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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of American Firearms Association,

MUR No. 7883

Respondent.

RESPONSE TO COMPLAINT

On behalf of respondent American Firearms Association ("AFA"), the undersigned counsel hereby responds to the complaint filed with the Federal Election Commission ("Commission") by John Cowan (MUR 7883). This response is submitted pursuant to 52 U.S.C. § 30109(a)(1), 11 CFR 111.6, and in accordance with the Commission's letter to AFA.

AFA respectfully requests, for the reasons discussed below, that the Commission find no reason to believe that AFA has violated the Federal Election Campaign Act, as amended (the "Act"), and that the Commission take no action on the basis of the complaint. Absent the existence of a violation of the Act, or facts indicating that a violation of the Act is likely to occur, the Commission should find no reason to believe that further proceedings are warranted in this matter.

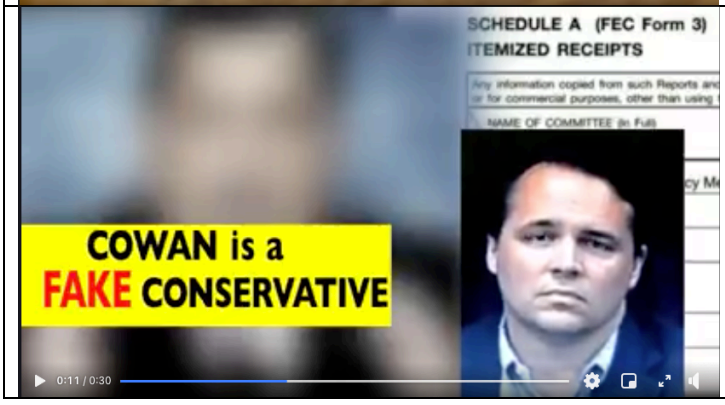
THE COMPLAINT

The complaint alleges that AFA knowingly and willfully violated the Act by engaging in protected, core First Amendment speech, specifically by publishing a video on social media that discusses John Cowan's positions on gun rights ("the Video"). (Compl. ¶¶ 1-2.) The complaint alleges that the Video failed to include the disclaimer requirements in 52 U.S.C. § 30120(a)(3) and that AFA "has not registered or reported these contributions as independent expenditures and has not disclosed the sources of the donations financing the communication." (Compl. ¶¶ 19-20.)

THE FACTS

AFA is a national grassroots mobilization organization that fights aggressively in defense of the Second Amendment, including the rights of law-abiding citizens to carry concealed weapons and own efficient, effective rifles such as the AR-15. AFA is not under the control of any candidate or committee.

Owing to Cowan's lack of a working link and his limited discussion of the Video in his complaint, AFA assumes the following link is the Video: https://www.facebook.com/AmericanFirearmsAssociation/videos/596112824612948. It was published on July 20, 2020.[1] The Video is summarized below with pertinent screen captures and transcript of its narration:

Video:	Audio:
	Marjorie Taylor Greene is a fighter for the Second Amendment, always standing up against radical antifa thugs who are burning our cities and shooting at our cops.
	But not John Cowan. Cowan is a fake conservative--

[1] The video was also published on AFA's YouTube page on October 22, 2020. *See* https://youtu.be/f2_tNyG5hEY.

	--who gave Chris Christie thousands of campaign dollars in 2015, even though Christie opposes concealed carry and wants to ban our AR-15s.
	What's wrong with John Cowan? Why would he support liberal politicians who hate our guns and attack our President?
	Call Cowan and ask him. Paid for by the American Firearms Coalition.

According to Commission records, Cowan contributed $2,700 to Christie for President, Inc. on November 19, 2015. At that time, Christie was still known to support bans on so-called "assault weapons" and other measures that infringe upon gun rights.[2] As displayed in images at points in the background of the video, Commission records also affirm that John Cowan for Congress, Inc.

