

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7543

DATE COMPLAINT FILED: November 15, 2018

DATE OF LAST RESPONSE: Not Applicable

DATE ACTIVATED: August 14, 2019

EXPIRATION OF SOL: November 2, 2023

ELECTION CYCLE: 2018

COMPLAINANT:

Committee to Elect Jesse Schmidt

RESPONDENTS:

Jefferson United, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

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

52 U.S.C. § 30104(b), (c), (g)

52 U.S.C. § 30120(a)

11 C.F.R. § 100.5

11 C.F.R. § 100.17

11 C.F.R. § 100.22

11 C.F.R. § 100.26

11 C.F.R. § 100.27

11 C.F.R. § 104.4

11 C.F.R. § 109.10

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Jefferson United, Inc. (“Jefferson”) produced and distributed a mailer without a disclaimer advocating the defeat of Jesse Schmidt, a candidate in the 2018 Primary Election for the Second Congressional District in Louisiana, in violation of 52 U.S.C. § 30120(a)(3).¹ According to the Complaint, the mailer was delivered to prospective voters

¹ Compl. at 1, ¶¶ 1-3 (November 15, 2018). Schmidt was an independent candidate for Louisiana's Second Congressional District in the U.S. House, and lost the primary election on November 6, 2018 with 8.7% of the vote.

1 starting November 2, 2018.² The mailer did not include a disclaimer, but did contain a return
2 address of “Jefferson United,” in Harvey, Louisiana.³ Jefferson did not submit a response. The
3 Commission’s records do not show that Jefferson United registered as a political committee or
4 filed any independent expenditure reports, and no individuals have listed Jefferson United as an
5 employer.⁴

6 The Schmidt mailer appears to be a public communication containing express advocacy
7 that should have contained proper disclaimers and been reported to the Commission. Therefore,
8 we recommend that the Commission find reason to believe that Jefferson United, Inc. violated
9 52 U.S.C. §§ 30120(a); 30104(b) or (c), and (g).

10 **II. FACTUAL BACKGROUND**

11 The Complaint alleges that beginning November 2, 2018, Jefferson produced and
12 distributed a mailer, with no disclaimer, that specifically mentions U.S. House candidate Jesse
13 Schmidt, and is an attempt to sway voters away from Schmidt.⁵ The front of the mailer is
14 reproduced below:⁶

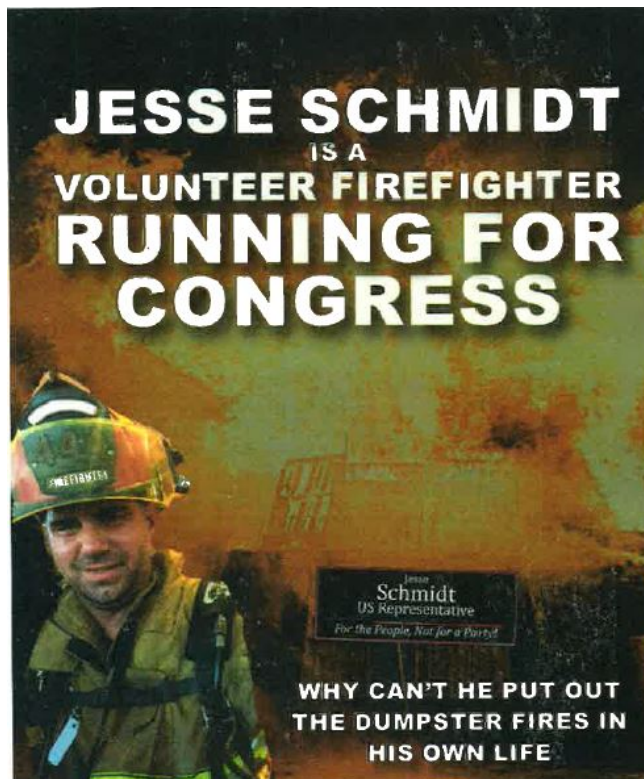
² *Id.*

³ *Id.* at 1-2.

