial election;[5]
- the registration and reports that Care in Action filed with the Georgia Government Transparency

[2] Celeste Bott, *Ad Watch: Wagner's Campaign, DC Nonprofit Spar Over Legality of Campaign Mailer*, St. Louis Post-Dispatch (Oct. 30, 2018), https://www.stltoday.com/news/local/govt-and-politics/ad-watch-wagner-s-campaign-d-c-nonprofit-spar-over/article_534916e5-3d4f-5ce0-912c-21071301bd7f.html ("October 30, 2018 SLPD Article").
[3] Celeste Bott, *Wagner Campaign Says Mailer Criticizing Her Immigration Record Is Illegal*, St. Louis Post-Dispatch (Oct. 25, 2018), https://www.stltoday.com/news/local/govt-and-politics/wagner-campaign-says-mailer-criticizing-her-immigration-record-is-illegal/article_17718630-906f-5baf-8e1a-ba0b520bdd34.html.
[4] Laura Bassett, *Georgia Domestic Workers Mobilize for Stacey Abrams in the Birthplace of Their Movement*, Huffington Post (Oct. 31, 2018), https://www.huffpost.com/entry/stacey-abrams-georgia-domestic-workers_n_5bd8a9cbe4b0da7bfc14a210. .
[5] Alice Miranda Ollstein, *Home Health Aides Test Political Clout in Georgia Governor's Race*, Politico (Oct. 17, 2018), https://www.politico.com/story/2018/10/17/georgia-governors-home-health-aides-test-857156.

and Campaign Finance Commission beginning in May 2018, which included Care in Action's mailing address;[6]
- the Form 8871 (Notice of Section 527 Status) that Care in Action PAC filed with the Internal Revenue Service on November 9, 2018, which listed Care in Action, Inc.'s contact information as the contact information for the PAC;[7]
- Care in Action's website and profiles on various social media platforms;[8] and
- Care in Action's corporate registration on file with the Delaware Division of Corporations.[9]

Despite this readily available information, the Commission did not notify Care in Action after receiving the Paulsen Complaint. In fact, Care in Action has found no evidence that the Commission even attempted to do so, nor did your November 2 letter provide any explanation for the three-year delay in notice.

Unlike the Paulsen Complaint, the MRP Complaint did not name Care in Action as a respondent or otherwise provide information that could have immediately connected Care in Action to its mailer naming Rep. Ann Wagner. However, it is clear that at some point prior to October 2021, OGC realized that the two complaints overlapped in part. This is evident from the fact that the Commission's RTB finding addressed communications naming Rep. Wagner that were not included in the MRP Complaint.[10] And, the two digital advertisements referring to Rep. Wagner appeared in Exhibit C of the *Paulsen* Complaint, evidently because the screenshot the complainant took to show Care in Action's digital ads referring to Rep. Paulsen necessarily captured images of digital advertisements referring to Rep. Wagner.[11] Thus the Paulsen complaint itself pointed the Commission to Care in Action's connection with the communications at issue in the MRP Complaint. At the latest, when OGC made the connection between the communications at issue in MUR 7532 and MUR 7537, OGC should have located Care in Action and notified it of the complaints filed against it. Again, this did not occur and there is no indication that such an attempt was made.

Finally, regardless of when OGC connected the mailer in Exhibit C of the MRP Complaint to the digital advertisements in Exhibit C of the Paulsen Complaint, the public record became only more replete

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[6] *See* Georgia Gov't Transparency and Campaign Fin. Comm'n, Campaign Reports and Registration Information for Care in Action, Inc. *available at* https://media.ethics.ga.gov/Search/Campaign/Campaign_Name.aspx?NameID=29237&FilerID=NC2018000035&Type=committee (accessed Dec. 15, 2022).

[7] Care in Action PAC Form 8871 (Attachment A).

[8] *See, e.g.*, Care in Action US, @CareinActionUS, Facebook.com, https://www.facebook.com/CareInActionUS/about_profile_transparency (created Sept. 26, 2018); Care in Action, @CareinActionUS, Twitter.com, https://twitter.com/CareInActionUS ("Joined October 2018"); Care in Action, @careinactionus, Instagram.com, https://www.instagram.com/careinactionus/?hl=en ("Date joined - September 2018"). Care in Action also appeared to have launched the website "careinactionvotes.org" by late October 2018. *See* October 30, 2018 SLPD Article, note 2, *supra* (link in article to careinactionvotes.org); *see also* Internet Archive, https://web.archive.org/web/20181208115704/https://careinactionvotes.org/ (captured December 8, 2018).

[9] Care in Action has been registered as a Delaware domestic corporation since January 1, 2014. It was originally named "Domestic Worker Legacy Fund, Inc." but changed its name to "Care in Action, Inc." in an amendment to its certificate of incorporation filed on January 16, 2018. *See* October 30, 2018 SLPD Article, note 2, *supra* (reporting this progression).

[10] Indeed, Exhibit C is the only communication referenced in the MRP Complaint that Care in Action disseminated. Care in Action has no information relating to the other communications in the MRP Complaint.

