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July 24, 2023

**VIA E-MAIL CELA@FEC.GOV**

Wanda Brown, Acting Assistant General Counsel  
Trace Keeys, Paralegal  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

**Re: MUR 8016**

Dear Ms. Brown:

We write as counsel to GDA Wins (“Respondent”) regarding the complaint in MUR 8016. The Complaint alleges that six mailers sent before the primary election in Virginia’s second congressional district violate federal law because they lack disclaimers. The Complaint is meritless for two reasons: first, GDA Wins did not pay for the mailers at issue and is not responsible for any disclaimer requirements, and second, the Federal Election Campaign Act of 1971, as amended (the “Act”) does not require disclaimers on these six mailers because they were not paid for by a political committee, are not electioneering communications, and do not expressly advocate for the election or defeat of any clearly identified federal candidate or solicit contributions in connection with a federal election.

**1. GDA Wins Did Not Pay for the Mailers at Issue in This Complaint and is Not Responsible for Compliance with Disclaimer Rules**

GDA Wins is a mail vendor. The Complaint does not mention GDA Wins or allege that GDA Wins paid for the mailers at issue. GDA Wins did produce and disseminate the six mailers at issue but was hired to do so by its paying customer. That customer is not a federal political committee. To GDA Wins’ knowledge, the mailers were not coordinated with any federal candidate or party committee.<sup>1</sup> Federal disclaimer rules require disclosing the identity of “the person who paid for

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<sup>1</sup> See Declaration of Gabby Adler.

the communication.”<sup>2</sup> Because GDA Wins did not pay for the mailers, it was not responsible for ensuring that the mailers had any disclaimer required under federal law.<sup>3</sup>

## **2. The Mailers Did Not Require a Disclaimer**

### **a. Disclaimers by Persons Other Than Political Committees are Only Required in Three Circumstances**

The Act requires persons other than political committees to include a disclaimer in three circumstances: (1) if the communication is an “electioneering communication,” (2) if the communication is “expressly advocating the election or defeat of a clearly identified candidate,” and (3) if the communication is soliciting contributions for the purposes of influencing federal elections.<sup>4</sup> Communications paid for by someone other than a political committee that do not fall into any of these three circumstances do not require a disclaimer under federal law.<sup>5</sup>

An electioneering communication includes “any broadcast, cable, or satellite communication” referring to clearly identified federal candidates within 60 days of a general election or 30 days of a primary election.<sup>6</sup> Mailers are therefore not “electioneering communications” subject to those disclaimer rules.

“Expressly advocating” means any communication that:

- (a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ‘94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush” or “Mondale!”; or
- (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—

<sup>2</sup> 52 U.S.C. § 30120(a); 11 C.F.R. 110.11(b)(3).

<sup>3</sup> *Cf.* FEC Matter Under Review 7839 (Westerleigh Press, Inc., *et. al.*)(Finding by a vote of 6-0 no reason to believe that mail vendor failed to include required disclaimers where mailers lacked express advocacy and vendor did not pay for the mailers).

<sup>4</sup> 52 U.S.C. 30120(a); 11 C.F.R. § 110.11(a).

<sup>5</sup> *See id.*; 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29.

<sup>6</sup> 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29.

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.<sup>7</sup>

Under this standard, “a mailer does not contain express advocacy under 11 C.F.R. § 100.22(b) merely because it identifies someone as a candidate for federal office, or because it compares two candidates’ policy positions with a clear preference for one, or because it comments on a candidate’s character, or even because the mailer is sent close in time to an election. It must be that ‘[r]easonable minds could not differ as to whether it encourages actions to elect or defeat’ a candidate.”<sup>8</sup>

For example, in 2005, the Commission voted 5-1 to find no reason to believe that a Sierra Club mailer, “The Dirt” did not contain express advocacy.<sup>9</sup> The mailer, which directed readers to “Dig deeper for facts about the candidates for president,” and to “CHECK THE FACTS,” indicated “that the Sierra Club views Senator Kerry’s environmental record as better than President Bush’s” but did not “tell readers explicitly or ‘in effect’ for whom to vote, urging them instead to take actions to further educate themselves.” The Commission concluded that the “electoral portion” was not “unmistakable, unambiguous, and suggestive of only one meaning” because “[o]ne can reasonably view the directives to “Dig deeper for facts.. .” and “CHECK THE FACTS” as encouraging readers to obtain more information about the candidates, and not limit themselves to that contained in the pamphlet, before deciding for whom to vote.”<sup>10</sup>

