

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 8017

DATE COMPLAINT FILED:	June 16, 2022
DATES OF NOTIFICATIONS:	June 17, 2022
	Mar. 31, 2023
LAST RESPONSE RECEIVED:	May 2, 2023
DATE ACTIVATED:	May 3, 2023
EXPIRATION OF SOL:	June 1, 2027
	(earliest)
	June 28, 2027
	(latest)
ELECTION CYCLE:	2022

COMPLAINANT:

Joe O'Dea for Senate

RESPONDENTS:

Unknown Respondent(s)
Christian Printers, Inc.
ProgressNow Colorado

MUR 8023

DATE COMPLAINT FILED:	July 8, 2022
DATE OF NOTIFICATION:	July 11, 2022
LAST RESPONSE RECEIVED:	Sept. 23, 2022
DATE ACTIVATED:	Nov. 23, 2022
EXPIRATION OF SOL:	June 1, 2027
	(earliest)
	June 28, 2027
	(latest)
ELECTION CYCLE:	2022

COMPLAINANT:

Stephen Fisher

RESPONDENTS:

Unknown Respondent(s)
Christian Printers, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b), (c), (g)
52 U.S.C. § 30120
11 C.F.R. § 100.16
11 C.F.R. § 100.22
11 C.F.R. § 100.29
11 C.F.R. § 110.11

MURs 8017, 8023 (Unknown Respondent(s), *et al.*)

First General Counsel's Report

Page 2 of 22

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED:

I. INTRODUCTION

The Complaints in these matters allege that Unknown Respondent(s), ProgressNow Colorado, and Christian Printers, Inc., violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for mailers (which the Complaints label as “electioneering communications”) that lacked disclaimers.¹ Specifically, they allege that the mailers were designed to undermine support for U.S. Senate candidate Joe O’Dea shortly before the 2022 Republican senate primary election in Colorado. Christian Printers, the entity that printed the mailers, denies violating the Act or Commission regulations, arguing that, as a commercial vendor, it is not responsible for including disclaimers on mailers it has not paid for.

As explained below, all but one of the six mailers attached to the Complaints appear to both meet the definition of “public communication” and expressly advocate the election or defeat of a clearly identified federal candidate, and therefore required disclaimers. Because these mailers lacked disclaimers, we recommend that the Commission find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a). And because the expenditures made in connection with these mailers do not appear to have been reported to the Commission, we recommend that the Commission find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(b) or (c), and/or (g). We further recommend that the

¹ “Electioneering communication” is a defined term that is limited to certain broadcast, cable, and satellite communications. 11 C.F.R. § 100.29. Because mailers are neither broadcast, cable, nor satellite communications, the disclaimer requirements for electioneering communications are inapplicable. *See* 11 C.F.R. § 110.11(a)(4). However, all public communications by political committees, as well as public communications by other persons that expressly advocate for or against a candidate in a federal election also require disclaimers. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). Therefore, this report analyzes whether the mailers implicated those requirements.

Commission authorize compulsory process to investigate who paid for these mailers and their cost. Because Christian Printers is a commercial vendor, and appears to have been acting in that capacity with respect to the mailers at issue, we recommend that the Commission find no reason to believe that Christian Printers violated 52 U.S.C. § 30120(a) or 11 C.F.R. § 110.11(a). Finally, because the available record does not sufficiently indicate that ProgressNow Colorado was involved with the MUR 8017 mailers, we recommend that the Commission find no reason to believe ProgressNow Colorado violated 52 U.S.C. §§ 30104(b), (c), or (g), 30120(a) or 11 C.F.R. § 110.11(a) in connection with the MUR 8017 mailers.

II. FACTUAL BACKGROUND

Joe O'Dea and Ron Hanks were both candidates in the June 28, 2022 Republican primary election for U.S. Senate in Colorado.² The mailers pictured in Attachments 1 and 2 of this Report — which, respectively, correspond to the mailers attached to the Complaints in MUR 8017 and MUR 8023 — were sent to Colorado voters in the weeks leading up to that election.³ Two of the three MUR 8017 mailers contrast the positions of O'Dea and Hanks on the issue of “gun rights” and “taxes and spending.”⁴ A third MUR 8017 mailer portrays Hanks as a “Defender of the Second Amendment” and O'Dea as someone who supports restricting gun rights.⁵ Two of the MUR 8017 mailers state that Hanks had been “endorsed” by the Colorado

² See Joseph Matthew O'Dea, Statement of Candidacy (Oct. 8, 2021), <https://docquery.fec.gov/pdf/871/202110089467207871/202110089467207871.pdf>; Ron Hanks, Statement of Candidacy (Oct. 1, 2021), <https://docquery.fec.gov/pdf/809/202110019467154809/202110019467154809.pdf>.

³ Compl. at 3, Exs. 1-5 (June 16, 2022), MUR 8017 (Unknown Respondent(s), *et al.*); Compl. at 3-8 (July 8, 2022), MUR 8023 (Unknown Respondent(s), *et al.*).

⁴ Compl., Ex. 3-5, MUR 8017.

⁵ *Id.*, Exs. 1-2.

Republican Party.⁶ The three MUR 8023 mailers focus exclusively on O'Dea and state that O'Dea "says he's a Republican," "Claims He Wants to 'Cut Wasteful Spending,'" "Claims He's A Conservative," or "Claims He Supports The Second Amendment," but add "Joe O'Dea is NOT who he says he is" because he donated to the U.S. Senate candidate of the opposing political party.⁷ All six mailers include the same postmark: "**PAID** Denver, CO PERMIT NO. 2571."⁸

The Complaint in MUR 8017 alleges that an Unknown Respondent and Christian Printers violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 by sending the mailers pictured in Attachment 1 without disclaimers.⁹ Although the MUR 8017 Complaint's caption names Unknown Respondent as a respondent, the Complaint identifies "progressive and other democratic-aligned groups, including ProgressNow Colorado" as "part of a coordinated effort to use false electioneering communications to discredit Joe O'Dea."¹⁰ The MUR 8017 Complaint also alleges that the "coordinated effort" included the specific mailers at issue.¹¹ The Complaint

⁶ *Id.*, Exs. 2, 5; *see also* Next 9News, *Dems' Involvement in Colorado GOP Primaries Continues With Mailers*, YOUTUBE (June 24, 2022), <https://www.youtube.com/watch?v=iwG9ZTF-KJ4>; Ernest Luning, *Colorado GOP Vows Legal Action Against Fliers Claiming it Endorsed Ron Hanks in U.S. Senate Primary*, COLORADO POLITICS (June 14, 2022), https://www.coloradopolitics.com/elections/2022/colorado-gop-vows-legal-action-against-fliers-claiming-it-endorsed-ron-hanks-in-u-s/article_ae454690-ec37-11ec-96c9-6b3234ad512c.html.

⁷ Compl. at 3-8, MUR 8023.

⁸ *Id.*; Compl., Ex. 3-5, MUR 8017.

⁹ Compl. at 1, MUR 8017.

¹⁰ *Id.* at 3. The only specific entity identified was ProgressNow Colorado. ProgressNow Colorado is a nonprofit Colorado corporation that formed in 2005. *See* Nevada Secretary of State, Business Entity Search, <https://www.coloradosos.gov/biz/BusinessEntityCriteriaExt.do> (search "ProgressNow Colorado") (linking to articles of incorporation and amendments to articles of incorporation). It is currently recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code. *See* IRS Exempt Organizations Business Master File Extract (last visited Dec. 1, 2022), <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-co-bmf> (search in Colorado for "ProgressNow"). A news article cited in the MUR 8017 Complaint reported that "ProgressNow Colorado announced . . . it will launch a campaign against businessman Joe O'Dea" and reported its executive director as saying the campaign could involve mailers. Bente Birkeland, *The Big New Player in Colorado's Senate Primary? Democratic Groups*, CPR NEWS (June 8, 2022), <https://www.cpr.org/2022/06/08/colorado-senate-republican-primary-democrat-groups/>.

¹¹ Compl. at 3, MUR 8017 ("On information and belief, this campaign includes the electioneering communications, mailers, at issue in this Complaint.").

1 in MUR 8023 claims that the mailers were sent by Unknown Respondent via Christian Printers
2 and should have included a disclaimer.¹²

3 In Response, Christian Printers admits that it printed the mailers referencing Joe O'Dea
4 and Ron Hanks but does not identify who paid for the mailers.¹³ Christian Printers's Response
5 then gives two reasons why it did not violate the Act. First, it states that as a commercial vendor
6 engaged in *bona fide* commercial activity, Christian Printers has not made an expenditure, and
7 therefore, is not responsible for including a disclaimer.¹⁴ Second, the Response argues that
8 Christian Printers could not have violated the Act as alleged because the mailers do not meet the
9 definition of "electioneering communication[s]," which is limited to certain broadcast, cable, and
10 satellite communications.¹⁵

11 ProgressNow Colorado submitted a sworn declaration from its executive director in
12 which she states that she is "not familiar with the mail pieces" pictured in the MUR 8017
13 Complaint and that ProgressNow Colorado "has no record of these communications, [or] of any
14 involvement with such communications, or any expenditures or contributions made for such
15 communications."¹⁶

¹² Compl. at 1, MUR 8023. Like the MUR 8017 Complaint, the MUR 8023 Complaint appears to view the mailers as electioneering communications. *Id.* They are not electioneering communications for the same reason that the mailers in MUR 8017 are not electioneering communications. *See supra* note 1.

¹³ Christian Printers Resp. at 1 (Sept. 23, 2022). Christian Printers, Inc. is an Iowa corporation which also goes by the name Christian - Edwards Print & Graphics. *Business Entities Search*, IOWA SECRETARY OF STATE, <https://sos.iowa.gov/search/business/search.aspx> (last visited June 12, 2023) (search "Christian Printers"). It is full service commercial printer. *See* Christian - Edwards Print & Graphics, <https://ceprinter.com/capabilities> (last visited June 12, 2023).

¹⁴ Christian Printers Resp. at 1-2.

¹⁵ *Id.* at 2.