[11] It is also possible that OGC first learned of the Wagner digital advertisements through either of the articles published in the St. Louis Post-Dispatch, *see* notes 3-4, *supra*, both of which also included a copy of the mailer attached to the MRP Complaint as Exhibit C. However, that article attributed the mailer and the digital advertisements to Care in Action, and so provided OGC with the same information as the Paulsen Complaint.

with information about Care in Action as time progressed. During the nearly three years after the Commission failed in its duty to notify Care in Action of the complaints, Care in Action's national profile grew significantly. To provide only a few examples from those three years, articles featuring Care in Action's work or quoting its leaders appeared in *The New York Times*,[12] *Vox*,[13] *The Washington Post*,[14] *Time Magazine*,[15] *Fortune*,[16] *Essence*,[17] and on National Public Radio.[18] And, in June 2020, Care in Action PAC registered with the Commission.[19] Although Care in Action PAC is not a separate segregated fund of Care in Action, the PAC registered at Care in Action's address (as it had done when it filed Form 8871 with the IRS in November 2018) and appointed Care in Action personnel as its treasurer and assistant treasurers. Care in Action PAC also reported disbursements to Care in Action for staff time on its 2020 Post-General Election Report. Thus, long before the time it voted to find RTB that Unknown Respondents had violated the Act, the Commission could have located Care in Action merely by searching its own records.

2. The Commission Was Obligated But Failed To Notify Care in Action Of the Complaints Before Taking Action

Within five days after receiving a sworn complaint, the Act requires the Commission to send written notice to "any person alleged in the complaint to have committed … a violation" of the Act. 52 U.S.C. § 30109(a)(1). The Commission's regulations direct the General Counsel to fulfill this statutory obligation – the General Counsel "*shall* within five (5) days after receipt [of a complaint that substantially complies with the Commission's technical requirements] notify each respondent that the complaint has been filed, advise them of Commission compliance procedures, and enclose a copy of the complaint." 11 C.F.R. § 111.5(a) (emphasis added). The regulations further specify the respondent's procedural rights – namely, "an opportunity to demonstrate that no action should be taken on the basis of the complaint" by submitting a written response within (15) days from receipt of a copy of the complaint. 11 C.F.R. § 111.6(a). This procedural right is made meaningful by the constraint that applies to the Commission, which "*shall not* take *any* action, or make *any* finding, against a respondent other than action dismissing the complaint, unless it has considered such response or unless no response has been served" within the

[12] Lauren Hilgers, *Out of the Shadows*, New York Times (Feb. 21, 2019), https://www.nytimes.com/interactive/2019/02/21/magazine/national-domestic-workers-alliance.html; Isabella Grullón Paz, *To This Group, Labor Is More Than A 'White Man Who Works In A Factory'* (Feb. 22, 2020), https://www.nytimes.com/2020/02/22/us/politics/domestic-workers-politics-2020.html.

[13] Anna North, *Focusing on America's Child Care Crisis Could Help Democrats Win The Next Election,* Vox (Jan. 8, 2021), https://www.vox.com/22215259/georgia-runoff-election-child-care-covid.

[14] Vanessa Williams, *Lawsuit by Abrams PAC Continues Debate Over Voter Suppression In Bitter Georgia Governor's Race*, The Washington Post (Nov. 29, 2018), https://www.washingtonpost.com/politics/lawsuit-alleges-voter-suppression-in-bitter-georgia-governors-race-and-seeks-protections-for-future-races/2018/11/29/750afc20-f353-11e8-aeea-b85fd44449f5_story.html.

[15] Lissandra Villa, *Democrats Worry Joe Biden Is Taking Latino Voters For Granted*, Time Magazine (Sept. 2, 2020), https://time.com/5885656/joe-biden-latino-voters/.

[16] Emma Hinchliffe and Nicole Goodkind, *Melinda Gates, Ai-Jen Poo, and 9 More Women On What The 19th Amendment's 100th Anniversary Means to Them*, Fortune (Aug. 18, 2020), https://fortune.com/2020/08/18/19th-amendment-anniversary-100-years-melinda-gates-ai-jen-poo-women-voting-right-to-vote/.

[17] Breanna Edwards, *Georgia State Sen. Nikema Williams On Continuing the Legacy of the Civil Rights Movement*, Essence (Oct. 23, 2020), https://www.essence.com/news/georgia-state-sen-nikema-williams-on-continuing-the-legacy-of-the-civil-rights-movement/.

[18] All Things Considered, *A Year After Accusations, Justin Fairfax Plots Next Act: A Run for Governor*, National Public Radio (Mar. 10, 2020), https://www.npr.org/2020/03/10/814164916/a-year-after-accusations-justin-fairfax-plots-next-act-a-run-for-governor.

[19] Care in Action PAC, Statement of Organization (June 8, 2020).

15-day period. 11 C.F.R. § 111.6(b) (emphasis added). The Commission breached all of these important and explicit due process requirements by voting to find RTB that Care in Action's mailers and digital advertisements violated the Act.

Moreover, the Commission's failure to afford Care in Action an opportunity to respond in 2018 has prejudiced Care in Action's position in this matter in two ways. First, the four-year delay in notifying Care in Action means it is more difficult to gather the information necessary to respond to the allegations in the complaints. Nearly all of the Care in Action personnel who dealt with the 2018 communications are no longer working for the organization. And, because Care in Action neither filed reports with the Commission in 2018 (because it was not obligated to do so, as discussed below) nor was notified by the Commission that a complaint was pending against it (as the Commission was required to do), Care in Action was not obligated to preserve any records of its 2018 public communications. *See* 11 C.F.R. § 104.14(b).[20]

Second, the fact that the Commission proceeded to a "RTB" finding contrary to the Act and its regulations has effectively imposed an extra-statutory burden of persuasion on Care in Action to convince the Commission to reverse its own action. Had the Commission followed its regular procedures and timely notified and heard from Care in Action, the Commission would have been informed as Congress intended when it determined whether there was RTB that Care in Action had violated the Act. *See* 52 U.S.C. § 30109(a)(2). And, at that point Care in Action would have had to persuade only three Commissioners not to find RTB. *See id*. Instead, Care in Action has been doubly improperly disadvantaged: the complainants' voices were the only ones heard by the Commission before it voted, and Care in Action must now persuade four Commissioners to act, and not just act but actually reverse what the Commission has already decided. And, although that much is clear, it is not apparent from the Commission's regulations, its publicly-disclosed enforcement process materials, or from your November 2 letter exactly what Care in Action must persuade four Commissioners to do procedurally. As discussed below, we argue that the Commission should either dismiss this matter as an exercise of its prosecutorial discretion or vacate its October 4, 2021 finding of "RTB" – but either way, Care in Action is now treading uphill instead of on the level due-process field that the Act and the Commission's regulations have established.