⁴ “Jefferson United, Inc.” is registered with Louisiana Ethics Administration Program as a state Political Action Committee, and with the Louisiana Secretary of State as a Non-Profit Corporation. Jefferson has not electronically filed a state campaign finance report since 2015, but appears to still be registered. *See*: <http://www.ethics.la.gov/CampaignFinanceSearch/ViewEfiler.aspx?FilerID=PAC990365>. The most frequent expenditures in Jefferson’s most recent reports are “Canvassing,” “Election,” “Election Day,” and “Political Consultant.”

⁵ Compl. at 1.

⁶ *Id.*



1
 2 The back of the mailer has three photos of Schmidt and lists three categories: “BAD
 3 BUSINESS DEALS,” “PROBLEM PERSONAL FINANCES,” and “CONFLICTS WITH LAW
 4 ENFORCEMENT & COURTS.”⁷ These lists include the statements: “Jesse was sued by a former
 5 employer and a business partner to collect monies owed them under agreements totaling nearly
 6 \$100,000.00;” “Chapter 7 Bankruptcy in state of Wisconsin; Lawsuit – Aurora Health;” and
 7 “Unauthorized Entry of Phoenix Pawn, 200 Clearview Pkwy days after Hurricane Katrina and
 8 Charged with Battery, Aggravated Assault, Criminal Trespassing; Failed to Appear (3/07/2006)
 9 Forf[e]jited Bond – Attachment Issued (3/27/2006); Cited by State Wildlife & Fisheries
 10 Enforcement Agent for Night Activity – violation of rules in Wildlife Management Area; Failed to

⁷ *Id.* at 2.

1 Appear in Court, Warrants Issued 2002, 2004, 2005, 2006, 2010.”⁸ The back of the mailer also
 2 states: “SHOULDN’T CHARACTER AND HONESTY MATTER?”⁹ The mailer does not
 3 contain a disclaimer, and the Complainant states that upon information and belief, the mailer was
 4 produced and distributed by Jefferson.¹⁰

BAD BUSINESS DEALS

Jesse was sued by a former employer and a business partner to collect monies owed them under agreements totaling nearly \$100,000.00

Pratt Landry vs Jesse Schmidt 24th JDC Case #661944 Filed 7/11/2008 Div. G

Craig Clark vs Gulf Coast Special Systems, LLC & Jesse Schmidt 24 JDC Case #727623 Filed 6/04/2013 Div N

PROBLEM PERSONAL FINANCES

Chapter 7 Bankruptcy in state of Wisconsin

Eastern District, Milwaukee Case # 0132591 Filed 11/26/2001 Trustee Russell Schaller

Lawsuit - Anova Health

Walworth Circuit Court - Elkhorn, WI Filing # 01SC01646 Filed 9/27/2001

CONFLICTS WITH LAW ENFORCEMENT & COURTS

- Unauthorized Entry of Phoenix Pason, 300 Clearview Pike days after Hurricane Katrina and Charged with Battery, Aggravated Assault, Criminal Trespassing
- Failed to Appear (3/07/2006) Forfeited Bond - Attachment Issued (3/27/2006)
- Jefferson - 1st Parish Court - Item # 10513305 Offense Date 9/05/2005
- Cited by State Wildlife & Fisheries Enforcement Agent for Night Activity - violation of rules in Wildlife Management Area
- Jefferson - 2nd Parish Court - Item # WLE890037 Offense Date 8/26/2005
- Failed to Appear in Court, Warrants Issued 2002, 2004, 2005, 2006, 2010
- Jefferson - 1st Parish Court - Item # P4 104278 Offense Date 1/02/2003
- Jefferson - 1st Parish Court - Item # P4 570303 Offense Date 9/24/2004
- Jefferson - 2nd Parish Court - Item # S1157212 Offense Date 5/09/2010

SHOULDN'T CHARACTER AND HONESTY MATTER?

5

⁸ *Id.* Each of these statements cite to corresponding court records and case numbers.

⁹ *Id.*

¹⁰ *Id.* at 1.

