

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT****MUR 7643**

DATE COMPLAINT FILED: September 12, 2019

DATE OF LAST RESPONSE: April 15, 2020

DATE ACTIVATED: January 28, 2020

EXPIRATION OF SOL: October 15, 2023

ELECTION CYCLE: 2018

COMPLAINANT: Campaign Legal Center**RESPONDENTS:** America Progress Now
Evan Muhlstein**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(17), (22)

52 U.S.C. § 30104(b), (c), (g)

52 U.S.C. § 30120(a)

11 C.F.R. § 100.17

11 C.F.R. § 100.22

11 C.F.R. § 100.26

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 unknown persons operating a Facebook page called America Progress Now (“APN”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to disclose independent expenditures and failing to include required disclaimers

1 on Facebook ads.¹ The Complaint alleges that APN has not reported any independent
2 expenditures, and questions whether an organization by that name exists.²

3 Evan Muhlstein responded on behalf of APN, and acknowledged that he set up the APN
4 Facebook page and placed the ads to advocate for candidates he supported.³ Muhlstein states that
5 any errors were due to his inexperience, the amounts spent were small, and he intends to take
6 remedial action.⁴

7 The APN Facebook ads are public communications containing express advocacy that
8 should have contained proper disclaimers, and should have been reported to the Commission as
9 independent expenditures. However, the amount spent appears to have been between \$2,400 and
10 \$8,000, the Respondents have indicated that they are unlikely to participate in election activity
11 again, and they will take any necessary remedial action. Therefore, we recommend that the
12 Commission exercise its prosecutorial discretion, dismiss the allegations that America Progress
13 Now and Evan Muhlstein violated 52 U.S.C. §§ 30120(a); 30104(c), and (g), and send
14 Respondents a cautionary letter directing them to work with the Commission's Reports Analysis
15 Division ("RAD") to file the appropriate reports.

16 **II. FACTUAL BACKGROUND**

17 The Complaint states that on October 15, 2018, approximately three weeks before the 2018

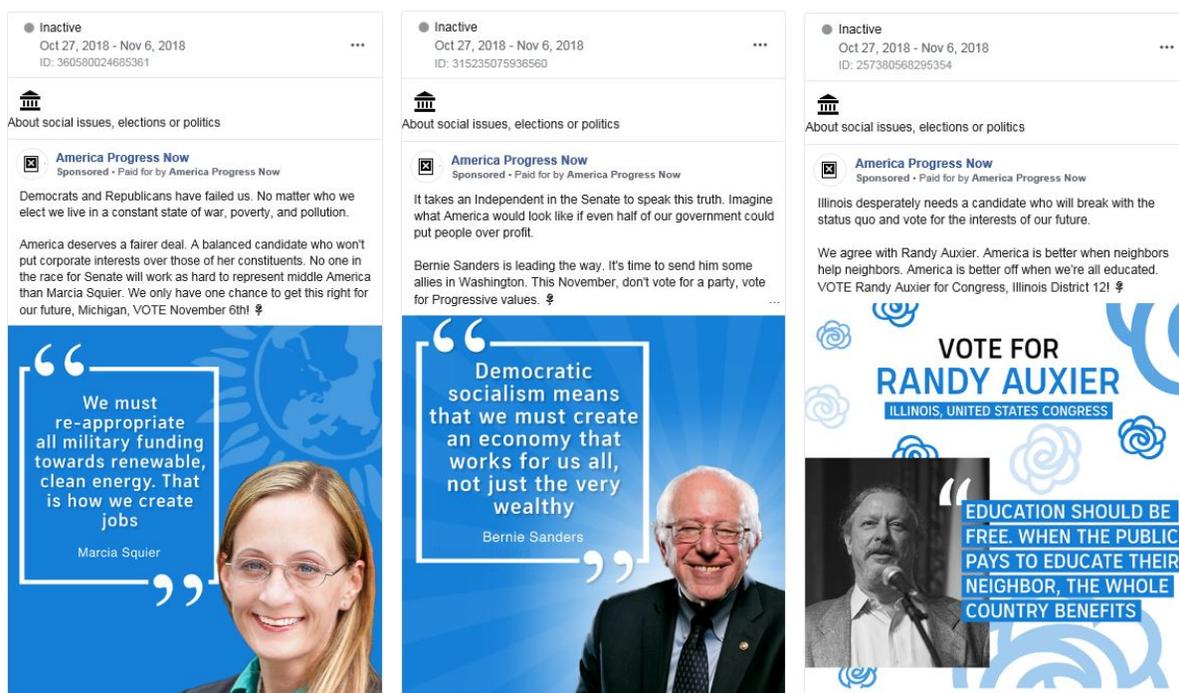
¹ Compl. at 1-4 (September 12, 2019); *see also* America Progress Now, FACEBOOK, <https://www.facebook.com/AmericaProgressNow/>, and America Progress Now, Facebook Ad Library, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&impression_search_field=has_impressions_lifetime&view_all_page_id=751228941880577 ("America Progress Now, Facebook Ad Library").