By contrast, in the same matter, the Commission found reason to believe that another mailer, “Conscience,” did contain express advocacy where the mailer “portrays protecting the environment as a matter of conscience, with the words ‘LET YOUR CONSCIENCE BE YOUR GUIDE,’ accompanied by images extolling a healthy environment; and it highlights by means of checkmarks those candidates whose pro-environment records meets the dictates of conscience and directs voters to ‘LET YOUR VOTE BE YOUR VOICE.’”<sup>11</sup> The General Counsel’s Report made limited reference to three external events, (1) the proximity to the November 2, 2004 general election; (2) the identification of the two leading candidates for President and U.S. Senate in Florida, and (3) the Sierra Club’s “well-known stance promoting environmental regulation,” to conclude that “reasonable minds could not differ as to whether the pamphlet encourages readers to vote for Senator Kerry and Betty Castor or encourages some other kind of action.”<sup>12</sup> In so concluding, the General Counsel’s Report rejected the argument that “the ‘reasonable mind’ of a voter favoring relaxed or loose environmental regulation could regard the words ‘LET YOUR CONSCIENCE BE YOUR GUIDE and LET YOUR VOTE BE YOUR VOICE,’ with the

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<sup>7</sup> 11 C.F.R. § 100.22.

<sup>8</sup> FEC Matter Under Review 7460, 7536 & 7551, Supplemental Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III (May 26, 2021).

<sup>9</sup> FEC Matter Under Review 5634, Certification (September 20, 2005) and General Counsel’s Report at 8 (Aug. 10, 2005).

<sup>10</sup> *Id.*

<sup>11</sup> FEC Matter Under Review 5634, General Counsel’s Report at 10.

<sup>12</sup> *Id.*

accompanying voting records and checkmarks, as encouragement to vote for President Bush and Mel Martinez.” Instead, the General Counsel explained that “the ‘reasonable mind’ standard need not encompass every possible explanation that a creative individual might conjure,” but is an objective test that leads to only one conclusion: that the pamphlet advocated the election of Senator Kerry and Betty Castor.<sup>13</sup> The difference between this mailer and the previous one is that in this mailer, the reader is directed to which candidate meets specific standards outlined in the communication – in this case, using check marks – while in the previously described mailer, the reader is merely encouraged to “check the facts” and make their own decision.

**b. The Mailers Did Not Meet Any of the Circumstances in which a Disclaimer is Required**

The Complaint references six mailers, none of which meets a circumstance in which a disclaimer would be required. As discussed above, mailers are not “electioneering communications” subject to those disclaimer rules.<sup>14</sup> None of the mailers solicits a contribution in connection with a federal election. And the mailers do not contain express advocacy under 11 C.F.R. § 100.22.

First, none of the mailers contains the phrases identified in 11 C.F.R. § 100.22(a). Nor does any of the referenced mailers meet the express advocacy test in 11 C.F.R. § 100.22(b), which requires both that (1) the electoral portion of the mailer be “unmistakable, unambiguous, and suggestive of only one meaning” and (2) “[r]easonable 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.” While the mailers exhorted readers to vote, none of them told readers which candidates to vote for. Instead, all mailers presented facts and asked readers to vote their *own* values.

Discussing each of these mailers in the order in which they were shared with the Commission:

- The first mailer, “2022 Conservative Voter Guide,” fails the express advocacy test because the electoral portion of the mailer is not “unmistakable, unambiguous, and suggestive of only one meaning.” The electoral portions of the mailer say, “See which candidate for Congress shares your values,” “Make your choice on June 21,” and “On June 21 vote for the candidate who shares your values.” Like the “The Dirt” mailer, these directives are suggestive of more than one meaning; one can reasonably view them “as encouraging readers to obtain more information about the candidates, and not limit themselves to that contained in the pamphlet, before deciding for whom to vote.”<sup>15</sup> Unlike the “Conscience” mailer, this mailer does not highlight which candidates “meet the dictates of conscience”<sup>16</sup> or which values should drive voters’ choices. There is no color change or other coding that would indicate that one candidate’s positions are the “right” answer. Some readers will prefer one candidate’s positions; some will prefer the other. And while this is titled a “Conservative Voter Guide,” the mailer does nothing to indicate which position is “conservative.” Some readers may

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<sup>13</sup> *Id.* at 11–12.

<sup>14</sup> 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 10.

decide that supporting police is “conservative”; some may decide that lower government funding, a traditional conservative value, is. Some may see support of Donald Trump as conservative since he was the Republican nominee for president; some may view support of a candidate and president who protected Social Security and Medicare as more of a populist and view support of him as not consistent with conservative principles. And it is not clear whether increased government regulation of abortion is “conservative” or not. That is why the mailer only asks “Who is the true conservative” and does not indicate which answer is correct. Reasonable minds could therefore differ over whether this mailer encourages the election or defeat of a particular candidate or encourages some other action, such as researching which candidate shares their own personal values and voting for the candidate that matches those values.