[2] Christie went on the record saying otherwise only in early 2016, after Cowan's contribution. *See* Nolan D. McCaskill, *Christie says he 'changed his mind' on guns*, POLITICO, Jan. 7, 2016, https://www.politico.com/story/2016/01/chris-christie-guns-217437.

received a total of $10,000 from the National Emergency Medicine Political Action Committee / American College of Emergency Physicians in 2020. The American College of Emergency Physicians "supports legislative and regulatory efforts that . . . [r]estrict the sale and ownership of weapons, munitions, and large-capacity magazines that are designed for military or law enforcement use[.]"[3]

The website for the Cowan for Congress campaign published a statement that "Cowan [is] the only candidate to trust on gun rights – or on anything." *See* **Attachment A**. The earliest cached version of this page dates to August 12, 2020.[4]

THE LAW

There are constitutional limits to the reach of campaign finance law that prevent the over-regulation of political advocacy, because political speech is a core purpose of the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976). These limits are largely reflected in the Act. The Supreme Court has explained that freedom to criticize public officials and oppose or support them constitutes the "central meaning" of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the ordinary course of its business, the Commission scrutinizes the content of political expression and feeds upon speech—with many members who "almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized." *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, C.J., concurring).

[3] *Policy Statement - Firearm Safety and Injury Prevention*, AM. COLLEGE OF EMERGENCY PHYSICIANS, Oct. 2019, *available at* https://www.acep.org/globalassets/new-pdfs/policy-statements/firearm-safety-and-injury-prevention.pdf.
[4] https://web.archive.org/web/20200812093848/https://cowanforcongress.com/cowan-the-only-candidate-to-trust-on-gun-rights-or-on-anything/.

An independent expenditure under the Act is "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 candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(18). The definition of express advocacy at issue is defined by Commission regulation:

> [A]ny communication that— . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, 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—
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) 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) (emphasis added). Previous advisory opinions from the commission found an advertisement criticizing a candidate for "tak[ing] hundreds of thousands" of dollars from Wall Street and asking if she was "[a] leader you can believe in?" to not contain express advocacy under 100.22. Advisory Opinion ("AO") 2012-27 (Nat'l Defense Cmte.).

DISCUSSION

I. UNDER THE ACT, AFA'S VIDEO IS NOT AN INDEPENDENT EXPENDITURE

The Video is not an independent expenditure under section 100.22(a) or (b). It does not contain an electoral portion that is unmistakable, unambiguous and suggestive of only one meaning and it does not encourage action to defeat one or more clearly identified candidates.

There is no electoral portion in the communication. One might argue that referencing Marjorie Taylor Greene constitutes an electoral portion simply because she was Cowan's opponent, but with no reference to their candidacies or the upcoming election, this would not rise to the level of "unmistakable, unambiguous, and suggestive of only one meaning[.]" Because a

regulation subject to section 100.22(b) requires both an electoral portion and encouragement of the election or defeat of a candidate, the Commission may conclude its analysis of the Video here.

But neither does the Video "encourage[] actions to elect or defeat" either Greene or Cowan. It explicitly encourages viewers to call John Cowan and ask him about his past support of a candidate with a questionable record on gun rights. It is thus an invitation to learn more about John Cowan and his perspectives on gun control. As Cowan's own complaint states, the ad "urges the recipients to contact Dr. Cowan and ask him about his stance." (Compl. ¶¶2, 6.) The Video's implicit call to action is to ask Cowan about his own positions on gun rights, since he has supported a candidate with a questionable record and accepted funds from a political committee that unequivocally supports extensive gun control. The Video's discussion of gun rights is not "incidental[]", but central to the ad. (*Cf.* Compl. ¶8.) Reasonable minds could not—and, in fact, do not—differ as to the action called for in the Video. (*See* Compl. ¶2.) It is not express advocacy under section 100.22.

Cowan instead advances arguments that are irrelevant to the express advocacy analysis—indeed, arguments that have been rejected by the United States Supreme Court as unconstitutional. Cowan complains that "[t]he sole purpose of the communication was to influence the 2020 primary runoff election." (Compl. ¶10.) Considering the purpose of an ad—that is, the intent behind it—is unconstitutional for the Commission to do. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 468 (2007) ("Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue."). Likewise, "the effect

of advocating for [Cowan's] defeat" or "the effect of expressing for [Cowan's] defeat" are inappropriate analyses. *See id.* at 467 (citing *Buckley*, 424 U.S. at 43) (Compl. ¶¶ 2, 12.).