² Compl. at 1-2, 5, 7, 9-10.

³ Resp. at 1 (April 15, 2020). Although the Complaint was filed against unknown persons, we located an entity in Arizona named America Progress Now and notified it of the Complaint. Muhlstein filed a response on behalf of APN. *Id.*

⁴ *Id.*

1 midterm elections, a Facebook page labeled America Progress Now was created.⁵ According to
 2 the Complaint, that page ran ads expressly advocating for federal candidates in five U.S. Senate or
 3 House races in Michigan, Missouri, Illinois, Iowa, and Ohio; the ads reached hundreds of
 4 thousands of Facebook users; and the ads stopped running a week after Election Day.⁶ A selection
 5 of the ads is shown below:⁷



⁵ Compl. at 1, 3.

⁶ *Id.* at 1-4. Detailed Facebook ad data show that the number of times the ads at issue were seen fell in a range between 81,000 and 377,000. *See* America Progress Now, Facebook Ad Library. The following federal Green Party candidates were named and depicted in the APN ads: Marcia Squier (2018 Michigan Senate candidate), Jo Crain (2018 Missouri Senate candidate), Joe Manchik (2018 candidate for Ohio's 12th Congressional District), Randy Auxier (2018 candidate for Illinois's 12th Congressional District), and Paul Knupp (2018 candidate for Iowa's 3rd Congressional District). Compl. at 3-6. Some APN ads also named and depicted Senator Bernie Sanders, who was running for re-election to the Senate in the 2018 election as an Independent. *Id.* at 5-6. All candidates except Sanders were Green Party candidates, and all except Sanders lost in their respective general elections.

⁷ Facebook promotes Location Targeting for ads placed on Facebook, encouraging advertisers to "[r]each people based on locations such as country, region or city." *See* <https://www.facebook.com/business/help/202297959811696?id=176276233019487>. The ads for Squier, Crain, Manchik, Auxier, and Knupp targeted either primarily or only the candidates' respective states, however the ads for Sanders targeted multiple states. Compl. at 5-6. *See also* America Progress Now, Facebook Ad Library.

1 The Complaint states that each ad included the disclaimer “Paid for by America Progress
2 Now,” but alleges that no entity named America Progress Now exists in any form other than the
3 Facebook page.⁸ None of APN’s Facebook ads referenced in the Complaint or included in the
4 Facebook Ad Library contain compliant disclaimers within the ads’ text fields or images, although
5 it appears that all of these Facebook ads were accompanied by Facebook-generated labels
6 indicating that the ads were “Sponsored” and “Paid for by America Progress Now.”⁹ None of the
7 Facebook-generated labels disclose the payor’s permanent street address, telephone number, or
8 website address, or state whether the communication is authorized by any candidate or candidate’s
9 committee.¹⁰

10 The Complaint also cites a news report that the APN ads had falsely attributed quotes to
11 the federal candidates they were supporting.¹¹ According to this article, candidate Auxier stated “I
12 did not say or write the text that is with my picture, although I do agree with the content, for the

⁸ Compl. at 1-2, 7. The Complaint cites a news report that there was no record of APN at the address in the Bronx, NY, that was previously listed on APN’s Facebook page, and that after reporters spoke to the landlord of the listed Bronx address and reached out to APN, the Bronx address was removed from the Facebook page. Compl. at 7. Our review of a corporate registrations database identified a nonprofit organization in Arizona called America Progress Now, and we notified it of the Complaint. See Arizona Corporation Commission Entity Information, available at <https://ecorp.azcc.gov/BusinessSearch/BusinessInfo?entityNumber=1873283>; see also APN, Articles of Incorporation, available at <https://ecorp.azcc.gov/CommonHelper/GetFilingDocuments?barcode=18070120287129>. APN filed a response admitting that it was responsible for the Facebook page and ads at issue. Resp. at 1.