¹⁶ ProgressNow Colorado Resp., Decl. of Sara Loflin (May 2, 2023).

1 **III. LEGAL ANALYSIS**

2 The Act and Commission regulations require a disclaimer on certain types of
 3 communications identifying who paid for the communication and, where applicable, whether a
 4 communication was authorized by a candidate. Among other communications, disclaimers are
 5 required on all “public communications” made by a political committee and on all publicly
 6 available internet websites of a political committee.¹⁷ Disclaimers are also required on all
 7 “public communications” made by any person that expressly advocate the election or defeat of a
 8 clearly identified federal candidate or solicit contributions.¹⁸ The term “public communication”
 9 is defined as a communication by means of any broadcast, cable, or satellite communication,
 10 newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the
 11 general public, or any other form of general public political advertising.¹⁹ “Mass mailing”
 12 means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an
 13 identical or substantially similar nature within any 30-day period.”²⁰

14 The current record does not conclusively prove that each mailer meets the definition of a
 15 “mass mailing,” but such proof is not required at the preliminary stage of administrative
 16 enforcement.²¹ Recently, in MUR 7543, the Commission determined that the record sufficiently
 17 indicated a mass mailing despite the fact that the Complaint did not specify the number of

¹⁷ 11 C.F.R. § 110.11(a)(1).

¹⁸ *See* 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). 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.

¹⁹ 11 C.F.R. § 100.26.

²⁰ *Id.* § 100.27.

²¹ *See* Factual & Legal Analysis (“F&LA”) at 5, MUR 7543 (Jefferson United, Inc.)

1 mailings.²² In that case, the Commission considered the mailer's professional appearance, the
 2 inclusion of a U.S. Postal Service ("USPS") permit imprint, and the level of voter turnout in the
 3 relevant election as indicative of a mass mailing.²³

4 Here, all the mailers were sent via USPS Marketing Mail (formerly Standard Mail),
 5 which means, at a minimum, *at least* 200 copies of each mailer were distributed.²⁴ Second, as in
 6 MUR 7543, each mailer appears professionally produced. Indeed, Christian Printers, which
 7 appears to have printed the mailers at issue, is a "full service commercial printer."²⁵ Third, the
 8 voter turnout in the relevant election — the Republican primary election for U.S. Senator for
 9 Colorado — was 633,845, which, as the Commission concluded in MUR 7543, indicates that the
 10 mailers likely exceeded 500 pieces.²⁶ Finally, the MUR 8017 Complaint states, although without
 11 providing specifics, that between 400,000-500,000 voters received the mailers at issue.²⁷
 12 Therefore, it appears that the mailers meet the definition of a "mass mailing."

²² *Id.*

²³ *Id.*; see also F&LA at 10, MUR 7537 (Unknown Respondents) (concluding mailers were likely public communications because they appeared professionally produced and were sent via USPS bulk mail).

²⁴ See USPS, *USPS Marketing Mail*, <https://pe.usps.com/businessmail101?ViewName=StandardMail> (last visited June 12, 2023).

²⁵ See Christian Printers, *Capabilities*, <https://ceprinter.com/capabilities> (last visited June 12, 2023). Christian Printers stated that it was "hired to print the communications" and "produced the communications." Christian Printers Resp. at 1-2.

²⁶ Colorado Secretary of State, *Database of Historical Election Information*, <https://historicalelectiondata.coloradosos.gov/eng/> (search "2022" for "United States Senator" in "Republican Primary").

²⁷ Compl. at 4, MUR 8017.

A. Mailers Depicted in MUR 8017 & MUR 8023 Should Have Included a Disclaimer Because They Appear to be Public Communications That Expressly Advocate the Election or Defeat of a Federal Candidate

Because each mailer appears to meet the definition of a “mass mailing,” and qualifies as a “public communication,” any mailer that expressly advocates must include a disclaimer.²⁸ A communication expressly advocates under 11 C.F.R. § 100.22(a) if it:

“[u]ses 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!’”²⁹

A communication expressly advocates under 11 C.F.R. § 100.22(b) if:

“[w]hen 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.”³⁰

²⁸ 11 C.F.R. § 110.11(a)(2).

²⁹ *Id.* § 100.22(a).

³⁰ *Id.* § 100.22(b). 11 C.F.R. § 100.22(b) has been upheld by the U.S. Court of Appeals for the Tenth Circuit, which includes Colorado. *Free Speech v. FEC*, Case No. 12-CV-127-S, 2013 WL 12142583, at *7 (D. Wyoming Mar. 19, 2013) (“[A]gree[ing] with the assessment of the Fourth Circuit in [*Real Truth About Abortion v. FEC*, 681 F.3d 544, 552-56 (4th Cir. 2012)]” which upheld 11 C.F.R. § 100.22(b) against a constitutional challenge) (adopted in full as the opinion for the Tenth Circuit in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), *cert. denied* 572 U.S. 1114, No. 13-772 (2014)). The court viewed 11 C.F.R. § 100.22(b) as closely correlated to the “functional equivalent test” announced in *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 460-70 (2007). See *Free Speech*, 720 F.3d at 795.

None of the mailers use the sorts of phrases, campaign slogans, or individual words that constitute express advocacy under 11 C.F.R. § 100.22(a). Accordingly, we analyze whether the mailers expressly advocate under 11 C.F.R. § 100.22(b).

1. Two Mailers in MUR 8017 Expressly Advocate Under 11 C.F.R. § 100.22(b)

The two mailers shown in the MUR 8017 Complaint's exhibits 1-2 and exhibit 5, contained in Attachment 1 to this Report, expressly advocate under 11 C.F.R. § 100.22(b). The electoral portion is clear: one mailer states that Hanks "won the top line designation for U.S. Senate" and the other is specifically labeled as a "voter guide."³¹ As to 11 C.F.R. § 100.22(b)'s second element, reasonable minds could not differ that the mailers encourage actions to elect or defeat one or more clearly identified candidate and not some other action. An endorsement of a federal candidate is express advocacy.³² Here, the mailer shown in the MUR 8017 Complaint's exhibits 1-2 and the mailer shown in exhibit 5 state that Hanks is "endorsed by the Colorado Republican Party" and "won . . . the endorsement of the Colorado Republican Party."

³¹ See MUR 8017 Compl., Exs. 2-5. In Colorado, candidates who seek to be nominated by a major political party – either the Republican Party or the Democratic Party – can have their names placed on the ballot in two ways: submission of a candidate petition or nomination by party assembly. C.R.S. § 1-4-102. To be designated a candidate by assembly, a candidate must receive 30% or more of the vote at a nominating assembly. C.R.S. § 1-4-601(2)(a). It appears that candidates with the most assembly votes are given the top spot (or "top line designation") on the primary ballot. See Ernest Luning, *Republican Lori Saine Nabs Top Line on 8th CD Primary Ballot with Assembly Win*, COLORADO POLITICS (Apr. 4, 2022), https://www.coloradopolitics.com/elections/2022/republican-lori-saine-nabs-top-line-on-8th-cd-primary-ballot-with-assembly-win/article_f158f1ee-b43c-11ec-8caf-1b93526b562b.html.

³² See, e.g., F&LA at 6-7, MUR 6861 (Williams, *et al.*) (yard sign saying respondent "has endorsed" candidate is express advocacy); First GCR at 6 n.5 (endorsement "by definition expressly advocates") & Certification ("Cert.") at ¶ 1 (Feb. 8, 2005), MUR 5522 (Wisconsin Right to Life, Inc.); Gen. Counsel's F&LA at 2 (sign stating candidate was "endorsed by Christian Voice" was express advocacy) & Cert. ¶ 2 (Nov. 27, 1984), MUR 1711 (Christian Voice Moral Government Fund); First GCR at 2, MUR 995 (Janosko) (believing there was express advocacy where advertisement "designated a specific candidate as the "ENDORSED CANDIDATE" and the other as "CHALLENGER" but recommending no reason to believe because candidate was not a federal candidate). Corporate endorsements not coordinated with a candidate were long considered a prohibited corporate expenditure, which by definition, includes express advocacy. See Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62,797, 62,808 (Oct. 21, 2014) (revising rule on corporate endorsements following *Citizens United v. FEC*, 558 U.S. 310 (2010)).

1 The fact that Ron Hanks had *not* been endorsed by the Colorado Republican Party³³ does
 2 not make the mailers susceptible to a different interpretation on their face. And when viewed in
 3 the context of being sent close to the primary election, the fact that readers had no way of
 4 knowing from the face of the mailer that the endorsements were *not* from the Colorado
 5 Republican Party, the mailers can still only be interpreted by a reasonable person as encouraging
 6 the election of Ron Hanks and the defeat of Joe O'Dea. A different reading based on the fact
 7 that the endorsement was not true elevates context over mailers' content.³⁴ It also could lead to
 8 identical language being regulated differently depending on whether an individual recipient
 9 subjectively knows a campaign endorsement is true or false — a result entirely at odds with the
 10 express advocacy construct.³⁵ Moreover, exempting false endorsements from the definition of
 11 express advocacy could incentivize deceitfulness, and as a result, work against one the broad
 12 purposes of the Act. For example, an honest endorser who included a technically deficient
 13 disclaimer or who filed a late independent expenditure report would violate the Act, while the
 14 dishonest endorser who makes the exact same communication with no disclaimer and never files
 15 an independent expenditure report would not.

³³ Ernest Luning, *Colorado GOP Vows Legal Action Against Fliers Claiming it Endorsed Ron Hanks in U.S. Senate Primary*, COLORADO POLITICS (June 14, 2022), https://www.coloradopolitics.com/elections/2022/colorado-gop-vows-legal-action-against-fliers-claiming-it-endorsed-ron-hanks-in-u-s/article_ae454690-ec37-11ec-96c9-6b3234ad512c.html (“Let me be clear, the Colorado GOP has not and does not endorse in primary races.”) (quoting Colorado Republican Party chair Kristi Burton Brown).

³⁴ See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (“context cannot supply a meaning that is incompatible with . . . the clear import of the words”).