1 The mailer's return address reads "Jefferson United, 1901 Manhattan, Building C, Suite
 2 203, Harvey, Louisiana 70058."¹¹ Since the mailer does not include a disclaimer, the Complainant
 3 alleges that it violates 52 U.S.C. § 30120(a).¹²

4 **III. LEGAL ANALYSIS**

5 **A. Disclaimers**

6 The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that
 7 whenever a political committee makes a disbursement for the purpose of financing any
 8 communication through any mailing, or any other type of general public political advertising, such
 9 communication must clearly state who paid for the communication.¹³ A communication
 10 authorized and paid for by a candidate, an authorized committee of a candidate, or an agent of
 11 either, must clearly state that the communication was paid for by the authorized political
 12 committee.¹⁴ A communication authorized by a candidate, an authorized committee of a
 13 candidate, or an agent of either but paid for by another person, must clearly state that the
 14 communication was paid for by such person but authorized by the political committee.¹⁵

15 The Act also requires that all public communications that expressly advocate the election

¹¹ *Id.* at 1. The postmark reads: "PRESORTED STANDARD US POSTAGE PAID KENNER, LA PERMIT NO. 39." The delivery address contains a barcode, and the USPS code: "SCH 5-DIGIT 70053 seq 0000229 cont 000001." It appears at least 200 copies of the mailer were distributed because the bulk mail permit imprint indicates that the mailers were sent by Standard Mail. The U.S. Postal Service ("USPS") requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. *See* USPS, <https://pe.usps.com/businessmail101?ViewName=StandardMail>. (Last visited October 30, 2019). The Louisiana Secretary of State reports that there are 510,934 qualified voters in the second congressional district, and 248,172 votes were cast in the November 6, 2018, election. *See* "Voter Stats" at <https://voterportal.sos.la.gov/Graphical>. (Last visited October 30, 2019). Given the size of the district, it is likely that more than 500 pieces were mailed.

¹² *Id.* at 1-2. *See also* 11 C.F.R. § 110.11(b), (c)(1)-(2).

¹³ 52 U.S.C. § 30120(a).

¹⁴ 52 U.S.C. § 30120(a)(1).

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

1 or defeat of a clearly identified candidate include a disclaimer.¹⁶ “Public communications”
2 include “mass mailings,” which are mailings of more than 500 pieces of mail of an identical or
3 substantially similar nature within any 30-day period.¹⁷

4 Where required, disclaimers must be “presented in a clear and conspicuous manner, to give
5 the reader, observer, or listener adequate notice of the identity of the person or political committee
6 that paid for, and where required, that authorized the communication.”¹⁸ If a communication is
7 not authorized by a candidate’s authorized committee, it must clearly state the name and
8 permanent address, telephone number or website address of the person who paid for the
9 communication and state that the communication is not authorized by any candidate or candidate’s
10 committee.¹⁹

11 The available information indicates that the Schmidt mailer constitutes a public
12 communication. It appears professionally produced, included a USPS permit imprint, and likely
13 consisted of more than 500 pieces.²⁰ The mailer, however, does not include any disclaimers.²¹

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

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

¹⁸ 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).

¹⁹ *Id.* § 110.11(b)(3).

²⁰ The Complaint does not specify the number of mailings, however, the voter turnout for the November 6, 2018, election in Louisiana’s Second Congressional District was 248,172. *See* “Voter Stats” at <https://voterportal.sos.la.gov/Graphical>.

²¹ Compl. at 1-2.

1 **The Schmidt Mailer Needed a Disclaimer because it Contained Express Advocacy**

2 Commission regulations provide that a communication expressly advocates the election or
3 defeat of a clearly identified candidate²² when it uses certain phrases or uses campaign slogans or
4 individual words, “which in context can have no other reasonable meaning than to urge the
5 election or defeat of one or more clearly identified candidate(s).”²³ Commission regulations also
6 state, a communication constitutes express advocacy if “[w]hen taken as a whole and with limited
7 reference to external events, such as the proximity to the election, [the communication] could only
8 be interpreted by a reasonable person as containing advocacy of the election or defeat of one or
9 more clearly identified candidate(s) because — (1) [t]he electoral portion of the communication is
10 unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds
11 could not differ as to whether it encourages actions to elect or defeat one or more clearly identified
12 candidate(s) or encourages some other kind of action.”²⁴

13 Here, the mailer clearly identifies Schmidt, a federal candidate. However, the mailer does
14 not use the certain phrases, campaign slogans, or individual words that have been interpreted to
15 constitute express advocacy under 11 C.F.R. § 100.22(a). Therefore, the mailer constitutes
16 express advocacy only if the electoral portions are “unmistakable, unambiguous, and suggestive of

²² The term “clearly identified” means “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or the ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R. § 100.17.