This matter is not the first in which the Commission has put a respondent in the disadvantaged position Care in Action now finds itself. It appears that the first occasion when the Commission found RTB that an unknown respondent had violated the Act and thereafter proceeded against a specific named respondent was in MUR 1651 (Hustler Magazine).[21] After the second RTB finding, counsel for the then-named respondents objected to the Commission's proceedings on the same grounds we do now. The Commission's response to those objections is illuminating. In justifying its refusal to vacate the second

[20] Of course, even if Care in Action *had* been obligated to preserve records by application of 11 C.F.R. § 104.14(b), that three-year obligation would have expired almost a full year before the Commission notified it of the complaints against it.

[21] The procedural background in MUR 1651 is as follows: There, the Commission found RTB that an unidentified "Concerned Citizen" had violated the Act by publishing an advertisement in Hustler Magazine. The Commission sent interrogatories to the Republican National Committee and to Hustler's publisher, Larry Flynt, seeking information about the advertisement's source. OGC interpreted Mr. Flynt's response – which objected in part to the interrogatory on the grounds that it violated the Commission's obligation to notify a complaint respondent in a timely manner, then codified at 2 U.S.C. § 437(g) – as providing sufficient information to identify Mr. Flynt and his companies as responsible for the violation. Upon OGC's further recommendation but no other response from Mr. Flynt, the Commission found RTB that he and his companies had violated the Act by placing the advertisement in question.

RTB finding, Chairman McGarry emphasized that the Commission "did as much as possible to insure [sic] that all potential respondents were informed of all of the case's pertinent facts" and that the Hustler respondents "knew of the investigation from its inception."[22] He also indicated that the Commission treated the second RTB finding as arising from an internally-generated matter because it resulted from the Commission's investigation into the identity of the complaint's respondents, implying that the Commission was thereby relieved of its statutory obligation to notify the respondents before finding RTB that they had violated the Act.

Care in Action's position differs from that of the Hustler respondents because Care in Action did *not* know of the investigation from its inception and it is clear that the Commission did not come close to doing "as much as possible" to ensure that Care in Action was aware of the complaint or the relevant facts.[23] And yet, it is not clear from your November 2 letter whether or not Care in Action is now in a procedural posture similar to that which the Hustler respondents were in before the second RTB finding in that case. What action is OGC preparing to recommend to the Commission? Is our confirmation that Care in Action is responsible for the communications enough for the Commission to find probable cause to believe the Act was violated? Is it enough to find RTB a second time but with Care in Action actually named, essentially fast-tracking Care in Action to the probable cause stage? Or is the Commission's next step not a second RTB finding but rather a vote to substitute Care in Action's name for "Unknown Respondents" in the Commission's previous findings? The Commission's otherwise helpful 2012 publication, "Guidebook for Complainants and Respondents on the FEC Enforcement Process," says only that OGC will notify respondents in the case of complaint-generated matters *and* non-complaint generated matters, but it does not address the procedures by which the Commission might find RTB against unknown respondents and then again once the respondents are located. Likewise, the Commission's 1997 Enforcement Manual instructs that, "[u]pon activation, the staff person should review the file to ensure that all respondents have been properly notified[,]" and provides extensive guidance on conducting research at the preliminary stages of a matter, but says nothing about how the Commission proceeds when notification has not occurred.[24]

Instead, the Commission has simply described what it's doing here to Care in Action as a "practice."[25] That the Commission lacks a clear and formal process for how it deals with cases against unknown respondents is a procedural deficiency that should be addressed in light of its tension with the Act – but it should be addressed in a rulemaking or through other agency guidance so that respondents like

[22] Letter to H. Richard Mayberry (Date Unknown), MUR 1651; *see also* Gen. Counsel's Memo., MUR 1651 (arguing that it, the Commission, "made its [second] finding against [the Hustler] Respondents on the basis of internal generation" because the complaint had not named the respondents).

[23] It is of no moment that a spokesperson for Rep. Wagner's campaign stated to the press that the campaign intended to file a complaint with the Commission. *See* October 30, 2018 SLPD Article, note 2, *supra*. The campaign did not in fact file a complaint (as is often the case in election season when a campaign publicizes that it will), and even if it had, the obligation to notify a respondent falls on the Commission. This past spring, a Care in Action vendor that was involved with the 2018 ads informed Care in Action that the Commission was asking who its client was, and Care in Action authorized the vendor to identify it, but Care in Action did not know about the existence of this matter, let alone its status.

[24] *See* 1997 Enforcement Manual, Chapter 2 § II(A).

[25] *See* MUR 7335 (Heller for Senate), Memorandum, Notification of Respondent (August 19, 2021). This "practice" sometimes entails dismissing the matter after a vote to substitute a named respondent and sometimes proceeding to a second RTB vote against the named respondent. *See, e.g.*, *id*., Certification (Sept. 22, 2022) (substituting named respondent and then dismissing case); MUR 7280 (Derek Utley), Certification (Apr. 28, 2022) (substituting named respondent and then dismissing case); MUR 6920 (American Conservative Union, *et al.*), Certification (July 12, 2017) (substituting named respondent and then finding RTB against that named respondent).