³⁵ See *Buckley*, 424 U.S. at 43 (rejecting interpretation of expenditure that would put speakers “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning”); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 552 (4th Cir. 2012) (“[J]ust as the ‘functional equivalent’ test is objective, so too is the similar test contained in § 100.22(b).”). Finding express advocacy here, where a communication contains a false endorsement should not establish a *per se* rule that every communication containing a statement that one candidate is “endorsed” is express advocacy. It is important that in this case, recipients could not know from the mailer itself that the sender was not also the endorser and that the endorsement was not true.

Therefore, the mailers shown in the MUR 8017 Complaint's exhibits 1-2 and exhibit 5 expressly advocate. Their electoral portion is unmistakable, unambiguous, and suggestive of only one meaning and reasonable minds could not differ as to whether they encourage the election of Ron Hanks or the defeat of Joe O'Dea.

Conversely, the "voter guide" mailer appearing in the MUR 8017 Complaint's exhibits 3-4 does not expressly advocate. While its electoral portion is unmistakable, unambiguous, and suggestive of only one meaning (it is titled as a "voter guide"), it does not encourage the election of one candidate over another. Instead, it draws a contrast between O'Dea and Hanks on the issue of gun rights by listing legislation sponsored by Hanks ("Sponsor of Constitutional Carry . . . Sponsored legislation to end limits on ammunition capacity . . . Sponsored legislation to allow use of deadly force") and describing O'Dea's contributions to Colorado Governor John Hickenlooper ("Gave hundreds in campaign contributions to Democrat John Hickenlooper after he signed laws restricting gun rights").³⁶ This mailer cannot only be interpreted by a reasonable person as encouraging the election of Ron Hanks and the defeat of Joe O'Dea.³⁷ Accordingly, it does not require a disclaimer.

2. The Mailers in MUR 8023 Expressly Advocate Under 11 C.F.R. § 100.22(b)

The mailers in MUR 8023 expressly advocate under 11 C.F.R. § 100.22(b). The electoral portion is clear: each mailer clearly identifies Joe O'Dea, a federal candidate as a federal

³⁶ MUR 8017 Compl., Ex. 4.

³⁷ See F&LA at 6-7, MUR 7557 (Center for Voter Information) (determining voter guide did not expressly advocate because "each candidate was given equal space without markings indicating a preference for either candidate. The information about the candidates' positions are stated only as "yes" or "no," . . . and are based on information contained on the candidates' website or the public record"); First GCR at 12 (website's display of candidate's voting records in relation to organization's preferred positions, even if considered a voter guide, did not expressly advocate despite failing to "present the candidates' positions in a neutral manner") & Cert. ¶ 1 (Feb. 27, 2004), MUR 5342 (U.S. Chamber of Commerce).

1 candidate by stating O'Dea "wants to run against, Michael Bennet," describing O'Dea as a
 2 "Bennet challenger" and that Bennet is "the same senator [O'Dea] now wants to defeat."³⁸ Each
 3 mailer also employs the phrase "Joe O'Dea is NOT who he says he is" preceded by statements
 4 that O'Dea "says he's a Republican," "Claims He Wants to 'Cut Wasteful Spending,'" "Claims
 5 He's A Conservative," or "Claims He Supports The Second Amendment," but donated to the
 6 candidate of the opposing political party.³⁹ That constitutes a comment on O'Dea's character
 7 (*i.e.*, that O'Dea is purposely not telling the truth should not be trusted). Taken as a whole, these
 8 mailers can only be interpreted by a reasonable person as encouraging the defeat of Joe O'Dea:
 9 their reference to O'Dea's candidacy and their comment on O'Dea's character shortly before the
 10 Republican primary election⁴⁰ — the mailers appear to have been sent within 30 days of the
 11 primary election — leaves no doubt that the mailers encourage actions to defeat O'Dea, as
 12 opposed to some other action.

13 In its explanation and justification for section 100.22(b), the Commission stated,
 14 "communications discussing or commenting on a candidate's *character, qualifications* or
 15 *accomplishments* are considered express advocacy under new section 100.22(b) if, in context,

³⁸ See, e.g., Compl. at 3, MUR 8023 (noting O'Dea "wants to run against, Michael Bennet"), 4 (describing O'Dea is a "Bennet challenger"), and 5 (stating O'Dea donated to Michael Bennet, "the same senator he [O'Dea] now wants to defeat"). Unlike the individuals depicted in the billboard in MUR 7930, O'Dea has never been a federal officeholder.

³⁹ *Id.* at 4 (O'Dea "Claims He Supports The Second Amendment"), 6 ("Claims He Wants to 'Cut Wasteful Spending'"), 7 (O'Dea "Claims He's A Conservative"), and 8 (O'Dea "says he's a Republican").

⁴⁰ The Complaint characterized the mailers as electioneering communications, indicating that they were distributed within 30 days of the Colorado Republican primary. *Id.* at 1; 11 C.F.R. § 100.29(a)(2) (defining "electioneering communication" as certain communications that are "publicly distributed . . . within 30 days before a primary or preference election").

they can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.”⁴¹

Like the Commission's interpretation of endorsements, the Commission has interpreted communications commenting on a candidate's *character, qualifications* or *accomplishments* as encouraging a candidate's election or defeat even absent a “call to action” (*i.e.*, verbs telling the reader/viewer/listener to affirmatively take electoral action as found in 11 C.F.R. § 100.22(a)).⁴²

Recently, in MUR 7543, the Commission determined that mailers expressly advocated under 11 C.F.R. § 100.22(b) when they identified a federal candidate, were sent shortly before a primary election, and commented on that candidate's character by stating “SHOULDN'T CHARACTER AND HONESTY MATTER?” preceded by the statements “bad business deals,” “problem personal finances,” and “conflicts with law enforcement & courts.”⁴³ The Commission

⁴¹ Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (emphasis added).

⁴² For example, in MURs 5511/5525, the Commission concluded that attacks on John Kerry's character, fitness for public office, and capacity to lead, including phrases such as “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command” were “unmistakable, unambiguous and suggestive of only one meaning” — and had no reasonable meaning other than to encourage actions to defeat him in the upcoming election. Conciliation Agreement at IV.25-28, MUR 5511/5525 (Swift Boat Veterans). The Commission made the same conclusion with respect to ads that commented on George Bush's character. *See* Conciliation Agreement at IV.27-28, MUR 5487 (Progress for America Voter Fund); Conciliation Agreement at IV.29, MUR 5440 (The Media Fund). In MUR 5831, the Commission concluded that, in context, an ad attacking Bob Casey's qualifications and stating: “Can we really risk Bob Casey learning on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions were “unmistakable, unambiguous and suggestive of only one meaning” — to vote against Bob Casey. F&LA at 8-9, MUR 5831 (Softer Voices). In MUR 5819, the Commission concluded that, in the context of being communicated eight days before the election, an automated telephone call directed to absentee voters stating that a candidate “has over twenty years of experience in both the public and private sector, and he has fought hard and delivered on his promises . . . [and] has made tough decisions that are right for Hawaii” was “the type [of statement] contemplated when the Commission promulgated Section 100.22(b).” F&LA at 3-4, MUR 5819 (U.S. Chamber of Commerce). Courts have similarly declined to require communications contain an affirmative “call to action” in order to be the functional equivalent of express advocacy. *See, e.g., The Real Truth About Abortion Inc. v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) (viewing application of 11 C.F.R. § 100.22(b) to ad which stated, *inter alia*, that Senator Obama “has been lying” would not be unconstitutional), *aff'd* 681 F.3d 544; *Citizens United v. FEC*, 558 U.S. 310, 325-26 (2010) (interpreting the film *Hillary: The Movie* as the functional equivalent of express advocacy).

⁴³ F&LA at 8, MUR 7543 (Jefferson United, Inc.)

made its express advocacy determination despite the mailer's omission of an electoral call to action. Similarly, in MUR 7537, the Commission viewed mailers sent shortly before an election in which federal candidates were described as "unjust," "unworthy," "un-American," and "ha[ve] betrayed American values," as express advocacy under 11 C.F.R. § 100.22(b).⁴⁴ In another recent matter, the Commission suggested that a billboard depicting two federal candidates that "criticiz[ed] their character (*i.e.* implying that they have a propensity to lie)" but which lacked an electoral call to action would be express advocacy but for the fact that the candidates pictured were also federal officeholders and because the billboard did not mention their status as federal candidates.⁴⁵ In that context, the Commission determined the billboard's message was not unambiguous.⁴⁶

* * * * *

In sum, all but one of the mailers attached to the Complaints in MURs 8017 and 8023 appear to be public communications that expressly advocate the election or defeat of a federal candidate. Accordingly, they each should have included a disclaimer. Because they did not, we recommend that the Commission find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11.⁴⁷

⁴⁴ F&LA at 13, MUR 7537 (Unknown Respondents)

⁴⁵ F&LA at 12-13, MUR 7930 (Minocqua Brewing Company SuperPAC, *et al.*)

⁴⁶ *Id.*

⁴⁷ Two of the mailers depicted in the MUR 8017 Complaint are described as voter guides. Compl., Exs. 3-5, MUR 8017. Because one of those mailers contains express advocacy, it cannot be exempt from the definition of contribution and expenditure under the Commission's voter guide rules. See 11 C.F.R. § 114.4(c)(5) (excluding corporate or labor organization sponsored voter guides from definition of "contribution" or "expenditure" if, among other things, the guide does not include express advocacy or an "electioneering message").

As for ProgressNow Colorado,⁴⁸ the only link in the record to any of the MUR 8017 mailers is a reported quote from ProgressNow's executive director Sara Loflin. However, ProgressNow's Response includes a sworn declaration from Loflin that she is not familiar with the MUR 8017 mailers, and that ProgressNow has no record of those mailers or involvement with them.⁴⁹ In the absence of any additional information connecting ProgressNow Colorado to the MUR 8017 mailers, we believe that the record sufficiently indicates that ProgressNow did not pay for the MUR 8017 mailers.⁵⁰ Accordingly, we recommend that the Commission find no reason to believe that ProgressNow Colorado violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 in connection with the mailers identified in the MUR 8017 Complaint.⁵¹

B. The Commission Should Find Reason to Believe that Unknown Respondent(s) Failed to Report the Costs of the Mailers in Violation of 52 U.S.C. § 30104(b), (c), and/or (g)

All political committees must disclose disbursements as part of their regular reporting to the Commission.⁵² Further, all political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting.⁵³ Any person other than a political committee that makes expenditures that

⁴⁸ *FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&most_recent=true&is_notice=true (search "ProgressNow" within 2022 election cycle).