²³ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “vote for the President,” “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).

²⁴ 11 C.F.R. § 100.22(b).

1 only one meaning,” and if the messages could only be interpreted by a reasonable mind as
2 encouraging the defeat of Schmidt under 11 C.F.R. § 100.22(b).

3 In its explanation and justification for section 100.22(b), the Commission stated,
4 “communications discussing or commenting on a candidate’s *character, qualifications or*
5 *accomplishments* are considered express advocacy under new section 100.22(b) if, in context, they
6 can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in
7 question.”²⁵ In MUR 5024R, the Commission concluded that, in context, the brochures
8 constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions of the
9 brochure, including the phrase “Tell Tom Kean Jr...New Jersey Needs New Jersey Leaders,”
10 were “unmistakable, unambiguous and suggestive of only one meaning” — to vote against Tom
11 Kean.²⁶ In MURs 5511/5525, the Commission concluded that attacks on John Kerry’s character,
12 fitness for public office, and capacity to lead, including phrases such as “JOHN KERRY
13 CANNOT BE TRUSTED” and “unfit for command” were “unmistakable, unambiguous and
14 suggestive of only one meaning” — and had no reasonable meaning other than to encourage
15 actions to defeat him in the upcoming election.²⁷ Similarly, in MUR 5831, the Commission
16 concluded that, in context, the ad attacking Bob Casey’s qualifications and stating “Can we really
17 risk Bob Casey learning on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b),
18 because the electoral portions were “unmistakable, unambiguous and suggestive of only one

²⁵ Express Advocacy E&J, 60 Fed. Reg. at 35,295 (emphasis added).

²⁶ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

²⁷ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

1 meaning” — to vote against Bob Casey.²⁸ The Commission concluded that outside the context of
2 the upcoming election, these advertisements were virtually meaningless.²⁹

3 The available information indicates that the mailer contained express advocacy under
4 11 C.F.R. § 100.22(b) because it comments on Schmidt’s character, qualifications or
5 accomplishments and, when read in context, has no other reasonable meaning than to encourage
6 actions to defeat Schmidt. The mailer clearly identifies a federal candidate by using a photo image
7 of Schmidt, states that he is “RUNNING FOR CONGRESS,” and shows a billboard image
8 reading “Jesse Schmidt US Representative.” Further, the phrase “SHOULDN’T CHARACTER
9 AND HONESTY MATTER?” when preceded by the statements “bad business deals,” “problem
10 personal finances,” and “conflicts with law enforcement & courts,” is similar in nature to “JOHN
11 KERRY CANNOT BE TRUSTED” and “unfit for command,” phrases the Commission found to
12 have no other reasonable meaning other than to encourage Kerry’s defeat. Additionally,
13 Commission regulations specify that the “proximity to the election” is a permissible external event
14 to consider when determining whether a communication has a reasonable, non-electoral
15 meaning.³⁰ Here, the mailer was sent on November 2, 2018, four days before the November 6
16 primary election.³¹

²⁸ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

²⁹ *Id.*

³⁰ 11 C.F.R. § 100.22(b); *FEC v. Furgatch*, 807 F.2d 857, 865 (9th Cir. 1987) (“Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.”).

³¹ *See* Compl. at 1.

1 The statements in the mailer, along with its timing,³² have an unmistakable, unambiguous
2 meaning: vote against Jesse Schmidt in the upcoming election. Because the Schmidt mailer
3 advocates the defeat of a federal candidate, it constitutes express advocacy, and should have
4 contained a disclaimer. Accordingly, we recommend that the Commission find reason to believe
5 Jefferson United, Inc. violated 52 U.S.C. § 30120(a).

6 **B. Reporting**

7 Jefferson is registered in Louisiana as a state political action committee and as a non-profit
8 corporation; however, there is insufficient information in the record to determine whether
9 Jefferson is a federal political committee. Political committees, whether authorized by any
10 candidate or not, must disclose disbursements as part of their regular reporting to the
11 Commission.³³ Political committees that make independent expenditures, whether authorized by
12 any candidate or not, must also disclose these expenditures to the Commission as part of their
13 regular reporting.³⁴ Any person other than a political committee that makes expenditures that
14 expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an
15 independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³⁵
16 Additionally, political committees and other persons that make independent expenditures

³² 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); *Furgatch*, 807 F.2d at 865.