Care in Action at least have the minimum due process protection of knowing where they stand. Until those procedures are clear, the bottom line is that nothing in the Act provides the Commission with the authority to find "RTB" against a complaint respondent without first notifying the respondent of the complaint.[26] And even if the Commission had such authority, it of course could not exercise it with respect to a respondent that was *not* unknown, which is plainly the case here.

B. Care in Action's Communications Did Not Contain Express Advocacy

In addition to the procedural failures described above, the Commission erred substantively in finding that the six communications described in the Factual and Legal Analysis (FLA) gave rise to potential violations of the Act. These communications did not expressly advocate for the election or defeat of a clearly-identified candidate, so they were not independent expenditures requiring either disclaimers or reporting to the Commission.

The Commission found RTB that Unknown Respondents violated 52 U.S.C. § 30120(a) and 52 U.S.C. § 30104(c) by disseminating two mailers and four digital advertisements that expressly advocated the defeat of a clearly-identified candidate without including required disclaimers or filing reports with the Commission. Care in Action does not dispute that it was responsible for the six communications, that they qualified as "public communications" under 11 C.F.R. § 100.26, and that their substance pertained to clearly-identified officials who were also candidates for public office at the time. But Care in Action *does* dispute that the communications contained express advocacy.

A communication can meet the Commission's definition of "express advocacy" in two ways – either by using words or phrases like those specifically included in the regulation's text or because the communication's only reasonable interpretation is as advocacy for the election or defeat of a clearly-identified candidate. *See* 11 C.F.R. § 100.22(a)-(b). The Commission's finding was based on a determination that Care in Action's six communications met the latter standard because they supposedly included attacks on Reps. Paulsen and Wagner's character and fitness that were "very similar to those the Commission has found to be express advocacy under § 100.22(b)."[27] The import of such attacks, according to the Commission's explanation and justification for § 100.22(b), is that "communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, *in context*, they can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question."[28] In other words, by its own explanation, the Commission should examine character-related commentary in a communication in light of its context and then determine if, within that context, "reasonable minds" could differ as to whether the character commentary encouraged the audience to vote for or against the candidate identified.

However, the October 2021 Factual and Legal Analysis ("FLA") falls short of such an analysis; rather, the Commission analogized the six communications to three older enforcement actions in which the relevant context was entirely different:

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[26] Although the Commission has not said so in this matter (to our knowledge – again, we are uncertain what procedural recommendation OGC is preparing), we submit that its position in MUR 1651 that the second RTB finding could proceed without notifying the respondent because the investigation to identify a complaint's unnamed respondent qualified as an internally-generated matter was a remarkable side-step of the Act's requirements.

[27] Factual and Legal Analysis at 13.

[28] Corporate and Labor Organization Expenditures, 60 Fed. Reg. at 35,292, 35,295 (July 6, 1995) (emphasis added).

- First, the FLA cites to the Commission's findings in MUR 5024R that two brochures attacking congressional candidate Tom Kean, Jr. in the 2000 Republican primary election contained express advocacy under § 100.22(b), including by using the phrase "Tell Tom Kean Jr. … New Jersey Needs New Jersey Leaders." But the FLA's analysis omits other facts about the brochures that the Commission found relevant to the express advocacy analysis – specifically, that they directly referred to Kean's campaign for Congress and used a photo of Kean wearing a campaign button that read "Tom Kean Jr. for Congress."[29]

- Second, the FLA cites to the Commission's finding in MURs 5511/5525 that communications in the 2004 general election stating then-presidential candidate John Kerry "CANNOT BE TRUSTED" and that he was "unfit for command" qualified as express advocacy under § 100.22. But the FLA's analysis leaves out the Commission's reliance on the context in which those communications occurred – specifically that the audience would view them together with the fact that he was a candidate for the only elected office that commands the U.S. military and the surrounding commentary on Senator Kerry's actions in the Vietnam War.[30]

- The final communication the FLA cites as "very similar" to Care in Action's communications is an ad attacking Sen. Bob Casey's qualifications for the U.S. Senate when he first ran in 2006. This advertisement asked if the audience could "risk Bob Casey learning on the job." However, the FLA fails to mention that the ad also praised Casey's incumbent opponent Sen. Rick Santorum's qualifications and personal characteristics in a manner that the Commission found was "unrelated to any issue."[31]

Care in Action's communications differ from these decades-plus-old examples of express advocacy under § 100.22(b) in multiple key respects. First, *Care in Action's communications lacked any reference to the election whatsoever*. Chairman Dickerson and Commissioners Trainor and Cooksey's characterization of OGC's analysis in MURs 7672, 7674 and 7732 (Iowa Values) applies to the FLA in this matter as well, in that the FLA "gives short shrift to § 100.22(b)'s requirement that the communication must also include an electoral portion" and ignores the fact that "not one of the [communications] referenced … contains a reference to an election, to [Paulsen or Wagner] as a candidate in an election, or a call for voters to take electoral action."[32] The fact that they were disseminated close in time to an election or the possibility that a communication might somehow be interpreted as election-related does *not* satisfy the necessary condition in § 100.22(b) that a communication have an unmistakable "electoral portion" in order to be regulated as express advocacy.[33] As the Commission determined in MUR 7150 (New Yorkers