- The second mailer, “Jarome Bell. An America-First, Conservative Republican from Virginia Beach,” also fails the express advocacy test. The electoral portions of the mailer say, “As you get ready for Election Day, learn more about Jarome Bell’s conservative record” and “On June 21 vote for the candidate who shares your values.” Again, reasonable minds could differ over whether this mailer encourages the election or defeat of Jarome Bell or encourages some other action, such as learning more about Jarome Bell or even voting against him. The mailer takes no position on whether Jarome Bell’s beliefs are the correct ones; it merely accurately states what his candidacy represents. Many readers may not agree with those beliefs, which is why the mailer exhorts readers to vote for the candidate that aligns with their values, whatever they may be.
- The third mailer, “See which candidate for Congress stands with President Trump,” again lacks an unmistakable, unambiguous electoral portion suggestive of only one meaning. The electoral portions, “2022 Conservative Voter Guide,” “See which candidate for Congress stands with President Trump. Learn more about Jarome Bell and Jen Kiggans,” and “On June 21 vote for the candidate who shares your values,” are messages about which reasonable minds could differ over whether they encourage the election or defeat of either candidate or encourage other action, such as learning more about the candidates and deciding which one shares the reader’s values. Readers who support Donald Trump will naturally prefer the candidate listed who does the same; readers who do not support Donald Trump will likely react to the mailer by supporting the other candidate. The mailer, again, asks readers only to support the candidate that matches their values and takes no position on whether supporting Donald Trump is the right or wrong position.
- The fourth mailer, “Pro-Life,” presents information about the candidate’s relative positions on abortion issues and asks “Which candidate shares your values?” It does not contain an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could differ on what, if any, action it encourages. Again, there is no indication that any of the positions listed by the candidates are correct or incorrect; the mailer merely asks readers to


make their own decision regarding the candidates' positions. Merely identifying candidates and their positions on issues, even "with a clear preference for one" is not a sufficient "electoral portion" to rise to the level of express advocacy.<sup>17</sup>

- The fifth mailer, "Trump's name," presents information about Jen Kiggans's record and asks, "Does Jen Kiggans share your values?" The electoral portion reads, "ELECTION DAY IS JUNE 21. Polls are open 6:00 am – 7:00 pm." Reasonable minds could differ over whether this mailer encourages the election or defeat of Jen Kiggans or merely encourages researching and deciding whether the candidate shares the reader's values before voting. Readers who support Donald Trump may decide that the candidate does not share their values; readers who oppose Donald Trump may support the candidate's position. The mailer does nothing to indicate which is the correct position, only that readers should be aware of this candidate's position on the issue when making up their minds on who to support.
- The six mailer, "Make a plan to vote your values," presents information about each candidate's positions and then asks, "Who is the conservative candidate that will earn your vote on June 21?" Unlike the "Conscience" mailer, this mailer does not indicate which of the listed positions are "conservative," nor is it clear from context; reasonable minds could differ on whether this mailer encourages the election or defeat of either candidate or some other action, such as making a plan to vote and researching which candidate shares the reader's values.<sup>18</sup>

Because none of the mailers contain express advocacy under 11 C.F.R. 100.22, they were not electioneering communications, and they did not solicit contributions in connection with a federal election, the mailers were not required to include a disclaimer.<sup>19</sup>

For the foregoing reasons, the Commission should find no reason to believe that a violation of the Act occurred and promptly dismiss this matter.

Very truly yours,



Ezra Reese  
Emily Hogin  
Counsel to Respondents

Enclosure

<sup>17</sup> See FEC Matter Under Review 7460, 7536 & 7551, Supplemental Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (May 26, 2021).

<sup>18</sup> See FEC Matter Under Review 5634, General Counsel's Report at 10.

<sup>19</sup> See *id.* § 30120(a); 11 C.F.R. 110.11(a).



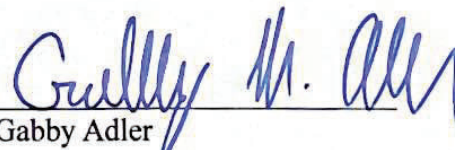
**DECLARATION OF GABBY ADLER**

1. I am over eighteen years of age. I have personal knowledge of the facts set forth herein.
2. I am Partner at GDA Wins
3. GDA Wins is a mail vendor firm.
4. GDA Wins printed and mailed the six mailers at issue in MUR 8016 on behalf of a paying customer (the "Customer").
5. The Customer is not a political committee registered with the Federal Election Commission.
6. I have no knowledge, information, or belief that the Customer coordinated with any candidate, candidate's committee, or political party committee in producing the mailers at issue in MUR 8016.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on:

7/24/23  
Date

  
Gabby Adler