⁹ Compl. at 3-6. See also America Progress Now, Facebook Ad Library; *Improving Enforcement and Transparency of Ads on Facebook*, FACEBOOK (Oct. 2, 2017), <https://newsroom.fb.com/news/2017/10/improving-enforcement-and-transparency/> (announcing plans to institute policy appending labels with “paid for by” language to paid political ads); *Shining a Light on Ads With Political Content*, FACEBOOK (May 24, 2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/> (announcing implementation of label policy).

¹⁰ Compl. at 3-6. See also America Progress Now, Facebook Ad Library.

¹¹ Compl. at 6-7, citing Jeremy Merrill and William Turton, *A Mysterious Facebook Group Is Using Bernie Sanders' Image to Urge Democrats to Vote for the Green Party*, ProPublica and VICE News (Nov. 5, 2018), <https://www.propublica.org/article/a-mysterious-facebook-group-is-using-bernie-sanders-image-to-urge-democrats-to-vote-for-the-green-party>.

1 most part,”¹² and candidate Squier wrote in a comment on APN’s Facebook page “This site is
2 NOT authorized to make up quotes I never said or run ads on my behalf,” and “Cease and desist
3 NOW!”¹³

4 The Complaint alleges that the ads did not provide sufficient disclaimer information, and
5 thus that APN violated 52 U.S.C. § 30120(a)(3).¹⁴ The Complaint also alleges that because APN
6 did not file reports of independent expenditures, APN violated 52 U.S.C. § 30104(c).¹⁵

7 Muhlstein, responding on behalf of APN, acknowledges that he set up the APN Facebook
8 page and placed the ads to advocate for candidates he supported.¹⁶ Muhlstein states that he was
9 unfamiliar with proper procedures for disclosure when he placed the ads, and that any errors were
10 oversights due to inexperience with the political process.¹⁷ The Response states the total amount
11 spent supporting the candidates was \$2,467.54.¹⁸ According to the Facebook ad library, the total
12 amount spent on all APN ads of any kind was \$7,665.¹⁹ A review of that ad library reveals that
13 APN’s ads were a mixture of express advocacy, such as the ads featured in the Complaint, and

¹² *Id.*

¹³ *Id.* See also America Progress Now, FACEBOOK, October 18, 2018 at 7:21 PM, available at <https://www.facebook.com/AmericaProgressNow/posts/752920488378089>.

¹⁴ Compl. at 1, 9-10. See also 11 C.F.R. § 110.11(b)(3).

¹⁵ Compl. at 1, 9. See also 11 C.F.R. § 109.10.

¹⁶ Resp. at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 1-2. The Response specified the candidates supported and amounts spent: Jo Crain, Missouri Senate candidate: \$610 total; Marcia Squier, Michigan Senate candidate: \$317.54 total; Joe Manchik, Ohio 12th District candidate: \$920 total; Randy Auxier, Illinois 12th District candidate: \$310, and Paul Knupp, Iowa 3rd District candidate: \$310.

¹⁹ See America Progress Now, Facebook Ad Library.

1 issue advocacy, such as ads promoting democratic socialism as opposed to capitalism.²⁰

2 The Response argues that APN's ads qualify for the "small items" exception to the
3 disclaimer requirement.²¹ Muhlstein also states it is highly unlikely he will ever participate in the
4 election process again and that he intends to work with the Commission to correct the errors as
5 quickly as possible.²²

6 **III. LEGAL ANALYSIS**

7 **A. Respondents Violated the Disclaimer Provisions of the Act and Regulations.**

8 The Act and Commission regulations require a disclaimer identifying who paid for a
9 communication and, where applicable, whether a communication was authorized by a candidate,
10 on, among other communications, all "public communications" made by any person that expressly
11 advocate the election or defeat of a clearly identified federal candidate.²³ "Public
12 communications" include "communications placed for a fee on another person's Web site."²⁴
13 Thus, disclaimer requirements apply to "all potential forms of advertising" placed for a fee online,
14 including "banner advertisements, streaming video, popup advertisements, and directed search
15 results."²⁵

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

²⁰ *Id.*

²¹ *Id.* at 2.