⁴⁹ ProgressNow Colorado Resp., Decl. of Sara Loflin.

⁵⁰ ProgressNow Colorado did report paying \$325 for an independent expenditure in the form of a digital ad opposing O'Dea in the 2022 general election. *FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&most_recent=true&is_notice=true (search "ProgressNow" within 2022 election cycle).

⁵¹ It is possible that ProgressNow Colorado could be involved with the MUR 8023 mailers. Should our proposed investigation reveal such involvement, we will make the appropriate recommendation.

⁵² 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. *See Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007).

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

1 expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an
 2 independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).⁵⁴
 3 Additionally, political committees and other persons that make independent expenditures
 4 aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of
 5 an election, must report the expenditures by filing a 24-hour notice.⁵⁵ Political committees and
 6 other persons that make independent expenditures aggregating \$10,000 or more for an election in
 7 any calendar year, up to and including the 20th day before an election, must report the
 8 expenditures by filing a 48-hour notice.⁵⁶

9 The available information suggests that expenditures for each mailer likely exceeded
 10 \$250.⁵⁷ Therefore, they should have been disclosed to the Commission, either as an independent
 11 expenditure or as a communication made by a political committee. The Commission's database
 12 shows that no political committee located in Colorado reported payments to Christian Printers
 13 and no committee reported payments to Christian Printers (or Christian Edwards) in the month
 14 leading up to Colorado Republican primary election. Similarly, the Commission's database
 15 shows no independent expenditures paid to Christian Printers (or Christian Edwards) in the 2022

⁵⁴ The Act defines an "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); 11 C.F.R. § 100.16.

⁵⁵ See 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1). 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 aggregating less than \$10,000 in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. §§ 104.4(c), 109.10(d).

⁵⁶ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). Political committees and other persons must file 48-hour notice by 11:59 p.m. on the second day following the date on which the independent expenditure communication aggregating \$10,000 or more in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. § 104.4(b)(2).

⁵⁷ See *supra* pp. 6-7.

election cycle. In fact, the Commission's database shows no independent expenditures against O'Dea for what can be described as mail during the entire 2022 election cycle.

Accordingly, we recommend that the Commission find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures made in connection with the mailers. Also, because the mailers appear to have been distributed shortly before the June 28, 2022, Republican primary election in Colorado, and may have cost over \$1,000, a 24-hour notice may also have been required.⁵⁸ Accordingly, we recommend that the Commission find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(g).⁵⁹

For the same reasons we recommend that the Commission find no reason to believe that ProgressNow Colorado violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 in connection with the MUR 8017 mailers, we recommend that the Commission find no reason to believe ProgressNow Colorado violated 52 U.S.C. § 30104(b), (c), or (g) in connection with the mailers identified in the MUR 8017 Complaint.

⁵⁸ The MUR 8017 Complaint alleges that the mailings it identified began the week of June 6, 2022. *See supra* p. 7 (listing evidence indicating mailers met Commission's definition of a "mass mailing"). Moreover, at the time of the mailing, there were over 950,000 active registered Republican voters in Colorado. *See* Colorado Secretary of State, *Total Registered Voters By Party Affiliation and Status as of July 1, 2022*, available at <https://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2022/June/VotersByPartyStatus.pdf>. The Commission recently found reason to believe against an unknown respondent for failing to file a 24-hour notice where the number of voters in the relevant election was far fewer, but where the estimated cost of postage was \$28,363. *See, e.g.*, F&LA at 10, MUR 7543 (Jefferson United, Inc.) (finding reason to believe respondent should have filed a 24-hour notice because Jefferson Parish, Louisiana had 121,211 qualified voters)

⁵⁹ *See* F&LA at 10, MUR 7543 (Jefferson United, Inc.) (reason to believe that a respondent failed to report independent expenditures in form of a mailer in violation of 52 U.S.C. § 30104(b) or (c), *and* (g)) F&LA at 3-4, MUR 6642 (Unknown Respondents) (reason to believe that an unknown respondent failed to report independent expenditures in form of a billboard advertisement saying "FIRE KLOBUCHAR" in violation of 52 U.S.C. § 30104(b), (c), *and/or* (g)).

C. The Commission Should Find No Reason to Believe that Christian Printers Violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a) Because Only the Person Paying for the Mailers is Responsible for Including a Disclaimer

Christian Printers's Response states that it "was not the payor of the communication."⁶⁰

Instead, the Response argues that it is a commercial printing company that was acting as a commercial vendor.⁶¹ The Commission has no information to the contrary. Accordingly, because the Commission has long held that the payor, and not the vendor, is responsible for including disclaimers,⁶² we recommend that the Commission find no reason to believe that Christian Printers violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(b).

D. Prudential Considerations

As stated in its Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, the Commission may believe there is a basis for investigating a matter but may also decline to proceed for prudential reasons.⁶³ At this stage, we do not recommend that the Commission dismiss this matter as a matter of prosecutorial discretion for several reasons.

First, in previous matters involving anonymous independent expenditures where the amount in violation was unknown, the Commission has found reason to believe and authorized

⁶⁰ See Christian Printers Resp. at 1.

⁶¹ *Id.*

⁶² See, e.g., F&LA at 4 n.6, MUR 6899 (Pat Meehan for Congress, *et al.*) ("under the Act, it appears that only the person making the 'disbursement' for the communication at issue has a duty to comply with the disclaimer obligations"); First GCR at 6 ("[payor] alone is liable for the omission of a disclaimer") & Cert. at ¶¶ 1-2, MUR 5083 (Gore 2000, Inc.); F&LA at 4, MUR 4109 (Barrett for Congress) ("it is the person who pays for the campaign materials that is responsible for adhering to the Act's disclaimer requirements"); F&LA at 4, MUR 3682 (Fox for Congress Committee) ("it is Respondents' [*i.e.*, the payor's] obligation to ensure that their advertisement includes the appropriate disclaimer").

⁶³ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (changing practice in such circumstances from finding reason to believe but take no further action to dismissal or dismissal with admonishment).

MURs 8017, 8023 (Unknown Respondent(s), *et al.*)

First General Counsel's Report

Page 19 of 22

1 an investigation to identify of the payor and the costs of the communications in question.⁶⁴ Here,
 2 there is some information suggesting that the costs may have been significant.⁶⁵ Second, the
 3 initial investigative step of identifying the owner of the bulk mail permit number on each mailing
 4 in MURs 8017 and 8023 has already been done; and it identified Christian Printers as the permit
 5 owner. Third, the current record does not include other types of evidence previously cited by the
 6 Commission to justify dismissal pursuant to *Heckler v. Chaney*.⁶⁶ This is not a case where a
 7 disclaimer was technically deficient but nevertheless included some identifying information.⁶⁷
 8 Nor is there information indicating corrective action,⁶⁸ or that omitting disclaimers was a
 9 mistake,⁶⁹ or a result of vendor error, or improper legal advice.⁷⁰ Nor is there information that
 10 the mailers had limited distribution.⁷¹

⁶⁴ See, e.g., MUR 7543 (Jefferson United, Inc.) (finding reason to believe and authorizing investigation where costs for mailer expressly advocating the defeat of a federal candidate was unknown)

MUR 7355 (Unknown Respondent) (Commission approved investigation to identify payor of billboard); MUR 7280 (Unknown Owner of "Trump 2020" Facebook Page) (same as to Facebook page); MUR 6838 (Joseph Aossey) (same as to mailers).

⁶⁵ See *supra* pp. 7 (noting that a "full service commercial printer" was used for the mailers, that the voter turnout in the Colorado Republican primary election was 633,845, and that the Complaint alleged 400,000-500,000 mailers were sent).

⁶⁶ 470 U.S. 821 (1985).

⁶⁷ See, e.g., F&LA at 3, MUR 7164 (Alaska Republican Party) (mailer's disclaimer was deficient but dismissed pursuant to *Heckler* because it included identifying information); F&LA at 5, MUR 6213 (DUMPREID PAC) (same).

⁶⁸ See, e.g., MUR 6378 (Conservatives for Congress) (billboard owner affixed disclaimers on three billboards after receiving complaint); MUR 6325 (Hartline for Congress 2010) (dismissed where candidate committee failed to include disclaimers on 2 billboards but took remedial action); MUR 6118 (Roggio) (billboards with partial disclaimer fixed).

⁶⁹ See MUR 7289 (Take Back the Tenth) (Committee had advertised on other mobile billboards which included proper disclaimer).

⁷⁰ See, e.g., MUR 6378 (Conservatives for Congress, *et al.*) (dismissed where respondent added disclaimers to the billboards after being notified of Complaint. Disclaimers were omitted after respondent received incorrect legal advice); MUR 5580 (Alaska Democratic Party) (reason to believe but taking no further action where vendor inadvertently omitted disclaimer on mailers).

⁷¹ See, e.g., MUR 6321 (Mark Reed for Congress, *et al.*) (dismissed where flyers without disclaimers were "handed out," indicating limited distribution); MUR 5001 (Charlie A. Dooley, *et al.*) (reason to believe but no further action where number of pamphlets produced was small (250) and not all pamphlets were disseminated).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

V. RECOMMENDATIONS

MUR 8017

1. Find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a);
2. Find reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(b), or (c), and/or (g);

MURs 8017, 8023 (Unknown Respondent(s), *et al.*)

First General Counsel's Report

Page 21 of 22

- 1 3. Find no reason to believe that Christian Printers, Inc. violated 52 U.S.C.
- 2 § 30120(a);
- 3
- 4 4. Find no reason to believe that ProgressNow Colorado violated 52 U.S.C.
- 5 § 30120(a) or 52 U.S.C. § 30104(b), (c), or (g);
- 6
- 7 5. Approve the attached Factual and Legal Analyses for Unknown Respondent(s)
- 8 and ProgressNow Colorado;
- 9

10 **MUR 8023**

- 11
- 12 6. Find reason to believe that Unknown Respondent(s) violated 52 U.S.C.
- 13 § 30120(a);
- 14
- 15 7. Find reason to believe that Unknown Respondent(s) violated 52 U.S.C.
- 16 § 30104(b), or (c), and/or (g);
- 17
- 18 8. Find no reason to believe that Christian Printers, Inc. violated 52 U.S.C.
- 19 § 30120(a);
- 20
- 21 9. Approve the attached Factual and Legal Analysis for Unknown Respondent(s);
- 22

23 **MURs 8017 and 8023**

- 24
- 25 10. Approve the attached Factual and Legal Analysis for Christian Printer, Inc.;
- 26
- 27 11. Authorize compulsory process; and
- 28
- 29 12. Approve the appropriate letters.

