

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL’S REPORT**

3 **MUR: 7557**

4 DATE COMPLAINT FILED: December 12, 2018

5 DATE OF NOTIFICATION: December 14, 2018

6 DATE RESPONSE RECEIVED: January 31, 2019

7 DATE ACTIVATED: September 24, 2019

8 EARLIEST SOL: November 6, 2023

9 LATEST SOL: November 6, 2023

10 ELECTION CYCLE: 2018

11 **COMPLAINANT:**

Susan N. Willoughby

12 **RESPONDENTS:**

13 Center for Voter Information
14 Kopser for Congress and Steven M. Carroll,
15 in his official capacity as treasurer

16 **RELEVANT STATUTES
AND REGULATIONS:**

17 52 U.S.C. § 30101

18 52 U.S.C. § 30116

19 52 U.S.C. § 30118

20 11 C.F.R. § 100.22

21 11 C.F.R. § 109.21

22 11 C.F.R. § 114.4

23 **INTERNAL REPORTS CHECKED:**

24 Disclosure Reports

25 **FEDERAL AGENCIES CHECKED:**

26 None

27 **I. INTRODUCTION**

28 The Complaint in this matter alleges that the Center for Voter Information (“CVI”), an
29 incorporated 501(c)(4) organization, violated the Federal Election Campaign Act of 1971, as
30 amended (the “Act”), by making prohibited contributions to a federal candidate when it sent
31 mailers to the general public endorsing Joseph Kopser’s congressional candidacy in advance of
32 the November 6, 2018 general election.¹ Kopser’s authorized campaign committee, Kopser for
33 Congress and Steven M. Carroll in his official capacity as treasurer (the “Committee”), denies

¹ Compl. at 1 (Dec. 12, 2018).

1 the allegations and asserts that the mailer is not an endorsement and that it did not have any
2 contact with CVI regarding the mailer. CVI denies the allegations and asserts that the mailer
3 was a non-partisan voter information guide and not an endorsement of any candidate.

4 Because the available information is insufficient to support the allegations that
5 Respondents violated the Act, we recommend the Commission dismiss the allegations that
6 Center for Voter Information violated 52 U.S.C. § 30118 by making a prohibited contribution.
7 We further recommend the Commission dismiss the allegations that Kopser for Congress and
8 Steven M. Carroll in his official capacity as treasurer, violated 52 U.S.C. § 30118(f) by accepting
9 a prohibited contribution.

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. Facts**

12
13 Joseph Kopser was a Democratic candidate for the 21st Congressional District in the
14 Texas 2018 general election and Chip Roy was his Republican opponent.² Center for Voter
15 Information is a nonprofit social welfare organization established under section 501(c)(4) of the
16 Internal Revenue Code.³ CVI describes itself as an organization “that works to provide even-
17 handed and unbiased information about candidates and their positions on issues.”⁴ CVI
18 acknowledges running a mailing program that includes sending out voter registration forms and
19 reportedly sent out mailers similar to the Kopser/Roy mailer in multiple states and districts
20 across the country in connection with the 2018 election.⁵

² Compl. at 1.

³ CVI Resp. at 1 (Jan. 3, 2019).

⁴ Center for Voter Information, <https://www.centerforvoterinformation.org> (last visited Jan. 21, 2020).

⁵ See CVI Resp. at 1.

In advance of the November 6, 2018 general election, the Complainant received a mailer from CVI, which read:

Dear [Voter]: The Center for Voter Information works to provide information about candidates to voters like you across the country. This year we asked voters in your congressional district what they would like to know about candidates for Congress in the general election being held on November 6th.⁶

The one-page mailer then sets forth three questions it claims voters are interested in knowing the candidates' views about, lists positions reportedly taken by Kopser and Roy on those issues, and provides links to the Kopser and Roy campaign committee websites as well as a March 10, 2017 National Review article as sources for this information:⁷

Coverage for Pre-existing Conditions: Do the candidates support requiring health insurance companies to cover individuals with pre-existing conditions?

Democrat Joseph Kopser: Yes	Republican Chip Roy: No
Source: kopserforcongress.com/my-values/health-care-for-all/	Source: National Review 3/10/2017

Medicaid Cuts: Do the candidates support cutting funding to Medicaid (the health insurance program for low-income Americans) for 14 million Americans?