³³ 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.

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

³⁵ 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).

1 aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of an
2 election, must report the expenditures by filing a 24-hour notice.³⁶

3 The available information suggests that expenditures for the mailer likely exceeded \$250.
4 Therefore, they should have been disclosed to the Commission, either as an independent
5 expenditure or as a communication made by a political committee. Accordingly, we recommend
6 that the Commission find reason to believe that Jefferson United, Inc. violated 52 U.S.C.
7 § 30104(b) or (c) by failing to report expenditures made in connection with the mailer. Also,
8 because the Schmidt mailer appears to have been distributed on November 2, 2018,³⁷ four days
9 before the November 6, 2018, primary election, and it appears to have cost over \$1,000, a 24-hour
10 notice may also have been required.³⁸ Accordingly, we recommend that the Commission find
11 reason to believe that Jefferson United, Inc. violated 52 U.S.C. § 30104(g).

12 **IV. PROPOSED INVESTIGATION**

13 During an investigation, we intend to identify the individuals associated with Jefferson
14 United, Inc., the party that appears to be responsible for the mailer, determine the number and cost
15 of the mailers, the exact dates when they were disseminated, and whether Jefferson sponsored
16 additional communications in the 2018 election cycle.³⁹ Although we intend to conduct the

³⁶ 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).

³⁷ See Compl. at 1.

³⁸ While the scope of the mailing is uncertain, there were 121,211 qualified voters in Louisiana's Jefferson Parish in the November 6, 2018, election. See "Voter Stats" at <https://voterportal.sos.la.gov/Graphical>. The mailer is marked USPS Marketing Mail as a non-automation basic 5-digit mailing, which costs a minimum of \$0.234/piece. Therefore, if Jefferson sent the mailer to each qualified voter in the parish, the postage alone would have likely cost approximately \$28,363. See USPS Business Price Calculator, available at <https://dbcals.usps.com/CalculatorSetPage.aspx>.

³⁹ If the investigation produces information indicating that Jefferson United, Inc. is a political committee, we will make the appropriate recommendations at that time.

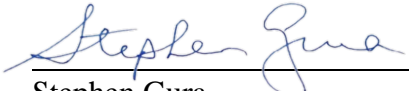
1 investigation through informal means, we recommend the Commission authorize compulsory
2 process if informal means fail.


3 **V. RECOMMENDATIONS**

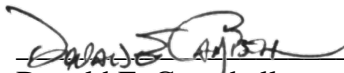
- 4 1. Find reason to believe that Jefferson United, Inc. violated 52 U.S.C. § 30120(a).
- 5
- 6 2. Find reason to believe that Jefferson United, Inc. violated 52 U.S.C. § 30104(b) or (c),
- 7 and (g).
- 8
- 9 3. Authorize the use of compulsory process, as necessary.
- 10
- 11 4. Approve the attached Factual and Legal Analysis.
- 12
- 13 5. Approve the appropriate letters.
- 14

Lisa J. Stevenson
Acting General Counsel

15
16
17
18
19 10.31.19
20 Date


Stephen Gura
Deputy Associate General Counsel


Jeff S. Jordan
Assistant General Counsel


Donald E. Campbell
Attorney

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33 Attachment
34 Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENTS: Jefferson United, Inc.