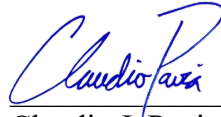
MURs 8017, 8023 (Unknown Respondent(s), *et al.*)
First General Counsel's Report
Page 22 of 22

Lisa J. Stevenson
Acting General Counsel

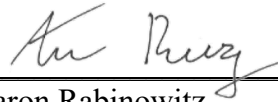
Charles Kitcher
Associate General Counsel for Enforcement

June 16, 2023

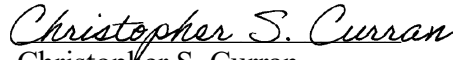
Date



Claudio J. Pavia
Deputy Associate General Counsel
for Enforcement



Aaron Rabinowitz
Assistant General Counsel



Christopher S. Curran
Attorney

Attachments:

1. Images of MUR 8017 Mailers
2. Images of MUR 8023 Mailers
3. MUR 8017 Factual and Legal Analysis for Unknown Respondent(s)
4. MUR 8017 Factual and Legal Analysis for ProgressNow Colorado
5. MUR 8023 Factual and Legal Analysis for Unknown Respondent(s)
6. MURs 8017 and 8023 Factual and Legal Analysis for Christian Printers, Inc.

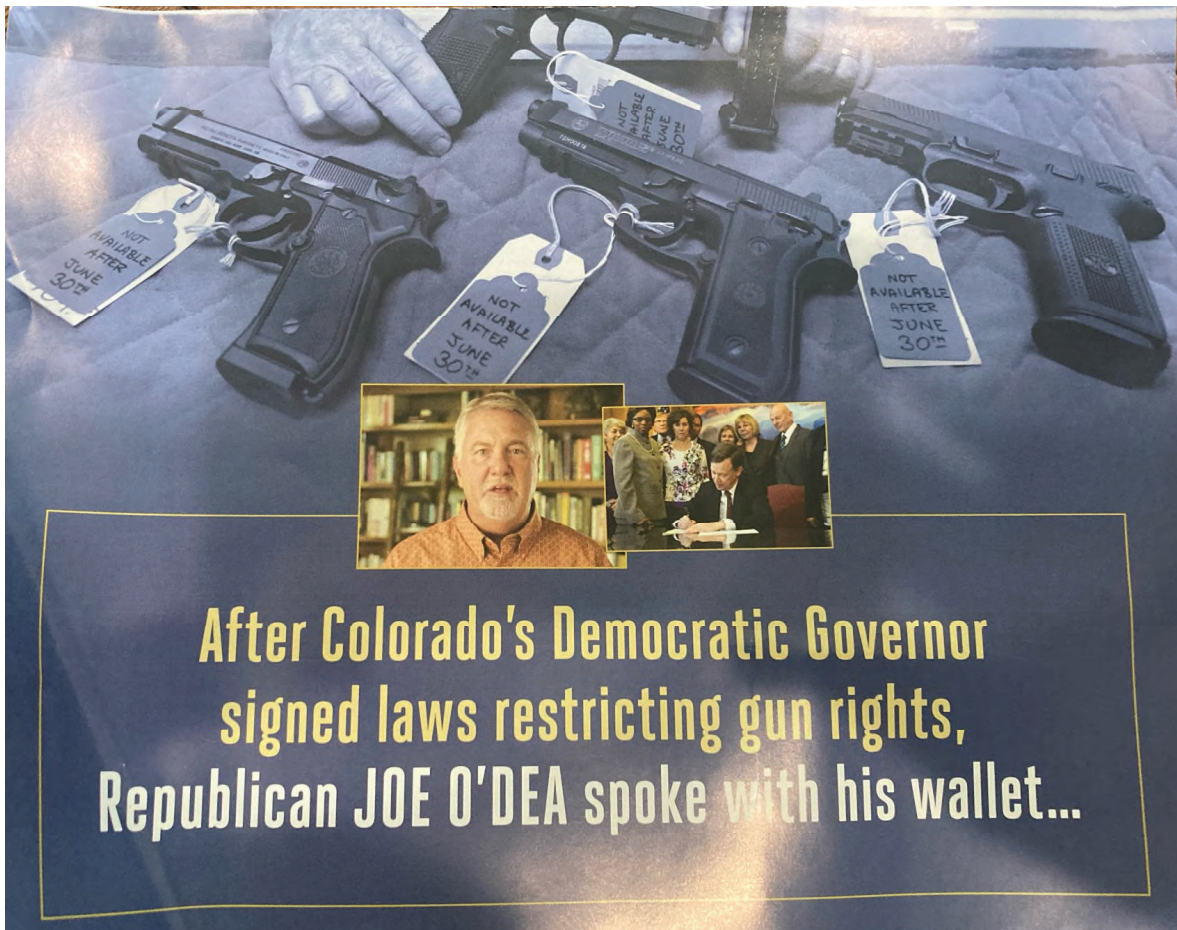


EXHIBIT 1

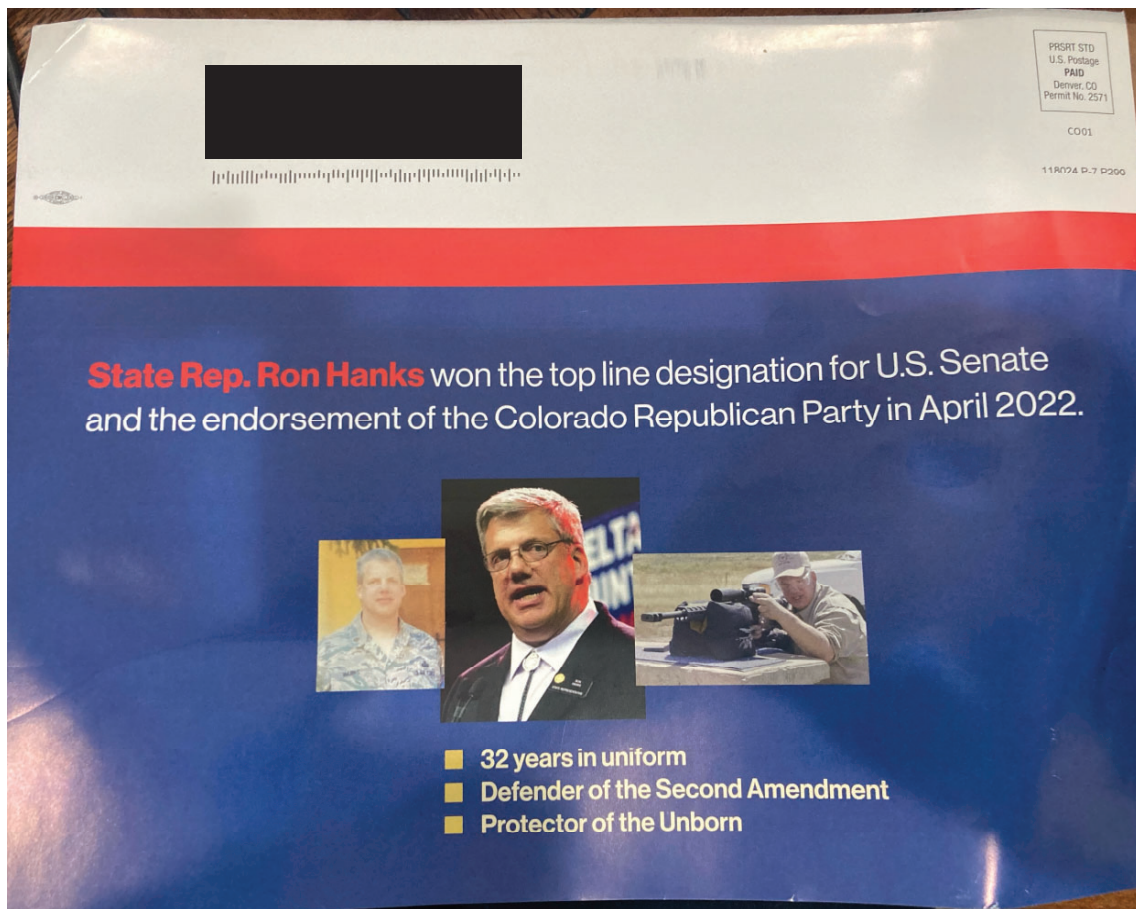


EXHIBIT 2

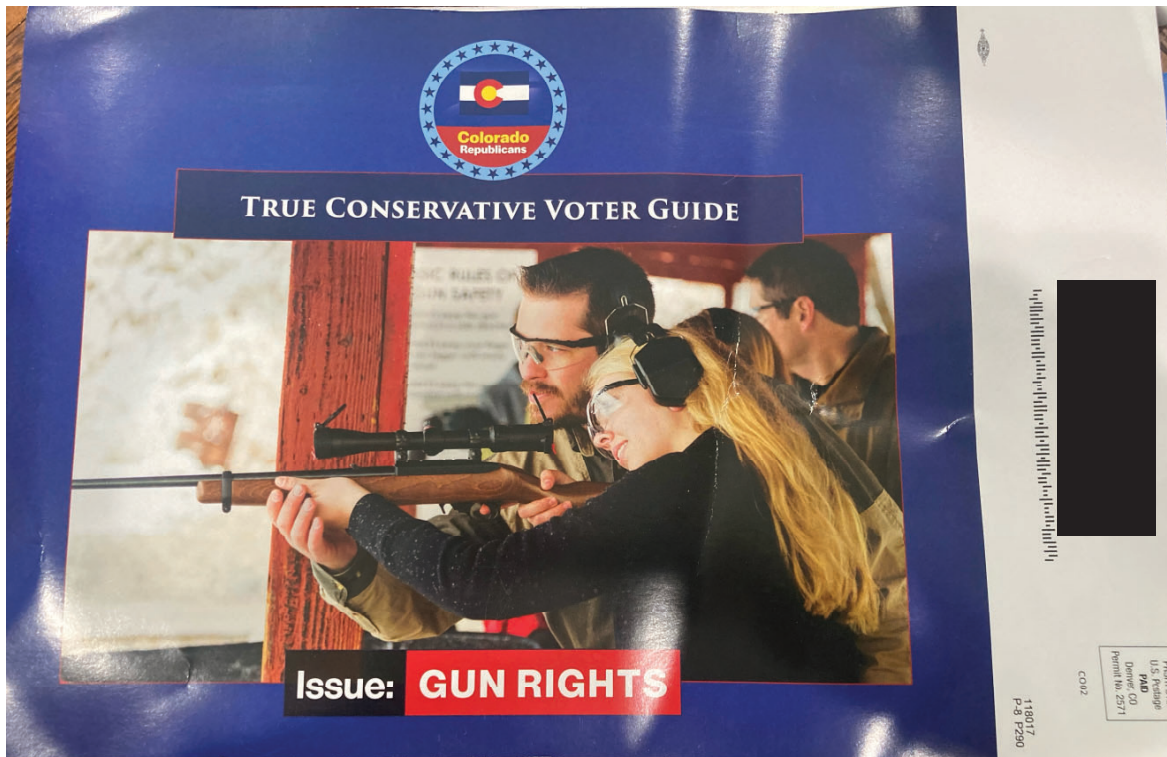



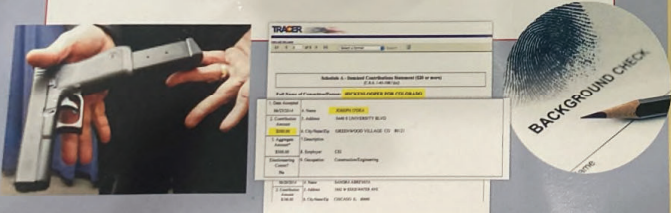
EXHIBIT 3


U.S. SENATE VOTER GUIDE: GUN RIGHTS



JOE O'DEA


Gave hundreds in campaign contributions to Democrat John Hickenlooper after he **signed laws restricting gun rights**, including background checks on private gun sales and limits on ammunition capacity.¹





RON HANKS

- Sponsor of **Constitutional Carry** proposal in Colorado that would guarantee our right to self-defense²
- Sponsored legislation to **end limits on ammunition capacity**³
- Sponsored legislation to **allow use of deadly force** against intruders⁴



1. Colorado Secretary of State

2. HB22-1033, 1-12-22

3. HB21-1070, 2-16-21

4. HB22-1105, 1-20-22

EXHIBIT 4

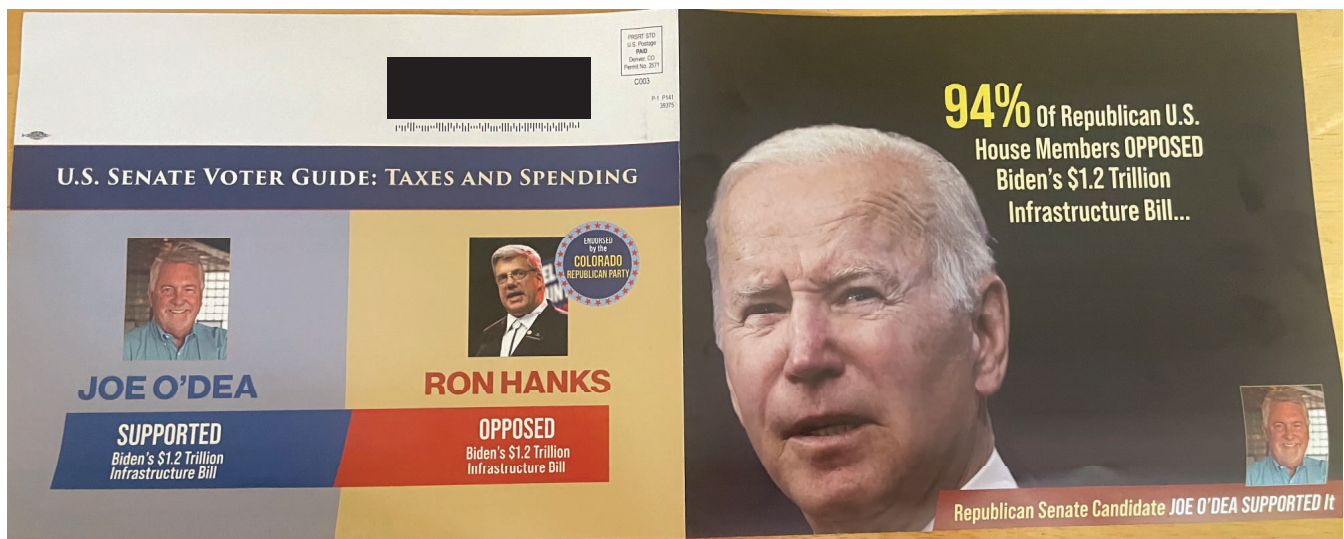


EXHIBIT 5

JOE O'DEA Gave Thousands In Campaign Contributions To Democratic Gun Control Advocates Including John Hickenlooper