Democrat Joseph Kopser: No	Republican Chip Roy: Yes
Source: kopserforcongress.com/my-values/health-care-for-all/	Source: National Review 3/10/2017

Millionaire Tax Cuts: Do the candidates support legislation recently passed by Congress that reduces taxes paid by millionaires and corporations?

Democrat Joseph Kopser: No	Republican Chip Roy: Yes
Source: kopserforcongress.com/my-values/tax-reform/	Source: chiproy.com/issues/

The closing paragraph of the mailer states,

A candidate's position is sometimes more complicated than a simple "yes" or "no." We have done our best to represent each candidate in a fair and reasonable way. But if you want more detailed information you can visit the candidates' websites at kopserforcongress.com or roychip.com where additional

⁶ Compl. at Attach. 1.

⁷ *Id.*

1 information on these issues is available. We hope this information
2 is useful.⁸

3 The mailer is signed, “Sincerely, Lionel Dripps Center for Voter Information” and includes a
4 post-script that reads, “The Center for Voter Information is a nonprofit organization that is not
5 endorsing any candidate in this race.”⁹ If you have comments about our information, suggestions
6 or additional questions you would like answered, you can contact us at
7 centerforvoterinformation.org.”¹⁰

8 In its response to the Complaint, the Committee asserts that CVI sent out its mailers
9 without the knowledge or permission of the Committee, that CVI did not inform or contact the
10 Committee about the mailer, and that neither Kopser nor any member of the Committee’s staff
11 had any contact or engagement with CVI.¹¹ The Committee points out that the mailer does not
12 claim to endorse Kopser, and the statements of Kopser’s views on the issues discussed in the
13 mailer are publicly available.¹² The Committee further states that it is not associated with CVI in
14 any way and does not endorse or approve the mailers that CVI sent out during the election
15 cycle.¹³ Finally, the Committee states that it is in the process of shutting down and has little cash
16 on hand.¹⁴

⁸ *Id.*

⁹ Lionel Dripps is Managing Director for Program and Digital at the Voter Participation Center, a 501(c)(3) organization associated with the Center for Voter Information. See <https://www.voterparticipation.org/our-team/>; see also <https://www.zoominfo.com/p/Lionel-Dripps/1791269275>.

¹⁰ *Id.*

¹¹ Committee Resp. at 1 (Jan. 3, 2019).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

1 The CVI Response states that the mailer was a nonpartisan voter guide and not an
2 endorsement of any candidate.¹⁵ CVI contends, however, even if the mailer were interpreted as
3 an endorsement of a candidate, the mailer would still be an allowable activity under the Act, and
4 the Complaint's assumption that CVI could not make an endorsement because it is a 501(c)(4)
5 organization is erroneous.¹⁶

6 **B. Analysis**

7 Under the Act, a contribution is defined as "any gift, subscription, loan, advance, or
8 deposit of money or anything of value made by any person for the purpose of influencing any
9 election for Federal office."¹⁷ An expenditure made by any person "in cooperation, consultation,
10 or concert with, or at the request or suggestion of, a candidate, his authorized political
11 committees, or their agents" constitutes a contribution to the candidate."¹⁸ However, the term
12 "expenditure" does not include "nonpartisan activity designed to encourage individuals to vote or
13 to register to vote."¹⁹

14 The Act prohibits a corporation from making contributions to federal candidates and their
15 authorized committees.²⁰ Officers and directors of corporations may not consent to any
16 contribution prohibited by section 30118(a).²¹ Correspondingly, federal candidates and their

¹⁵ CVI Resp.at 1.

¹⁶ *Id.*

¹⁷ 52 U.S.C. § 30101(8)(A)(i).

¹⁸ 52 U.S.C. § 30116(a)(7)(B)(i); *see also* Explanation and Justification for Regulations on Coordinated and Independent Expenditures ("Coordination E&J"), 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

¹⁹ 52 U.S.C. § 30101(9)(B)(ii).

²⁰ 52 U.S.C. § 30118(a).