²² *Id.*

²³ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c); *see also* 11 C.F.R. § 100.22 (defining "expressly advocating").

²⁴ 11 C.F.R. § 100.26.

²⁵ *See* Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

1 that paid for, and where required, that authorized the communication.”²⁶ If a communication is
2 not authorized by a candidate or candidate’s authorized committee, it must clearly state the name
3 and permanent street address, telephone number, or website address of the person who paid for the
4 communication and state that the communication is not authorized by any candidate or candidate’s
5 committee.²⁷

6 A person paying for a public communication that expressly advocates the election of a
7 clearly identified federal candidate on an internet social networking site, such as Facebook, must
8 include all disclaimer information specified by 52 U.S.C. § 30120(a).²⁸ In Advisory Opinion
9 2017-12 (Take Back Action Fund) (“AO 2017-12”), the Commission concluded that the requester
10 was required to include all of the disclaimer information required by 52 U.S.C. § 30120(a) on its
11 paid Facebook Image and Video advertising.²⁹ The Commission had received similar requests
12 before that advisory opinion, regarding whether small, character-limited internet advertisements
13 could be exempt from the disclaimer requirements under the small items exception at 11 C.F.R.
14 § 110.11(f)(1)(i) or the impracticable exception at 11 C.F.R. § 110.11(f)(1)(ii).³⁰ However, the

²⁶ 11 C.F.R. § 110.11(c).

²⁷ *Id.* § 110.11(b)(3).

²⁸

²⁹ See AO 2017-12 (addressing Facebook “Image” and “Video” ads, the former of which appear to be the same type of ad product as the complained-of communications in this matter); see also Concurrence of Comm’r Weintraub at 1, AO 2017-12; Concurrence of Comm’rs Hunter, Goodman & Petersen at 1-2, AO 2017-12 (concluding that disclaimers would be required on Facebook Image and Video ads in cases where the specific circumstances were substantially similar to those laid out in the request).

³⁰ See Advisory Op. Req. at 1, AO 2011-09 (Facebook) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Op. Req., AO 2013-18 (Revolution Messaging) (concerning application of exceptions to mobile banner ads); see also Advisory Op. 2010-19 (Google) (concluding that Google’s proposed AdWords program, in which 95-character text-only ads that would link to the payor’s own website with a

1 Commission has never approved of the application of either the small items exception or the
2 impracticable exception to internet ads. Because the Commission has never determined that a
3 regulatory exception applies to Facebook advertisements,³¹ and because the Commission's most
4 recent guidance, which pre-dates any of APN's Facebook ad purchases, unequivocally stated that
5 a payor "must include all of the disclaimer information specified by 52 U.S.C. § 30120(a)" on
6 Facebook Image advertising, paid Facebook advertisements, like those at issue in this matter,
7 require proper disclaimers under the Act and Commission regulations.³²

8 Here, APN admits purchasing the ads, which, as communications placed for a fee on
9 another person's website, are "public communications."³³ APN's ads clearly identify Sanders,
10 Squier, Crain, Manchik, Auxier, and Knupp, all federal candidates.³⁴ The Squier, Crain, Manchik,
11 Auxier, and Knupp ads use phrases that constitute express advocacy, directly exhorting the reader
12 to "vote" in each ad ("VOTE for Marcia Squier," "VOTE Jo Crain," "VOTE Joe Manchik,"
13 "VOTE Randy Auxier," "VOTE for Paul Knupp").³⁵ Therefore, the ads are public

full disclaimer, "under the circumstances described . . . [was] not in violation of the Act or Commission regulations," but not answering whether Google AdWords ads would qualify for the small items or impracticable exception).

³¹ This also includes ads that may have been created under Facebook's previous and more restrictive size- and character-count parameters. *See* Advisory Op. Req., AO 2011-09 (Facebook); *see also* Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12,864, 12,868 (Mar. 26, 2018) (quoting comment from Facebook representing that Facebook has expanded its advertising platform beyond what was offered at the time of its advisory opinion request in 2011, allowing users to create advertisements with larger images and more text).