MUR: 7543

4
 5 **I. INTRODUCTION**

6 The Complaint alleges that Jefferson United, Inc. (“Jefferson”) produced and distributed
 7 a mailer without a disclaimer advocating the defeat of Jesse Schmidt, a candidate in the 2018
 8 Primary Election for the Second Congressional District in Louisiana, in violation of 52 U.S.C.
 9 § 30120(a)(3).¹ According to the Complaint, the mailer was delivered to prospective voters
 10 starting November 2, 2018.² The mailer did not include a disclaimer, but did contain a return
 11 address of “Jefferson United,” in Harvey, Louisiana.³ Jefferson did not submit a response. The
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 16 that should have contained proper disclaimers and been reported to the Commission. Therefore,
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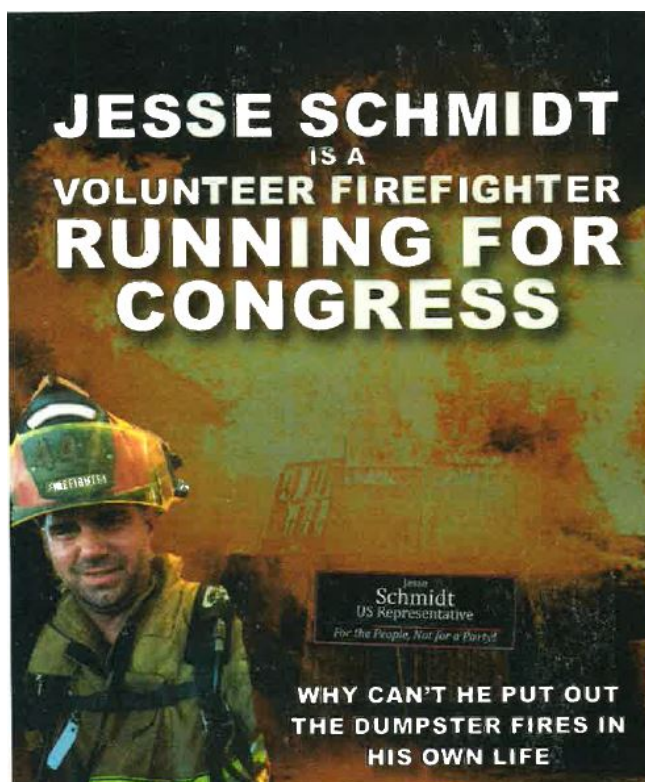
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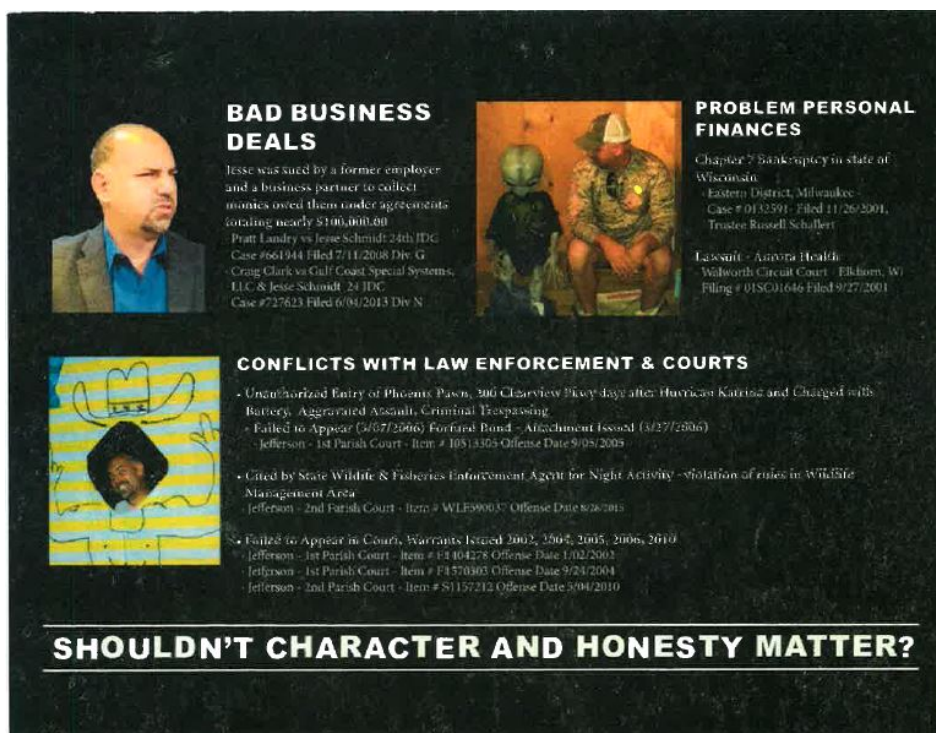
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¹² *Id.* at 1-2. *See also* 11 C.F.R. § 110.11(b), (c)(1)-(2).

¹³ 52 U.S.C. § 30120(a).

¹⁴ 52 U.S.C. § 30120(a)(1).