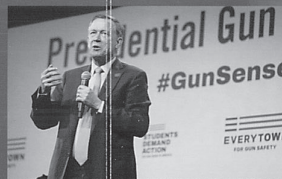


Joe O'Dea is **NOT** who he says he is.

O'Dea gave thousands in campaign dollars to multiple Democratic politicians who want to take away our gun rights. He even donated hundreds to Governor John Hickenlooper's campaign after he signed new laws restricting our gun rights.¹

O'Dea even gave hundreds of dollars to the very same Democratic Senator he now wants to run against, Michael Bennet.²

O'Dea is **NOT** who he says he is.



1. Federal Election Commission, Colorado Secretary of State
2. Federal Election Commission



Claims He Supports The Second Amendment

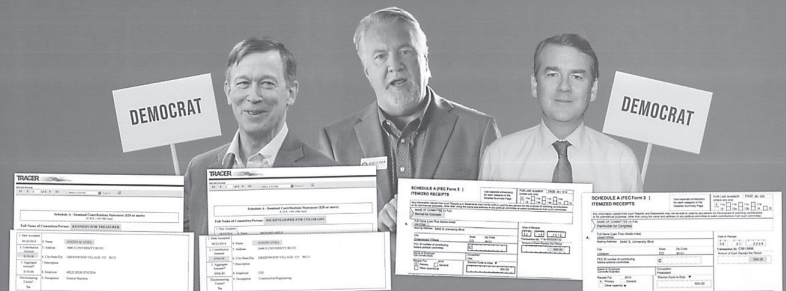


2nd Amendment

...shall not be infringed.

But The Truth Is...

Joe O'Dea gave thousands in campaign dollars to multiple Democratic politicians who want to take away our gun rights.



CO11
22043
P-2 P358

PSNRT STD
U.S. Postage
PAID
Denver, CO
Permit No. 2571

CO11
STEPHEN W FISHER
and
PRESIDENT
*****AUTO**5-DIGIT 80212
DENVER, CO 80212-1429

Joe O'Dea
NOT who he says he is.

JOE O'DEA SUPPORTED Biden's \$1.2 Trillion Pork Barrel Infrastructure Spending



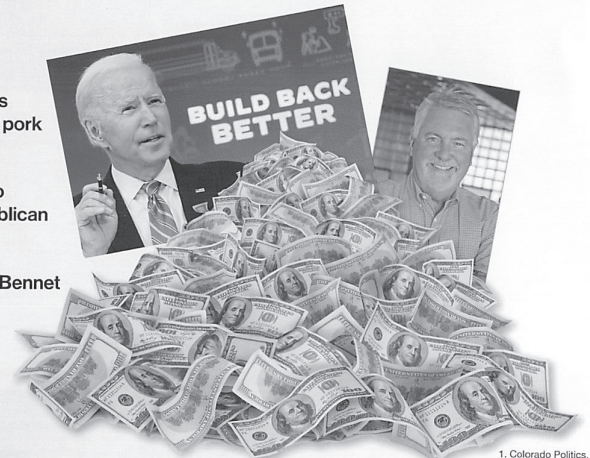
Joe O'Dea is **NOT** who he says he is.

He claims that he will "cut wasteful spending." But the truth is O'Dea supported Biden's \$1.2 trillion infrastructure bill full of pork barrel spending.

Not a single Republican member of Congress from Colorado supported Biden's infrastructure bill. In fact, 94% of all Republican U.S. House members *opposed* it.

Yet according to Colorado Politics, Joe O'Dea "was the lone Bennet challenger to say he would've voted for the bill."¹

O'Dea is **NOT** who he says he is.



¹ Colorado Politics, 11-8-21

Claims He Wants To
"Cut Wasteful Spending"



But The Truth Is...