³² AO 2017-12.

³³ 11 C.F.R. § 100.26.

³⁴ *See* 11 C.F.R. § 100.17 (defining "clearly identified" as meaning, among other things, the candidate's name or photograph).

³⁵ America Progress Now, Facebook Ad Library. 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. *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,294

1 communications that expressly advocate the election of clearly identified federal candidates and
2 are subject to the disclaimer requirements. However, the APN ads did not comply with the Act's
3 disclaimer provisions. Although the ads were accompanied by Facebook-generated labels
4 indicating that APN paid for them, the communications themselves did not include any compliant
5 disclaimers and the Facebook-generated labels did not include any of the additional information
6 required by the Act and Commission regulations for communications not paid for by a candidate
7 or party committee, that is, an authorization statement and payor's address, phone, or website.³⁶
8 And, as explained above, APN's argument that its ads qualified for the small item exception is
9 unpersuasive.

10 Though the available information indicates that the Respondents violated 52 U.S.C.
11 § 30120(a), the amount spent on the ads was between \$2,400 and \$8,000, and Respondents have
12 stated they are unlikely to repeat the activity and will take remedial actions. Under these specific
13 circumstances, we recommend that the Commission exercise its prosecutorial discretion pursuant
14 to *Heckler v. Chaney*, dismiss the allegations that APN and Evan Muhlstein violated 52 U.S.C.
15 § 30120(a), and send Respondents a cautionary letter explaining their obligations to include
16 appropriate disclaimers.³⁷

(July 6, 1995); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

³⁶ *See supra* pp. 3-5.

³⁷ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). *See* MUR 6404 (Stutzman) (dismissal where amount in violation was likely less than \$2,000 and billboard was likely displayed for less than one month); Gen. Counsel's Rpt. at 3-4, MUR 6205 (Fort Bend Democrats) (EPS dismissal where the federal portion of the expenses for door hangers was "modest" and may have exceeded the \$1,000 political committee threshold for expenditures by approximately \$500); *see also* MUR 6642 (Unknown Respondents) (taking no further action after investigation indicated that local politician spent \$3,000 on one billboard reading "FIRE KLOBUCHAR!" and failed to report independent expenditure).

1 **B. Respondents Violated the Reporting Provisions of the Act and Regulations.**

2 An “independent expenditure” is an expenditure for a communication expressly advocating
3 the election or defeat of a clearly identified federal candidate that is not coordinated with a
4 candidate, a candidate’s authorized committee, or their agents, or a political party committee or its
5 agents.³⁸ Any person other than a political committee that makes independent expenditures
6 aggregating over \$250 in a calendar year with respect to a given election must file an independent
7 expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³⁹ Additionally,
8 political committees and other persons that make independent expenditures aggregating \$1,000 or
9 more with respect to a given election made after the 20th day, but more than 24 hours before, the
10 date of an election, must report the expenditures by filing a 24-hour notice.⁴⁰

11 Persons, other than political committees, must disclose certain information about their
12 disbursements for independent expenditures (including the name and address of each person who
13 receives disbursements aggregating over \$200 in connection with an independent expenditure),
14 and indicate the candidates the independent expenditures support or oppose.⁴¹ In addition, the Act
15 requires persons, other than political committees, reporting independent expenditures to report
16 certain information about their receipts. Under 52 U.S.C. § 30104(c)(1), a person, other than a
17 political committee, reporting independent expenditures must disclose the information required
18 under section 30104(b)(3)(A) “for all contributions received by such person”; section

³⁸ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

³⁹ 52 U.S.C. § 30104(b)(4)(H)(iii).

⁴⁰ 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).

⁴¹ 52 U.S.C. § 30104(c)(2)(A) (incorporating requirements of 52 U.S.C. § 30104(b)(6)(B)(iii)).