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

1 or defeat of a clearly identified candidate include a disclaimer.¹⁶ “Public communications”
2 include “mass mailings,” which are mailings of more than 500 pieces of mail of an identical or
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6 committee that paid for, and where required, that authorized the communication.”¹⁸ If a
7 communication is not authorized by a candidate’s authorized committee, it must clearly state the
8 name and permanent address, telephone number or website address of the person who paid for
9 the communication and state that the communication is not authorized by any candidate or
10 candidate’s committee.¹⁹

11 The available information indicates that the Schmidt mailer constitutes a public
12 communication. It appears professionally produced, included a USPS permit imprint, and likely
13 consisted of more than 500 pieces.²⁰ The mailer, however, does not include any disclaimers.²¹

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

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

¹⁸ 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).

¹⁹ *Id.* § 110.11(b)(3).

²⁰ The Complaint does not specify the number of mailings, however, the voter turnout for the November 6, 2018, election in Louisiana’s Second Congressional District was 248,172. *See* “Voter Stats” at <https://voterportal.sos.la.gov/Graphical>.

²¹ Compl. at 1-2.

1 **The Schmidt Mailer Needed a Disclaimer because it Contained Express Advocacy**

2 Commission regulations provide that a communication expressly advocates the election
3 or defeat of a clearly identified candidate²² when it uses certain phrases or uses campaign
4 slogans or individual words, “which in context can have no other reasonable meaning than to
5 urge the election or defeat of one or more clearly identified candidate(s).”²³ Commission
6 regulations also state, a communication constitutes express advocacy if “[w]hen taken as a whole
7 and with limited reference to external events, such as the proximity to the election, [the
8 communication] could only be interpreted by a reasonable person as containing advocacy of the
9 election or defeat of one or more clearly identified candidate(s) because — (1) [t]he electoral
10 portion of the communication is unmistakable, unambiguous, and suggestive of only one
11 meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect
12 or defeat one or more clearly identified candidate(s) or encourages some other kind of action.”²⁴

13 Here, the mailer clearly identifies Schmidt, a federal candidate. However, the mailer
14 does not use the certain phrases, campaign slogans, or individual words that have been
15 interpreted to constitute express advocacy under 11 C.F.R. § 100.22(a). Therefore, the mailer
16 constitutes express advocacy only if the electoral portions are “unmistakable, unambiguous, and

²² The term “clearly identified” means “the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or the ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R. § 100.17.

²³ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “vote for the President,” “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).

²⁴ 11 C.F.R. § 100.22(b).

1 suggestive of only one meaning,” and if the messages could only be interpreted by a reasonable
2 mind as encouraging the defeat of Schmidt under 11 C.F.R. § 100.22(b).

3 In its explanation and justification for section 100.22(b), the Commission stated,
4 “communications discussing or commenting on a candidate’s *character, qualifications* or
5 *accomplishments* are considered express advocacy under new section 100.22(b) if, in context,
6 they can have no other reasonable meaning than to encourage actions to elect or defeat the
7 candidate in question.”²⁵ In MUR 5024R, the Commission concluded that, in context, the
8 brochures constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral
9 portions of the brochure, including the phrase “Tell Tom Kean Jr....New Jersey Needs New
10 Jersey Leaders,” were “unmistakable, unambiguous and suggestive of only one meaning” — to
11 vote against Tom Kean.²⁶ In MURs 5511/5525, the Commission concluded that attacks on John
12 Kerry’s character, fitness for public office, and capacity to lead, including phrases such as
13 “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command” were “unmistakable,
14 unambiguous and suggestive of only one meaning” — and had no reasonable meaning other than
15 to encourage actions to defeat him in the upcoming election.²⁷ Similarly, in MUR 5831, the
16 Commission concluded that, in context, the ad attacking Bob Casey’s qualifications and stating
17 “Can we really risk Bob Casey learning on the job?” constituted express advocacy under 11
18 C.F.R. § 100.22(b), because the electoral portions were “unmistakable, unambiguous and
19 suggestive of only one meaning” — to vote against Bob Casey.²⁸ The Commission concluded

²⁵ Express Advocacy E&J, 60 Fed. Reg. at 35,295 (emphasis added).

²⁶ MUR 5024R (Council for Responsible Government) Factual and Legal Analysis at 14-15.