The video contains no express advocacy under 11 CFR 122. It is thus not an independent expenditure, and not subject to disclaimer or reporting requirements under the Act. Cowan's complaint is wholly without merit. (*See* Compl. ¶¶19-20.)

II. UNDER CONTROLLING FIRST AMENDMENT PRECEDENT AND MATTERS UNDER REVIEW, THE VIDEO IS NOT REGULABLE EXPRESS ADVOCACY

Under relevant Matters Under Review ("MUR") following Supreme Court First Amendment precedent, there is no reason to believe a violation of the Act has occurred.

Even under the expansive reach of section 100.22(b), as long as reasonable minds can plausibly interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified candidate, the ad does not contain "express advocacy" under this section. Any suggestion that an examination of what a "reasonable person" would interpret an ad to mean has been decisively rejected. *Wisconsin Right to Life*, 551 U.S. at 469–70. And so, independent groups who run videos about policies they care about intermingled with candidates for office receive the full protection of the First Amendment against the Commission's labyrinth of speech regulations. This has been recognized by the Commission with some regularity.

In American Future Fund, the Commission could not find a violation of 11 CFR 100.22(b) with advertisements focusing on Senator Norm Coleman. MUR 5988 (American Future Fund). These ads discussed infrastructure, national guard issues, and consumer protection policy. They also asked viewers to "Call Norm Coleman and thank him for his agenda for Minnesota." True enough, the Office of General Counsel argued this constituted regulable express advocacy, but the Commission failed on a vote of 3-3 to find any violation of the Act.

In Americans for Job Security, a group ran one ad in support of Senator Santorum's position on taxes. It asked viewers to call Senator Santorum to thank him. Another ad focused on Santorum's position on social security reform and, again, asked viewers to call and thank him. MURs 5916 & 5694 (Americans for Job Security). The FEC also examined earlier advocacy by Americans for Job Security, including an ad in North Carolina praising Richard Burr for his positions on economic and trade issues. Once again, it included a request that viewers call and thank him. Because the ads did not contain "an 'unmistakable' or 'unambiguous' message urging viewers to vote one way or another" the Commission could not conclude a violation of the Act occurred. Rather, these ads were part of a larger advocacy campaign that drew attention to the "need for tax relief and retirement security." Since reasonable minds would likely come to different conclusions about whether the ads as something other than an appeal to vote for or against a candidate, they could not be deemed express advocacy.

The Commission has been equally clear in Sierra Club, Inc. and the Lantern Project that independent groups are free to run advertisements discussing policy and candidates for office without running afoul of the Act. MURs 5634 & 5854. In MUR 5634, Sierra Club, Inc., the group invited people to become more informed about issues and candidates but presented one candidate more favorably than another. In MUR 5854, the Lantern Project asked critical questions about Senator Santorum that cast him in a negative light. None of these ads constituted express advocacy, but were, rather, broad discussions of policy involving candidates fully protected as issue advocacy under the First Amendment.

The video in question lines up nicely with the facts of American Future Fund, Americans for Job Security, Sierra Club, and Lantern Project. That is, the video, on its face, plainly communicates a message about public policy issues relevant to the Second Amendment to the

Constitution. The video explains that Marjorie Taylor Greene was "standing up against radical antifa thugs who are burning our cities and shooting at our cops." It then examines John Cowan's record and asks, "Why would he support liberal politicians who hate our guns and attack our President?" As the Commission recognized in Lantern Project, the fact that AFA decided to highlight candidates for federal office to discuss Second Amendment issues does not diminish those issues or make them subject to the Act's regulations. In other words, the ad criticizes a candidate for office about a policy AFA cares about. Protection against regulating this sort of speech constitutes the "central meaning" of the First Amendment. *New York Times Co.,* 376 U.S. at 270.