²¹ *Id.*

1 authorized committees may not knowingly accept a corporate contribution.²² The Commission's
2 regulations allow a corporation to "prepare and distribute to the general public voter guides
3 consisting of two or more candidates' positions on campaign issues" provided that the guide
4 complies with certain restrictions set forth in the Commission's regulations.²³ Disbursements for
5 such activities are not contributions or expenditures, provided the corporation does not act in
6 cooperation, consultation, or concert with or at the request or suggestion of the candidates, the
7 candidates' committees or agents regarding the preparation, contents and distribution of the voter
8 guide, and no portion of the voter guide expressly advocates the election or defeat of one or more
9 clearly identified candidate or candidates of any clearly identified political party.²⁴

²² *Id.*

²³ 11 C.F.R. § 114.4(c)(5)(i).

²⁴ 11 C.F.R. § 114.4(c)(5)(ii)(A). A communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman, or "Smith for Congress," or uses campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)...." See 11 C.F.R. §100.22(a); *Buckley v. Valeo*, 424 U.S. 144 n.52 (1976); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). A communication may also contain express advocacy "when taken as a whole and with limited reference to external events" it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. §100.22(b); see also Factual & Legal Analysis at 12-13, 14-15 MUR 5024R (Council for Responsible Government/Kean) (analyzing brochures under 11 C.F.R. § 100.22(b)), General Counsel's Report # 3 at 1, MURs 5511/5525 (Swift Boat Veterans) (requesting that the Commission enter into a Conciliation Agreement for violations of section 100.22(b)); Conciliation Agreement at ¶¶ 5, 25-28, MURs 5511/5525 (Swift Boat Veterans); Certification, MURs 5511/5525 (Swift Boat Veterans) (approving the recommendations in General Counsel's Report #3 and authorizing the Conciliation Agreement); Factual and Legal Analysis at 7-8, MUR 5831 (Softer Voices) (Mar. 26, 2009).

1 The Commission has in the past considered whether an organization's voter guide is
2 exempt from regulation under 11 C.F.R. § 114.4(c)(5) or contained express advocacy and should
3 be considered a contribution or expenditure. In MUR 5874 (Gun Owners of America), the
4 Commission found no reason to believe a voter guide that rated every candidate in all 50 states
5 based on their positions on gun issues expressly advocated the election or defeat of federal
6 candidates. In that matter: 1) each candidate was given equal space in the voter guide; 2) there
7 were no marks of any kind indicating a preference for any one candidate over another; 3) each
8 candidate was rated on a scale from "A+" to "F" with an additional rating of "NR" for candidates
9 who refused to answer the questionnaire seeking information for the ratings, or had no record on
10 gun issues; 4) no other information about the candidates or comment on their fitness for office
11 was included in the voter guide; and 5) while candidates were rated in the guide based on their
12 position on gun issues, they were not rated in such a way as to advocate the election of a specific
13 candidate.²⁵ More recently, in MUR 7416 (Unknown Respondents), the Commission split on the
14 question of whether a voter guide had an "unambiguous, unmistakable meaning" when it
15 described one candidate as being a "[s]trong supporter of President Trump" and claimed he
16 would "fight for additional tax cuts in Congress" and a second candidate as having "[c]riticized

²⁵ Factual & Legal Analysis at 4-6, MUR 5874 (Gun Owners of America, Inc.); *see also* Factual & Legal Analysis at 8-10, MUR 6683 (Fort Bend County Democratic Party) (allocating costs of voter guide that expressly advocated the election of a federal candidate); Factual & Legal Analysis at 4, MUR 5820 (ACORN) (materials used for voter registration and GOTV efforts that did not include express advocacy and were not partisan did not trigger political committee status).

1 Trump during the 2016 campaign” and as someone who “[b]roke his promise to never raise out
2 taxes.”²⁶

3 The CVI mailer appears to be a voter guide that does not include express advocacy, for
4 the same reasons articulated in MUR 5874. Here, each candidate is given equal space without
5 markings indicating a preference for either candidate. The information about the candidates’
6 positions are stated only as “yes” or “no,” unlike in MUR 7416, and are based on information
7 contained on the candidates’ website or the public record. Additionally, there is also no
8 comment on either candidate’s fitness for office and no portion of the mailer expressly advocates
9 the election or defeat of Kopser or Roy, or any other clearly identified candidate or political
10 party. Further, the mailer does not contain words or “in effect” explicit directives that urge the
11 election or defeat of Kopser or Roy.²⁷ In fact, there is no language to encourage voting at all.²⁸

12 Although not specifically alleged in the Complaint, the Respondents could have violated
13 the act if the mailer were a coordinated communication that resulted in a prohibited in-kind
14 contribution from CVI to the Committee. In order for a communication to be coordinated with a
15 candidate, an authorized committee, or agent thereof, it must satisfy a three-pronged test:

²⁶ Certification, MUR 7416 (Unknown Respondent) (June 5, 2019).