[29] MUR 5024R (Council for Responsible Government) Conciliation Agreement at 5-8.
[30] MURs 5511 and 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agrmt at 26-28.
[31] MUR 5381 (Softer Voices), Factual and Legal Analysis at 8.
[32] Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (May 13, 2022), MURs 7672, 7674, and 7732 (Iowa Values, *et al*) at 8.
[33] *Id*; *see also* MUR 7839 (Westerleigh Press, Inc., *et al.*), Factual and Legal Analysis at 11-12 (unanimous finding of no RTB that mailers violated the Act where such mailers (i) did not "contain any reference to an election or call on the reader to take any electoral action," (ii) did not "refer to the incumbents as candidates in a federal election and [did] not mention their political opponents," and (iii) "the target of the advertisements [was] a current officeholder with the ability to effect change on policy"); MUR 6311 (Americans for Prosperity), Factual and Legal Analysis at 5-6 (unanimous finding of no express advocacy because ads that exhorted "Tell [incumbent Representative] we won't forget" and directed viewers to www.novemberiscoming.com contained no unmistakable electoral portion and could reasonably be understood to request that the incumbent officials take a different policy position); Statement of Reasons of Vice Chair Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (Oct. 7, 2021), MUR 7513 (Community Issues Project) at 4-5 (emphasizing that, to qualify under §

Together), even mentioning a federal candidate on the ballot and characterizing that candidate in unflattering terms in a communication disseminated close to an election in which that candidate appears on the ballot is not, by itself, enough to "exhort the recipient to vote" for or against that candidate.[34] The communications at issue here are similar to the billboard depicting Sen. Ron Johnson and Rep. Tom Tiffany in MUR 7930 that the Commission determined did not contain express advocacy: despite criticizing the officeholders' characters, the billboard's message was ambiguous because it made no mention of their status as candidates.[35] Because Care in Action's communications made no connection to the election and instead only discussed the actions of incumbent officeholders on matters of public concern, the Commission cannot find that they contained express advocacy.

In addition to the absence of an electoral component, there is an entirely reasonable interpretation of the Care in Action ads other than advocating the electoral defeat of either featured then-candidate that the FLA did not consider (perhaps because, again, the Commission eschewed hearing from Care in Action in the first place). The phrase "families deserve better" can, in the context of each communication as a whole, reasonably be interpreted to refer to the *migrant* families rather than the families of the communications' audience who may be constituents of the named officeholders. In fact, the October 7 digital advertisement communicates this point more directly, by including the statement "our children are in pain, taken from their parents by our own government" over an image of a detained child who is crying. Describing the migrant children as "our children" immediately following the image of the presumably non-migrant family walking together through a park and the phrase "your children," could reasonably be understood to purposefully blur the lines between migrant families and the audience's families in an effort to build the audience's identification with the migrant families and therefore also their agreement that those families "deserve better."

Second, *Care in Action's communications did not comment on character, qualifications or accomplishments.* The FLA suggests only the "character" element, but Care in Action's communications differ from the three cases cited in the FLA in that the communications are entirely focused on Representatives Paulsen and Wagner's official conduct and policy choices. The policy issues discussed in the communications were regularly described in public discourse at the time in terms of their morality and alignment with American values – Care in Action's communications used similarly hard-hitting language in characterizing Reps. Paulsen and Wagner's positions, but did not comment on matters outside the scope of their duties as sitting Members of Congress.[36] Also unlike the cases cited in the FLA, Care in Action's communications could reasonably be interpreted as exerting pressure regarding policy positions that, at the time the communications were disseminated, Care in Action hoped these Representatives would take *regardless* of whether or not they won re-election.[37] Although news of the Trump Administration's policy of separating migrant children from their parents first broke in June 2018, journalists and government

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100.22(b) as express advocacy, a communication must have an "electoral portion" that is unmistakable and explaining that referring to an incumbent officeholder who was also a candidate for federal office as a "career politician" did not qualify as such).

[34] MUR 7150 (New Yorkers Together), Factual and Legal Analysis at 4-5.

[35] MUR 7930 (Minocqua Brewing Co., *et al.*), Factual and Legal Analysis at 12.

[36] *See, e.g.*, Editorial Board, *Seizing Children From Parents at the Border is Immoral; Here's What We Can Do About It,* The New York Times (June 14, 2018), https://www.nytimes.com/2018/06/14/opinion/children-parents-asylum-immigration.html; Jazmine Ulloa, *Senators Call Border Family Separation Policy 'Immoral' As Officials Defend Their Actions*, The Los Angeles Times (July 31, 2018), https://www.latimes.com/politics/la-na-pol-family-separations-hearing-20180731-story.html.

[37] *See, e.g.*, MUR 7839 (Westerleigh Press, Inc., *et al.*), Factual and Legal Analysis at 11-12 (mailer with no electoral portion did not contain express advocacy where "the target of the advertisements [was] a current officeholder with the ability to effect change on policy").

officials were still actively investigating and reporting on how the policy came to be and its consequences when Care in Action's communications were disseminated.[38] The day before the October 7 digital advertisements began running, President Trump referred in a speech to legislation to prohibit family separation that was pending in Congress – which, as the mailers note, neither Rep. Paulsen nor Rep. Wagner had yet joined as a co-sponsor.[39] Moreover, when Congress recessed at the end of September, it was publicly reported that the Republican House leadership had struck a deal with President Trump to delay considering appropriations for the Department of Homeland Security – the agency that carried out the family separation plan – until December.[40] Had the Commission afforded Care in Action the opportunity to respond to the complaints when they were submitted, this context would have been easier to demonstrate with reference to contemporaneous news articles and commentary, and the non-electoral meaning of the communications could have been more readily apparent to the Commission.