REPUBLICAN



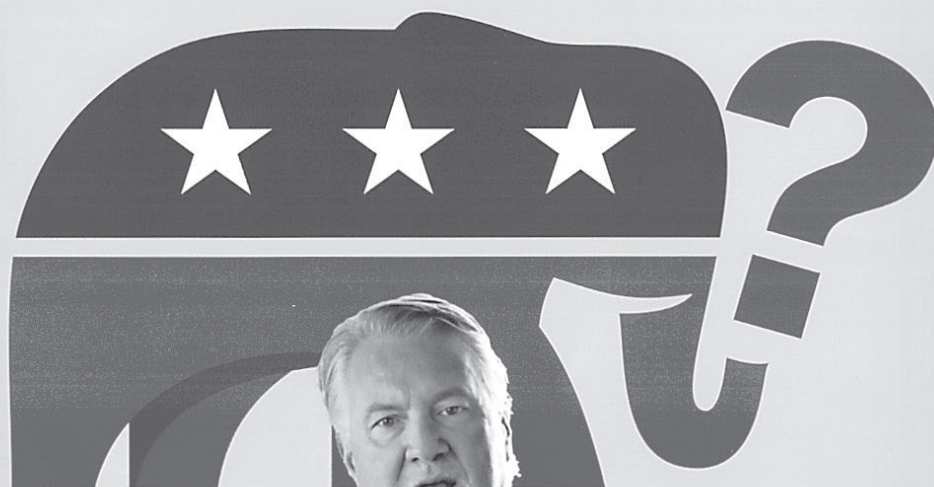
Joe O'Dea gave thousands in campaign contributions to Democrats – including a donation to the very same Democratic Senator he now wants to run against, Michael Bennet.

DEMOCRAT



Joe O'Dea
NOT who he says he is.



[illegible]

PRSR STD
U.S. Postage
PAID
Denver, CO
Permit No. 2577

Joe O'Dea Gave Thousands Of Dollars To Multiple DEMOCRATS...

Joe O'Dea says he's a Republican, but he donated to Democrat John Hickenlooper's campaign soon after he signed legislation to restrict our gun rights. He gave more to other Democrats, too – from Treasurer Cary Kennedy to Congressman Ed Perlmutter and more.

O'Dea even donated to the campaign of Democrat Michael Bennet – the same Senator he now wants to defeat!

O'Dea is NOT who he says he is.

The image shows three men: John Hickenlooper on the left, Joe O'Dea in the center, and Michael Bennet on the right. Hickenlooper and Bennet are holding signs that say "DEMOCRAT". O'Dea is holding a sign that says "JOE O'DEA". Below them are three screenshots of campaign finance forms. The leftmost is a "Schedule A (Itemized Contribution Statement)" for Cary Kennedy, showing a donation from Joe O'Dea. The middle is a "Schedule A (Itemized Contribution Statement)" for John Hickenlooper, also showing a donation from Joe O'Dea. The rightmost is a "Schedule A (Itemized Receipts)" form for Michael Bennet, showing a donation from Joe O'Dea.

O'Dea Even Donated To The Democrat He Wants To Run Against!!

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Unknown Respondent(s) **MUR:** 8017

I. INTRODUCTION

The Complaint in this matter alleges that Unknown Respondent(s) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for mailers (which the Complaint labels as “electioneering communications”) that lacked disclaimers.¹ Specifically, the Complaint alleges that the mailers were designed to undermine support for U.S. Senate candidate Joe O’Dea shortly before the 2022 Republican senate primary election in Colorado.

As explained below, two of the three mailers attached to the Complaint appear to both meet the definition of “public communication” and expressly advocate the election or defeat of a clearly identified federal candidate, and therefore required a disclaimer. Because these mailers lacked disclaimers, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a). And because the expenditures made in connection with these mailers do not appear to have been reported to the Commission, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(b) or (c), and/or (g).

¹ “Electioneering communication” is a defined term that is limited to certain broadcast, cable, and satellite communications. 11 C.F.R. § 100.29. Because mailers are neither broadcast, cable, nor satellite communications, the disclaimer requirements for electioneering communications are inapplicable. *See* 11 C.F.R. § 110.11(a)(4). However, all public communications by political committees, as well as public communications by other persons that expressly advocate for or against a candidate in a federal election also require disclaimers. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). Therefore, this report analyzes whether the mailers implicated those requirements.

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 2 of 10

II. FACTUAL BACKGROUND

Joe O’Dea and Ron Hanks were both candidates in the June 28, 2022 Republican primary election for U.S. Senate in Colorado.² The mailers pictured in Attachment 1 were sent to Colorado voters in the weeks leading up to that election.³ Two of the three mailers contrast the positions of O’Dea and Hanks on the issue of “gun rights” and “taxes and spending.”⁴ A third mailer portrays Hanks as a “Defender of the Second Amendment” and O’Dea as someone who supports restricting gun rights.⁵ Two of the mailers state that Hanks had been “endorsed” by the Colorado Republican Party.⁶ The mailers include the same postmark: “**PAID** Denver, CO PERMIT NO. 2571.”⁷

The Complaint alleges that an Unknown Respondent and Christian Printers violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 by sending the mailers pictured in Attachment 1 without disclaimers.⁸ The Complaint identifies “progressive and other democratic-aligned groups, including ProgressNow Colorado” as “part of a coordinated effort to use false electioneering communications to discredit Joe O’Dea.”⁹ The Complaint also alleges that the “coordinated effort” included the specific mailers at issue.¹⁰

² See Joseph Matthew O’Dea, Statement of Candidacy (Oct. 8, 2021), <https://docquery.fec.gov/pdf/871/202110089467207871/202110089467207871.pdf>; Ron Hanks, Statement of Candidacy (Oct. 1, 2021), <https://docquery.fec.gov/pdf/809/202110019467154809/202110019467154809.pdf>.

³ Compl. at 3, Exs. 1-5 (June 16, 2022), MUR 8017 (Unknown Respondent(s), *et al.*).

⁴ *Id.*, Ex. 3-5.

⁵ *Id.*, Exs. 1-2.

⁶ *Id.*, Exs. 2, 5.

⁷ *Id.*, Ex. 3-5.

⁸ *Id.* at 1.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3 (“On information and belief, this campaign includes the electioneering communications, mailers, at issue in this Complaint.”).

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 3 of 10

III. LEGAL ANALYSIS

The Act and Commission regulations require a disclaimer on certain types of communications identifying who paid for the communication and, where applicable, whether a communication was authorized by a candidate. Among other communications, disclaimers are required on all “public communications” made by a political committee and on all publicly available internet websites of a political committee.¹¹ Disclaimers are also required on all “public communications” made by any person that expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions.¹² The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.¹³ “Mass mailing” means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”¹⁴

The current record does not conclusively prove that each mailer meets the definition of a “mass mailing,” but such proof is not required at the preliminary stage of administrative enforcement. Instead, the Commission considers the mailers’ professional appearance, the inclusion of a U.S. Postal Service (“USPS”) permit imprint, and the level of voter turnout in the relevant election as indicative of a mass mailing.

¹¹ 11 C.F.R. § 110.11(a)(1).

¹² See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). 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.

¹³ 11 C.F.R. § 100.26.

¹⁴ *Id.* § 100.27.

Here, all the mailers were sent via USPS Marketing Mail (formerly Standard Mail), which means, at a minimum, *at least* 200 copies of each mailer were distributed.¹⁵ Second, each mailer appears professionally produced. Indeed, Christian Printers, which appears to have printed the mailers at issue, is a “full service commercial printer.”¹⁶ Third, the voter turnout in the relevant election — the Republican primary election for U.S. Senator for Colorado — was 633,845, which indicates that the mailers likely exceeded 500 pieces.¹⁷ Finally, the Complaint states, although without providing specifics, that between 400,000-500,000 voters received the mailers at issue.¹⁸ Therefore, it appears that the mailers meet the definition of a “mass mailing.”

A. There is Reason to Believe Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 By Failing to Include Disclaimers on Public Communications That Expressly Advocate the Election or Defeat of a Federal Candidate

Because each mailer appears to meet the definition of a “mass mailing,” and qualifies as a “public communication,” any mailer that expressly advocates must include a disclaimer.¹⁹ A communication expressly advocates under 11 C.F.R. § 100.22(a) if it:

“[u]ses 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

¹⁵ See USPS, *USPS Marketing Mail*, <https://pe.usps.com/businessmail101?ViewName=StandardMail> (last visited June 12, 2023).

¹⁶ See Christian Printers, *Capabilities*, <https://ceprinter.com/capabilities> (last visited June 12, 2023). Christian Printers stated that it was “hired to print the communications” and “produced the communications.” Christian Printers Resp. at 1-2.

¹⁷ Colorado Secretary of State, *Database of Historical Election Information*, <https://historicalelectiondata.coloradosos.gov/eng/> (search “2022” for “United States Senator” in “Republican Primary”).

¹⁸ Compl. at 4, MUR 8017.

¹⁹ 11 C.F.R. § 110.11(a)(2).

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 5 of 10

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!*’”²⁰

A communication expressly advocates under 11 C.F.R. § 100.22(b) if:

“[w]hen 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.”²¹

None of the mailers use the sorts of phrases, campaign slogans, or individual words that constitute express advocacy under 11 C.F.R. § 100.22(a). Accordingly, we analyze whether the mailers expressly advocate under 11 C.F.R. § 100.22(b).

1. Two Mailers Expressly Advocate Under 11 C.F.R. § 100.22(b)

The two mailers shown in the Complaint’s exhibits 1-2 and exhibit 5, contained in Attachment 1, expressly advocate under 11 C.F.R. § 100.22(b). The electoral portion is clear: one mailer states that Hanks “won the top line designation for U.S. Senate” and the other is specifically labeled as a “voter guide.”²² As to 11 C.F.R. 100.22(b)’s second element,

²⁰ *Id.* § 100.22(a).

²¹ *Id.* § 100.22(b). 11 C.F.R. § 100.22(b) has been upheld by the U.S. Court of Appeals for the Tenth Circuit, which includes Colorado. *Free Speech v. FEC*, Case No. 12-CV-127-S, 2013 WL 12142583, at *7 (D. Wyoming Mar. 19, 2013) (“[A]gree[ing] with the assessment of the Fourth Circuit in [*Real Truth About Abortion v. FEC*, 681 F.3d 544, 552-56 (4th Cir. 2012)]” which upheld 11 C.F.R. § 100.22(b) against a constitutional challenge) (adopted in full as the opinion for the Tenth Circuit in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), *cert. denied* 572 U.S. 1114, No. 13-772 (2014)). The court viewed 11 C.F.R. § 100.22(b) as closely correlated to the “functional equivalent test” announced in *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 460-70 (2007). *See Free Speech*, 720 F.3d at 795.