²⁷ See 11 C.F.R. § 100.22(a).

²⁸ Because of the phrasing of the issue questions, reasonable minds could differ as to whether the voter guide expressly advocates for any specific candidate under 11 C.F.R. § 100.22(b).

(1) payment for the communication by a third party; (2) satisfaction of one of the “content” standards;²⁹ and (3) satisfaction of one of the “conduct” standards.³⁰

CVI admits to paying for the communication, satisfying the payment prong. Though the mailer may meet the content prong because it refers to two federal candidates, Kopser and Roy, and was likely distributed within 90 days of the general election to voters in the jurisdiction, it does not meet the conduct prong and therefore cannot satisfy all three requirements for coordination. The mailer fails to meet the conduct test because there is no information that the Committee was materially involved in any decisions regarding the contents of the CVI mailer, its audience, means or mode of communication, timing or frequency distribution, or size or prominence. In fact, the Committee expressly denies having any knowledge of the mailer, its contents or distribution, and claims to have had no contact or affiliation with CVI or its agents.³¹

²⁹ The content standards are: (1) an electioneering communication; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, a candidate's campaign materials; (3) a public communication containing express advocacy; (4) a public communication that refers to a clearly identified Federal candidate that is publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate; and (5) a public communication containing the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

³⁰ A public communication satisfies the conduct prong if, *inter alia*, “[a] candidate, authorized committee, or political party committee is materially involved in decisions regarding: (i) [t]he content of the communication; (ii) [the] intended audience of the communication; (iii) [the] means and mode of the communication; (iv) [t]he specific media outlet used for the communication; (v) [t]he timing or frequency of the communication; or (vi) [t]he size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.” 11 C.F.R. § 109.21(c)(5)(d)(2).

³¹ Because it contains no express advocacy, the mailer also does not qualify as an endorsement for similar reasons. The mailer explicitly states that it does not endorse or advocate the election or defeat of either candidate. The mailer does not republish campaign materials of either candidate, nor did it use language to indicate that either candidate took a position that was “right” or “wrong.” It states public positions the candidates have taken on the issues and provides those candidate's websites as sources for its information. It also encourages recipients to visit those websites to get more detailed information on each candidate's views. 11 C.F.R. § 114.4(c)(6). While it is worth noting that the issues are presented in a way that might make one candidate's views appear to be more appealing, depending on the reader's perspective, the mailer stops short of the expression of support for a particular candidate or his views that would qualify as an endorsement.

1 Accordingly, the available information does not indicate that CVI acted “in cooperation,
2 consultation, or concert with or at the request or suggestion of” a candidate, candidate’s
3 committee, or agents regarding the preparation, contents and distribution of the mailer.³²

4 Because the record is insufficient to support the allegations that Respondents violated the
5 Act in connection with the mailer, we recommend the Commission dismiss allegations that
6 Center for Voter Information violated 52 U.S.C. § 30118. Additionally, we recommend that the
7 Commission dismiss allegations that Kopser for Congress and Steven M. Carroll in his official
8 capacity as treasurer, violated 52 U.S.C. § 30118.

9 **III. RECOMMENDATIONS**

- 10 1. Dismiss the allegations that Center for Voter Information violated 52 U.S.C. § 30118
11 by making a prohibited contribution in connection with the mailer;
- 12 2. Dismiss the allegations that Kopser for Congress and Steven M. Carroll in his official
13 capacity as treasurer violated 52 U.S.C. § 30118 by accepting a prohibited
14 contribution in connection with the mailer;
- 15 3. Approve the attached Factual and Legal Analysis;
- 16 4. Approve the appropriate letters; and

³² 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. 114.4(c)(5)(ii)(A). *See* Explanation and Justification for Regulations on Coordinated and Independent Expenditures (“Coordination E&J”), 68 Fed. Reg. 421, 426 (Jan. 3, 2003).