II. Alternatively, the Commission Should Dismiss the Complaint In an Exercise of Its Prosecutorial Discretion

As explained above, Care in Action's position is that the communications did not contain express advocacy under § 100.22 because there can be disagreement among reasonable persons as to whether or not they advocate for the reader to take any electoral action. However, Care in Action's ability to argue for its position has been unfairly disadvantaged by the Commission's four-year delay in giving Care in Action notice of the complaints against it and by proceeding to find RTB prior to giving such notice. The Commission has not made clear – either directly to Care in Action or through the publicly available information about its enforcement process – what its next procedural options are in this matter. If the Commission intends to proceed as it did in MUR 1651, we ask that the Commission affirmatively find no RTB that Care in Action violated the Act for the reasons set forth above, in order to clarify the record in this matter. If instead the Commission will next consider merely substituting Care in Action's name for that of "Unknown Respondent" in its earlier finding, we ask the Commission to instead vacate its finding of RTB because it was procedurally flawed under the Act and regulations and substantively incorrect as a matter of law.[41]

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[38] *See, e.g.*, Joshua Barajas, *More Than 400 Migrant Children Remain Separated From Their Parents; Here's What We Know*, PBS News Hour (Sept. 7, 2018), https://www.pbs.org/newshour/nation/more-than-400-migrant-children-remain-separated-from-their-parents-heres-what-we-know; Jeremy Raff, *'The Separation Was So Long; My Son Has Changed So Much'*, The Atlantic (Sept. 7, 2018), https://www.theatlantic.com/politics/archive/2018/09/trump-family-separation-children-border/569584/; Jeremy Stahl, *Newly Uncovered Memo Suggests Kirstjen Nielsen Lied to Congress About Family Separation*, Slate (Sept. 25, 2018), https://slate.com/news-and-politics/2018/09/memo-kirstjen-nielsen-lied-congress-family-separation.html; Amanda Holpuch, *Trump's Family Separations: Watchdog Review Paints Damning Picture of Policy*, The Guardian (Oct. 2, 2018), https://www.theguardian.com/us-news/2018/oct/02/trump-family-separations-watchdog-review-paints-a-damning-picture.

[39] *See* Dara Lind, *Anatomy of a Lie: Where Trump's Fictitious 'Open Borders Bill' Comes From*, Vox (Oct. 8, 2018), https://www.vox.com/2018/10/8/17951426/open-borders-bill-trump-feinstein-democrat (reporting on President Trump's comments in a speech on October 6, 2018 regarding an "Open Borders Bill" sponsored by Senator Dianne Feinstein and tracing the moniker "Open Borders Bill" to the legislation officially named the Keep Families Together Act); Keep Families Together Act, H.R. 6135, 115th Cong., List of Cosponsors *available at* https://www.congress.gov/bill/115th-congress/house-bill/6135/cosponsors?r=4&s=9&q=%7B%22search%22%3A%5B%22%5C%22keep+families+together+act%5C%22%22%2C%22%5C%22keep%22%2C%22families%22%2C%22together%22%2C%22act%5C%22%22%5D%7D.

[40] Lindsey McPherson, *Republicans Likely in for a Messy December Funding, Leadership Fight*, Roll Call (Oct. 1, 2018), https://rollcall.com/2018/10/01/republicans-likely-in-for-a-messy-december-funding-leadership-fight/

[41] There is precedent for the Commission's consideration of such a motion. *See, e.g.*, MUR 2093, Certification of Commission Vote on Motion to Vacate (Mar. 11, 1986).

Alternatively, if the Commission does not vacate its October 2021 finding in this matter or affirmatively find no RTB that Care in Action violated the act, then Care in Action asks that the Commission dismiss this matter as an exercise of its prosecutorial discretion.[42] Care in Action heard from the Commission about the complaints against it for the first time more than four years after the complaints were filed and more than an entire year after the Commission's own record-keeping requirements would have expired had they applied to Care in Action. As a result, Care in Action is now responding to the complaints for the first time less than a year before the relevant statute of limitations expires. Moreover, even aside from the significant procedural deficiencies in this matter, its substance resembles that underlying the Commission's recent exercise of its prosecutorial discretion in dismissing the complaint in MUR 7884 (Georgia Gun Owners, Inc.). In sum, the Commission's resources could no doubt be better spent on matters that are not already so stale and in which the Commission will not face the questions of statutory and regulatory compliance in its enforcement proceedings that it does here.

Thank you for your consideration.

Respectfully submitted,

Laurence E. Gold

Laurence E. Gold
Renata E.B. Strause
Counsel for Respondent Care in Action, Inc.

cc: Christina Obiajulu-Skinner
General Counsel
Care in Action, Inc.

[42] *See* Heckler v. Chaney, 470 U.S. 821 (1985).

MUR 7537, Care in Action, Inc.

Attachment A

Form **8871**
(Rev. July 2003)
Department of the Treasury
Internal Revenue Service

Political Organization Notice of Section 527 Status

OMB No. 1545-1693

Part I General Information

1 Name of organization

Care in Action PAC

Employer identification number

83 - 2488940

2 Mailing address (P.O. box or number, street, and room or suite number)

45 Broadway Suite 320

City or town, state, and ZIP code

New York, NY 10006

3 Check applicable box: ✔ **Initial notice** ☐ **Amended notice** ☐ **Final notice**

4a Date established

11/09/2018

4b Date of material change

11/09/2018

5 E-mail address of organization

no@email

6a Name of custodian of records

Jessica Livoti

6b Custodian's address

45 Broadway Suite 320
New York, NY 10006

7a Name of contact person

Jessica Livoti

7b Contact person's address

45 Broadway Suite 320
New York, NY 10006

8 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number

45 Broadway Suite 320

City or town, state, and ZIP code

New York, NY 10006

9a Election authority

NONE

9b Election authority identification number

Part II Notification of Claim of Exemption From Filing Certain Forms (see instructions)

10a Is this organization claiming exemption from filing Form 8872, Political Organization Report of Contributions and Expenditures, as a qualified state or local political organization? Yes ✔ **No** ☐

10b If 'Yes,' list the state where the organization files reports: GA

11 Is this organization claiming exemption from filing Form 990 (or 990-EZ), Return of Organization Exempt from Income Tax, as a caucus or associations of state or local officials? Yes ☐ **No** ✔

Part III Purpose

12 Describe the purpose of the organization

Supporting and opposing nonfederal political candidates.