There is no unmistakable or unambiguous communication where AFA encourages viewers to vote for or against particular candidates. The Supreme Court has long recognized that the "distinction between campaign advocacy and issue advocacy may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. Here, AFA elected to choose the most effective way to discuss Second Amendment public policy items—by linking the discussion to something citizens care about: Marjorie Taylor Greene and John Cowan. And its video speaks to issues the American electorate was interested in 2020 and remains interested in 2021: violence against police, antifa protests, and Second Amendment policies. This is core issue advocacy protected at the heart of the First Amendment which lays beyond the purview of this Commission.

Because the video produced by AFA does not contain express advocacy, it did not make an "expenditure" under the Act and thus was not required to include any disclaimers under 52 U.S.C. § 30120(a)(3). Consequently, it was not required to report contributions supporting the

Video or to report it as an independent expenditure since the Video is not one. 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. 104.4. All the Commission is left with is a frivolous complaint by an upset candidate. Since "sour grapes" is not a cognizable claim under the Act, the Commission should find no reason to believe here.

CONCLUSION

For the foregoing reasons, AFA requests that the Commission find that there is no reason to believe that a violation of the Act occurred or will occur with respect to the allegations of the Complaint and close the file in this matter.

Date: April 21, 2021

Respectfully submitted,

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ATTACHMENT A

COWAN THE ONLY CANDIDATE TO TRUST ON GUN RIGHTS — OR ON ANYTHING

In Congress, John Cowan will do more than stop the Far Left's gun-grabbing agenda. He's outlined an aggressive agenda for defending the Second Amendment with an expansion of gun rights.

"Marjorie Taylor Greene knows she can't win this election by telling the truth, so she lies about my record and my positions — even when her lies are easily disproved. Voters simply can't trust anything she says.

"My position is clear: I will always stand up for northwest Georgians' right to bear arms," said Cowan. "I am a lifetime member of the NRA, a sworn reserve deputy sheriff, a loyal supporter of law enforcement heroes, and I have owned a firearm since I was in elementary school. I fully support Constitutional Carry and you will never have to guess where I stand on our gun rights.

"Every group and individual who has chosen back my campaign knows that I am 100 percent pro-gun. They choose to support me because they know I have the background and conservative record to get the job done in Washington."

Unlike Greene — whose grasp on policies doesn't go past her talking points — Cowan outlined specific gun rights proposals early in his campaign that he would support in Congress:

- **Oppose unconstitutional "Red Flag" laws.** While an advocate for better mental

healthcare in America, John cannot support any law that robs Americans of their constitutional rights without due process based on the subjective opinions of friends, family or a colleague. These laws could lead to rampant abuse, government overreach and an erosion of personal liberty.

- **Oppose efforts to ban so-called "assault weapons."** Although the leftist media claim otherwise, the Clinton-era "assault weapon ban" had no impact on crime, according to government studies. In fact, murder rates were higher during the ban, which ended in 2004.

- **Support Concealed Carry Reciprocity legislation.** Our Second Amendment rights should not disappear at state lines. John supports the federal Concealed Carry Reciprocity Act to allow citizens to carry or possess concealed firearms in other states that also allow concealed carry.

- **Oppose efforts to limit "large" ammunition magazines.** Many common handguns and rifles used for self-defense have ammunition magazines of at least 10 rounds, exceeding the arbitrary size restriction the Democrats continue to seek.

- **Oppose efforts to use tax dollars to conduct biased firearm studies by liberal universities.** Federal funding to the CDC should not be allocated to research by leftist institutions that advocate or promote gun control policies. John will not allow taxpayer dollars to be spent to advance Democrats' political objectives.

"My opponent continues to fire ridiculously inaccurate claims about my positions in a desperate attempt to detract voters from her own past. She has lied about her record on illegal immigration and lied about supporting Trump from the beginning when she refused to vote in the 2016 presidential primary. If she will so blatantly lie to northwest Georgians about obvious facts, we can't trust her to keep her word in Congress."

Follow John Cowan