1 30104(b)(3)(A) requires identification of each “person (other than a political committee) who
2 makes a contribution to the reporting committee during the reporting period [aggregating] in
3 excess of \$200 within the calendar year.”⁴² Furthermore, under 52 U.S.C. § 30104(c)(2)(C), a
4 person, other than a political committee, reporting independent expenditures must also identify
5 “each person who made a contribution in excess of \$200 . . . which was made for the purpose of
6 furthering an independent expenditure.”⁴³

7 The available information shows that APN made independent expenditures for the Squier,
8 Crain, Manchik, Auxier, and Knupp ads that each aggregated over \$250, and they should have
9 been disclosed in reports filed with the Commission, but they were not. Although the ads appear
10 to have been disseminated after October 15, 2018,⁴⁴ and within 20 days before the November 6,
11 2018, primary election, the aggregate expenditure for each election contest appears not to exceed
12 \$1,000, so 24-hour notices do not appear to have been required.⁴⁵ In light of the response and the
13 particular circumstances of the matter, including the amounts at issue and Respondents' statement

⁴² 52 U.S.C. § 30104(b)(3)(A), (c)(1); *see also* 52 U.S.C. § 30101(13) (defining “identification” to include name, address, and, for individuals, occupation and employer).

⁴³ 52 U.S.C. § 30104(c)(2)(C). The Commission's implementing regulation at 11 C.F.R. § 109.10(e)(1)(vi) requires “[t]he identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made for the purpose of furthering *the* reported independent expenditure.” 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). On August 3, 2018, the District Court for the District of Columbia vacated 11 C.F.R. § 109.10(e)(1)(vi); after a brief stay, the vacatur of this regulation went into effect on September 18, 2018. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018); Press Release, *FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018) (“*CREW* Guidance”), available at <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

⁴⁴ *See* Compl. at 1.

⁴⁵ Independent expenditures are aggregated with respect to a given election. 11 C.F.R. § 104.4(a), (b)(1)-(2), and (c); *see* Advisory Op. 2003-40 (Navy Veterans) (concluding that three separate advertisements for separate races, one favoring Senate Candidate A (costing \$9,000) another favoring House Candidate B (costing \$9,000), and another favoring House Candidate C (costing \$9,000), were not required to be aggregated for purposes of filing a 48-hour report because the advertisements were related to separate elections). Thus, APN was not required to aggregate all of its expenditures, because each office sought by the candidates in APN's ads was the subject of a separate election, even though the general election for each candidate was held on the same day. *See* AO 2003-40 at 3.

1 that they are unlikely to participate in election activity again and will take remedial actions, we
 2 recommend the Commission exercise its prosecutorial discretion pursuant to *Heckler v. Chaney*
 3 and dismiss the allegations that APN and Evan Muhlstein violated 52 U.S.C. § 30104(c) and (g)
 4 by failing to report expenditures made in connection with the Facebook ads.⁴⁶ Additionally, we
 5 recommend issuing a letter cautioning the Respondents of their obligation to report independent
 6 expenditures and directing them to work with RAD to file the appropriate reports,⁴⁷ and close the
 7 file as to all Respondents.

8 **IV. RECOMMENDATIONS**

- 9 1. Dismiss the allegations that America Progress Now and Evan Muhlstein violated 52
 10 U.S.C. § 30120(a) and issue a letter of caution;
 11
 12 2. Dismiss the allegations that America Progress Now and Evan Muhlstein violated 52
 13 U.S.C. § 30104(c) and (g) and issue a letter of caution;
 14
 15 3. Approve the attached Factual and Legal Analysis;
 16
 17 4. Approve the appropriate letters; and
 18
 19 5. Close the file as to all Respondents.
 20

21 Lisa J. Stevenson
 22 Acting General Counsel

23 Charles Kitcher
 24 Acting Associate General Counsel for
 25 Enforcement

26
 27 05.04.20

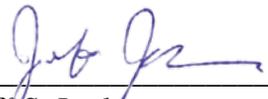
28 _____
 29 Date

30 
 31 Stephen Gura
 Deputy Associate General Counsel

⁴⁶ 470 U.S. 821 (1985).

⁴⁷ In the closing letter to Respondents, we intend to direct Respondents to RAD for guidance on reporting its independent expenditures. Although Muhlstein has indicated he is unlikely to participate in federal elections again, the letter would remind Respondents to review the Act and Commission regulations if they wish to engage in federal election activity in the future.

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Jeff S. Jordan
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