Part IV List of All Related Entities (see instructions)

13 Check if the organization has no related entities

14a Name of related entity	14b Relationship	14c Address
Care in Action, Inc.	Connected	45 Broadway Suite 320 New York, NY 10006

Part V List of All Officers, Directors, and Highly Compensated Employees (see instructions)

15a Name	15b Title	15c Address
Jessica Livoti	Political Director	45 Broadway Suite 320 New York, NY 10006

Under penalties of perjury, I declare that the organization named in Part I is to be treated as a tax-exempt organization described in section 527 of the Internal Revenue Code, and that I have examined this notice, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I am the official authorized to sign this report, and I am signing by entering my name below.

Sign Here

Raquel Lavina — Name of authorized official

11/09/2018 — Date

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RENATA E. B. STRAUSE

March 2, 2023

By email to dcampbell@fec.gov

Mr. Donald E. Campbell
Office of General Counsel
Federal Election Commission
1050 First St., NE
Washington, DC 20463

Re: MUR 7537, Care in Action, Inc.

Dear Mr. Campbell:

Thank you again for the opportunity to discuss this matter with you and Assistant General Counsel Roy Q. Luckett last Friday following receipt of your February 17 letter.

Your letter advised, and during our call you reiterated, that the Federal Election Campaign Act (the "Act") and the Federal Election Commission's (Commission) regulations "contain no provision for the Commission to consider" a request to "reconsider" its reason-to-believe (RTB) finding against Unknown Respondents,[1] so the Office of General Counsel (OGC) did not intend to recommend that the Commission take that procedural step. We agree that there is no such regulatory provision – but likewise there is no provision setting forth in so many words how the Commission must proceed regarding either an unknown respondent in the first instance, a later-identified respondent after RTB is found against the unknown respondent, or – as here – a respondent that was *not* unknown but was treated by the Commission as such through the Commission's first RTB determination.

In the absence of rules, the Commission's evident "practice"[2] has been the following: (1) the Commission determines whether or not to find RTB with respect to an unknown respondent; (2) if it finds RTB, the Commission directs OGC to investigate who the unknown respondent is; (3) if OGC determines facts "indicating" the unknown respondent's identity, OGC so notifies that entity, provides the previous RTB Factual and Legal Analysis (FLA), invites a "response" to the complaint and FLA, and says that OGC will then make a "recommendation" to the Commission, but – unlike the notice issued to a known respondent following receipt of a complaint pursuant to 52 U.S.C. § 30109(a)(1) and 11 C.F.R. § 111.6(a)(1) – does *not* inform the respondent about what actions, procedurally, the Commission might then take; (4) following the time for a response, OGC recommends whether or not the Commission should

[1] As discussed at page 3 below, Care in Action actually requested that the Commission "vacate" rather than "reconsider" that finding.

[2] See MUR 7335 (Heller for Senate), OGC Memorandum, Notification of Respondent (August 19, 2021).

substitute the now-named respondent in place of the "Unknown Respondent" in the *previous* RTB finding, and OGC sometimes recommends more decisions regarding the respondent, such as finding additional RTB[3] or taking no further action;[4] and (5) the Commission considers those recommendations and acts.[5]

Consistent with this approach, Associate General Counsel Kitcher's November 2, 2022 letter to Care in Action did not inform Care in Action what the Commission's procedural options were at the current stage of this matter. Our December 23 response pointed out how this posture unfairly disadvantaged Care in Action through no fault of its own, a state of legal jeopardy exacerbated, of course, by the fact that no RTB should have been considered in the first place without notifying and hearing from Care in Action. Only in response to our letter was Care in Action advised, by your letter and verbal confirmation last week, that the Commission "has not found reason to believe that...Care in Action...violated the Act or Commission regulations."

Given that, Care in Action understands its current procedural position in this matter to be that of a respondent that has been notified of a complaint against it and given an opportunity to respond *before* the Commission considers whether or not to find RTB in the first place; and, if there remains any doubt about this, Care in Action urges that it be so. It cannot be squared with the statute and the regulations for the Commission simply to substitute Care in Action for the so-called "Unknown Respondent" in its October 4, 2021, RTB, even if Care in Action had been truly "unknown" then. But because the Commission has operated in these situations under a never-fully-articulated practice, we cannot conclusively tell whether a post-RTB, newly identified respondent is treated as if there had been no RTB.

This practice's ambiguity was particularly evident in MUR 6920 (American Conservative Union). Following an RTB finding concerning a then-unknown respondent, the Commission both substituted the later-identified respondent in its previous RTB finding *and* voted a separate, fresh RTB finding as to the same violation.[6] However, with respect to another newly identified respondent, the Commission rejected OGC's recommendation to find RTB; the two dissenting Commissioners (of the five then in office) criticized OGC for its "irregular" failure not to *also* recommend this respondent's substitution for the previously unknown respondent, and stated: "The Commission typically would vote to add a person or organization and then vote to find reason to believe. We believe the parties added to a matter are entitled to formal notice of a complaint pursuant to 52 U.S.C. § 30109(a)(1), and a right to respond to the complaint, before the Commission votes to find reason to believe that party has violated the Act."[7] Neither the other Commissioners nor OGC addressed the nature or appropriateness of the procedure followed in the case.