²⁷ MUR 5511/5525 (Swift Boat Veterans) Conciliation Agreement at IV.25-28.

²⁸ MUR 5831 (Softer Voices) Factual and Legal Analysis at 6-8.

1 that outside the context of the upcoming election, these advertisements were virtually
2 meaningless.²⁹

3 The available information indicates that the mailer contained express advocacy under
4 11 C.F.R. § 100.22(b) because it comments on Schmidt’s character, qualifications or
5 accomplishments and, when read in context, has no other reasonable meaning than to encourage
6 actions to defeat Schmidt. The mailer clearly identifies a federal candidate by using a photo
7 image of Schmidt, states that he is “RUNNING FOR CONGRESS,” and shows a billboard
8 image reading “Jesse Schmidt US Representative.” Further, the phrase “SHOULDN’T
9 CHARACTER AND HONESTY MATTER?” when preceded by the statements “bad business
10 deals,” “problem personal finances,” and “conflicts with law enforcement & courts,” is similar in
11 nature to “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command,” phrases the
12 Commission found to have no other reasonable meaning other than to encourage Kerry’s defeat.
13 Additionally, Commission regulations specify that the “proximity to the election” is a
14 permissible external event to consider when determining whether a communication has a
15 reasonable, non-electoral meaning.³⁰ Here, the mailer was sent on November 2, 2018, four days
16 before the November 6 primary election.³¹

17 The statements in the mailer, along with its timing,³² have an unmistakable, unambiguous
18 meaning: vote against Jesse Schmidt in the upcoming election. Because the Schmidt mailer

²⁹ *Id.*

³⁰ 11 C.F.R. § 100.22(b); *FEC v. Furgatch*, 807 F.2d 857, 865 (9th Cir. 1987) (“Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.”).

³¹ *See* Compl. at 1.

³² 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); *Furgatch*, 807 F.2d at 865.

1 advocates the defeat of a federal candidate, it constitutes express advocacy, and should have
2 contained a disclaimer. Accordingly, the Commission finds reason to believe that Jefferson
3 United, Inc. violated 52 U.S.C. § 30120(a).

4 **B. Reporting**

5 Jefferson is registered in Louisiana as a state political action committee and as a non-
6 profit corporation; however, there is insufficient information in the record to determine whether
7 Jefferson is a federal political committee. Political committees, whether authorized by any
8 candidate or not, must disclose disbursements as part of their regular reporting to the
9 Commission.³³ Political committees that make independent expenditures, whether authorized by
10 any candidate or not, must also disclose these expenditures to the Commission as part of their
11 regular reporting.³⁴ Any person other than a political committee that makes expenditures that
12 expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an
13 independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³⁵
14 Additionally, political committees and other persons that make independent expenditures
15 aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of
16 an election, must report the expenditures by filing a 24-hour notice.³⁶

³³ 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.

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

³⁵ 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).

³⁶ 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).

1 The available information suggests that expenditures for the mailer likely exceeded \$250.
2 Therefore, they should have been disclosed to the Commission, either as an independent
3 expenditure or as a communication made by a political committee. Accordingly, the Commission
4 finds reason to believe that Jefferson United, Inc. violated 52 U.S.C. § 30104(b) or (c) by failing
5 to report expenditures made in connection with the mailer. Also, because the Schmidt mailer
6 appears to have been distributed on November 2, 2018,³⁷ four days before the November 6, 2018,
7 primary election, and it appears to have cost over \$1,000, a 24-hour notice may also have been
8 required.³⁸ Accordingly, the Commission finds reason to believe that Jefferson United, Inc.
9 violated 52 U.S.C. § 30104(g).

³⁷ See Compl. at 1.

³⁸ While the scope of the mailing is uncertain, there were 121,211 qualified voters in Louisiana's Jefferson Parish in the November 6, 2018, election. See "Voter Stats" at <https://voterportal.sos.la.gov/Graphical>. The mailer is marked USPS Marketing Mail as a non-automation basic 5-digit mailing, which costs a minimum of \$0.234/piece. Therefore, if Jefferson sent the mailer to each qualified voter in the parish, the postage alone would have likely cost approximately \$28,363. See USPS Business Price Calculator, available at <https://dbcalc.usps.com/CalculatorSetPage.aspx>.