We agree that 52 U.S.C. § 30109(a)(1), and so also 11 C.F.R. § 111.6(a)(1), ought to apply in this situation, because only that approach conforms with the letter and spirit of the Act. Accordingly, a notification letter like that sent by Associate General Counsel Kitcher to Care in Action last November 2 should specify that the regular RTB procedure applies along with providing the Commission's previous RTB finding about the then-unknown respondent.

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[3] See, *e.g.*, MUR 6920 (American Conservative Union), Second General Counsel's Report, pp. 1, 6 (July 5, 2017) (seeking RTB that violation was knowing and willful).
[4] See, *e.g.*, MUR 7355 (Heller for Senate), Second General Counsel's Report (September 6, 2022).
[5] See, *e.g.*, MUR 6920, Certification (July 12, 2017) (substituting respondent for unknown respondent in previous RTB finding, *and* separately making the same RTB finding, *and* failing to find RTB that violation was knowing and willful).
[6] See note 5, above.
[7] MUR 6920, Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, p.1 n.2 (December 20, 2017).

Your February 17 letter requests that Care in Action produce specific information regarding the October 2018 mailers and digital advertisements that are the subject of MUR 7537, including who designed them, how many there were, what they cost, and the allocation of those figures between the two Members of Congress the communications variously identified (in their official capacities, not as candidates, as we have described). We confirm some of the other information you request because we already acknowledged it in our December 23 letter: Care in Action paid for the communications in question and did so through an engagement with BerlinRosen Ltd. However, Care in Action respectfully declines to respond to the remainder of your questions at this time, for two reasons. First, such an investigatory-like request is inconsistent with the *pre*-RTB treatment of a respondent that Care in Action deserves and that you have asserted: a respondent in that position has complete discretion as to whether and how to respond, and we have chosen to do so with respect to the determinative legal issue of whether or not the communications contained express advocacy and so were independent expenditures subject to the Act. Second, unlike all the originally unknown respondents in the MURs we have cited, Care in Action was *never* "unknown," and as a result it continues to suffer significant prejudice due to the Commission's failure to afford it the statutorily-guaranteed opportunity to respond to the two complaints filed nearly 4½ years ago.

In our December 23 letter, we argued that the Commission should "vacate" – not "reconsider" as such – its RTB finding because it should not have made any such finding due to the Commission's failure in 2018 to afford Care in Action its statutorily guaranteed due process, which also deprived the Commission of Care in Action's arguments on the merits of the complaints before it considered RTB. Vacatur and reconsideration are not the same. Acknowledging that neither is provided for in the Commission's rules, vacatur can be decided on the procedural ground of denial of statutorily required due process without reaching the merits of the initial decision.[8] That would be appropriate here. Reconsideration would require the Commission to revisit the correctness of that decision. Whether or not the Commission vacates its decision, as discussed above, now that Care in Action has been notified of the complaints and has responded to them, we also urge the Commission to make a fresh affirmative determination that there is no reason to believe that Care in Action violated the Act because the communications at issue did not contain express advocacy. But if the Commission were to characterize its review now as reconsideration of its 2021 RTB determination then the same result should follow.

Regardless of how the Commission characterizes the stage of the enforcement process where Care in Action now finds itself, the Commission instead can exercise its prosecutorial discretion to dismiss this matter,[9] and we alternatively request that the Commission do so. The denial of due process alone counsels in favor of that decision, as do the resulting four-year delay in notifying Care in Action, the approaching statute of limitations expiration, and the unlikelihood that eventual litigation would sustain the legal position that Care in Action's 2018 communications contained express advocacy.

We further understand that the Commissioners will receive copies of both our December 23 letter and this one when OGC presents its recommendations, and again we appreciate the opportunity we have

[8] *See, e.g.*, Board of Veterans Appeals Rules of Practice, 38 C.F.R. §§ 20.1000-20.1001 (providing that a decision may be vacated based on a denial of due process and that a decision may be reconsidered only upon an alleged error of fact or law, the discovery of new evidence or when the decision had rested on false or fraudulent evidence); *compare* Black's Law Dictionary 1300 (8th ed. 2004) ("reconsider, vb. To discuss or take up (a matter) again") *with* Black's Law Dictionary 1584 (8th ed. 2004) ("vacate, vb. 1. To nullify or cancel; make void; invalidate"); *see also Norsworthy v. Hous. Indep. Sch. Dist.*, No. 22-821, 2002 U.S. Dist. LEXIS 181295 at *1-2 (S.D. Tex. Oct. 4, 2022) (explaining that a "motion asking the court to reconsider a prior ruling is evaluated as a motion to alter or amend a judgment under [Federal Rule of Civil Procedure] 59" and that such a motion "calls into question the correctness of a judgment") (cleaned up); *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 13 (D.D.C. 1998) (explaining that vacatur deprives a previous decision of its conclusive effect).

[9] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

had to discuss this matter with you. Thank you for your consideration.

Respectfully submitted,

Laurence E. Gold
Renata E.B. Strause
Counsel for Respondent Care in Action, Inc.

cc: Roy Q. Luckett, Assistant General Counsel, FEC
Christina Obiajulu-Skinner, General Counsel, Care in Action, Inc.

3. Close the file.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel for Enforcement

December 12, 2023
Date

Claudio Pavia
Deputy Associate General Counsel
for Enforcement

Wanda D. Brown
Assistant General Counsel

Attachments:
1. Letter from Laurence Gold & Renata E.B. Strause, Counsel for Care in Action, Inc., (Dec. 23, 2022).
2. Letter from Laurence Gold & Renata E.B. Strause, Counsel for Care in Action, Inc., (Mar. 2, 2023).