²² *See* MUR 8017 Compl., Exs. 2-5. In Colorado, candidates who seek to be nominated by a major political party – either the Republican Party or the Democratic Party – can have their names placed on the ballot in two ways; submission of a candidate petition or nomination by party assembly. C.R.S. § 1-4-102. To be designated a candidate by assembly, a candidate must receive 30% or more of the vote at a nominating assembly. C.R.S. § 1-4-601(2)(a). It appears that candidates with the most assembly votes are given the top spot (or “top line designation”).

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 6 of 10

reasonable minds could not differ that the mailers encourage actions to elect or defeat one or more clearly identified candidate and not some other action. An endorsement of a federal candidate is express advocacy.²³ Here, the mailer shown in the Complaint’s exhibits 1-2 and the mailer shown in exhibit 5 state that Hanks is “endorsed by the Colorado Republican Party” and “won . . . the endorsement of the Colorado Republican Party.”

The fact that Ron Hanks had *not* been endorsed by the Colorado Republican Party²⁴ does not make the mailers susceptible to a different interpretation on their face. And when viewed in the context of being sent close to the primary election, the fact that readers had no way of knowing from the face of the mailer that the endorsements were *not* from the Colorado Republican Party, the mailers can still only be interpreted by a reasonable person as encouraging the election of Ron Hanks and the defeat of Joe O’Dea. A different reading based on the fact that the endorsement was not true elevates context over mailers’ content.²⁵ It also could lead to

on the primary ballot. See Ernest Luning, *Republican Lori Saine Nabs Top Line on 8th CD Primary Ballot with Assembly Win*, COLORADO POLITICS (Apr. 4, 2022), https://www.coloradopolitics.com/elections/2022/republican-lori-saine-nabs-top-line-on-8th-cd-primary-ballot-with-assembly-win/article_f158f1ee-b43c-11ec-8caf-1b93526b562b.html.

²³ See, e.g., Factual and Legal Analysis (“F&LA”) at 6-7, MUR 6861 (Williams, *et al.*) (yard sign saying respondent “has endorsed” candidate is express advocacy); First GCR at 6 n.5 (endorsement “by definition expressly advocates”) & Certification (“Cert.”) at ¶ 1 (Feb. 8, 2005), MUR 5522 (Wisconsin Right to Life, Inc.); Gen. Counsel’s F&LA at 2 (sign stating candidate was “endorsed by Christian Voice” was express advocacy) & Cert. ¶ 2 (Nov. 27, 1984), MUR 1711 (Christian Voice Moral Government Fund); First GCR at 2, MUR 995 (Janosko) (believing there was express advocacy where advertisement “designated a specific candidate as the “ENDORSED CANDIDATE” and the other as “CHALLENGER” but recommending no reason to believe because candidate was not a federal candidate). Corporate endorsements not coordinated with a candidate were long considered a prohibited corporate expenditure, which by definition, includes express advocacy. See Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62,797, 62,808 (Oct. 21, 2014) (revising rule on corporate endorsements following *Citizens United v. FEC*, 558 U.S. 310 (2010)).

²⁴ Ernest Luning, *Colorado GOP Vows Legal Action Against Fliers Claiming it Endorsed Ron Hanks in U.S. Senate Primary*, COLORADO POLITICS (June 14, 2022), https://www.coloradopolitics.com/elections/2022/colorado-gop-vows-legal-action-against-fliers-claiming-it-endorsed-ron-hanks-in-u-s/article_ae454690-ec37-11ec-96c9-6b3234ad512c.html (“Let me be clear, the Colorado GOP has not and does not endorse in primary races.”) (quoting Colorado Republican Party chair Kristi Burton Brown).

²⁵ See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (“context cannot supply a meaning that is incompatible with . . . the clear import of the words”).

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 7 of 10

1 identical language being regulated differently depending on whether an individual recipient
2 subjectively knows a campaign endorsement is true or false — a result entirely at odds with the
3 express advocacy construct.²⁶ Moreover, exempting false endorsements from the definition of
4 express advocacy could incentivize deceitfulness, and as a result, work against one the broad
5 purposes of the Act. For example, an honest endorser who included a technically deficient
6 disclaimer or who filed a late independent expenditure report would violate the Act, while the
7 dishonest endorser who makes the exact same communication with no disclaimer and never files
8 an independent expenditure report would not.

9 Therefore, the mailers shown in the Complaint’s exhibits 1-2 and exhibit 5 expressly
10 advocate. Their electoral portion is unmistakable, unambiguous, and suggestive of only one
11 meaning and reasonable minds could not differ as to whether they encourage the election of Ron
12 Hanks or the defeat of Joe O’Dea.

13 Conversely, the “voter guide” mailer appearing in the Complaint’s exhibits 3-4 does not
14 expressly advocate. While its electoral portion is unmistakable, unambiguous, and suggestive of
15 only one meaning (it is titled as a “voter guide”), it does not encourage the election of one
16 candidate over another. Instead, it draws a contrast between O’Dea and Hanks on the issue of
17 gun rights by listing legislation sponsored by Hanks (“Sponsor of Constitutional Carry
18 Sponsored legislation to end limits on ammunition capacity . . . Sponsored legislation to allow
19 use of deadly force”) and describing O’Dea’s contributions to Colorado Governor John
20 Hickenlooper (“Gave hundreds in campaign contributions to Democrat John Hickenlooper after

²⁶ See *Buckley*, 424 U.S. at 43 (rejecting interpretation of expenditure that would put speakers “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning”); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 552 (4th Cir. 2012) (“[J]ust as the ‘functional equivalent’ test is objective, so too is the similar test contained in § 100.22(b).”).

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 8 of 10

he signed laws restricting gun rights”).²⁷ This mailer cannot only be interpreted by a reasonable person as encouraging the election of Ron Hanks and the defeat of Joe O’Dea.²⁸ Accordingly, it does not require a disclaimer.

In sum, the mailers shown in the Complaint’s exhibits 1-2 and exhibit 5 appear to be public communications that expressly advocate the election or defeat of a federal candidate. Accordingly, they should have included a disclaimer. Because they did not, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11.²⁹

B. There is Reason to Believe that Unknown Respondent(s) Failed to Report the Costs of the Mailers in Violation of 52 U.S.C. § 30104(b), (c), and/or (g)

All political committees must disclose disbursements as part of their regular reporting to the Commission.³⁰ Further, all political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting.³¹ Any person other than a political committee that makes expenditures that

²⁷ MUR 8017 Compl., Ex. 4.

²⁸ See F&LA at 6-7, MUR 7557 (Center for Voter Information) (determining voter guide did not expressly advocate because “each candidate was given equal space without markings indicating a preference for either candidate. The information about the candidates’ positions are stated only as “yes” or “no,” . . . and are based on information contained on the candidates’ website or the public record”); First GCR at 12 (website’s display of candidate’s voting records in relation to organization’s preferred positions, even if considered a voter guide, did not expressly advocate despite failing to “present the candidates’ positions in a neutral manner”) & Cert. ¶ 1 (Feb. 27, 2004), MUR 5342 (U.S. Chamber of Commerce).

²⁹ Two of the mailers depicted in the Complaint are described as voter guides. Compl., Exs. 3-5, MUR 8017. Because one of those mailers contains express advocacy, it cannot be exempt from the definition of contribution and expenditure under the Commission’s voter guide rules. See 11 C.F.R. § 114.4(c)(5) (excluding corporate or labor organization sponsored voter guides from definition of “contribution” or “expenditure” if, among other things, the guide does not include express advocacy or an “electioneering message”).

³⁰ 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. See Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007).

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

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 9 of 10

expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).³² Additionally, political committees and other persons that make independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-hour notice.³³ Political committees and other persons that make independent expenditures aggregating \$10,000 or more for an election in any calendar year, up to and including the 20th day before an election, must report the expenditures by filing a 48-hour notice.³⁴

The available information suggests that expenditures for each mailer likely exceeded \$250.³⁵ Therefore, they should have been disclosed to the Commission, either as an independent expenditure or as a communication made by a political committee. The Commission's database shows that no political committee located in Colorado reported payments to Christian Printers and no committee reported payments to Christian Printers in the month leading up to Colorado Republican primary election. Similarly, the Commission's database shows no independent expenditures paid to Christian Printers in the 2022 election cycle. In fact, the Commission's

³² The Act defines an "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); 11 C.F.R. § 100.16.

³³ See 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1). 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 aggregating less than \$10,000 in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. §§ 104.4(c), 109.10(d).

³⁴ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). Political committees and other persons must file 48-hour notice by 11:59 p.m. on the second day following the date on which the independent expenditure communication aggregating \$10,000 or more in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. § 104.4(b)(2).

³⁵ See *supra* pp. 3-4.

MUR 8017 (Unknown Respondent(s))
Factual and Legal Analysis
Page 10 of 10

1 database shows no independent expenditures against O’Dea for what can be described as mail
2 during the entire 2022 election cycle.

3 The Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C.
4 § 30104(b) or (c) by failing to report expenditures made in connection with the mailers. Also,
5 because the mailers appear to have been distributed shortly before the June 28, 2022, Republican
6 primary election in Colorado, and may have cost over \$1,000, a 24-hour notice may also have
7 been required.³⁶ Accordingly, the Commission finds reason to believe that Unknown
8 Respondent(s) violated 52 U.S.C. § 30104(g).³⁷

³⁶ The Complaint alleges that the mailings it identified began the week of June 6, 2022. *See supra* p. 4 (listing evidence indicating mailers met Commission’s definition of a “mass mailing”). Moreover, at the time of the mailing, there were over 950,000 active registered Republican voters in Colorado. *See* Colorado Secretary of State, *Total Registered Voters By Party Affiliation and Status as of July 1, 2022*, available at <https://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2022/June/VotersByPartyStatus.pdf>.

³⁷ *See* F&LA at 3-4, MUR 6642 (Unknown Respondents) (reason to believe that an unknown respondent failed to report independent expenditures in form of a billboard advertisement saying “FIRE KLOBUCHAR” in violation of 52 U.S.C. § 30104(b), (c), and/or (g)).

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS****RESPONDENT:** ProgressNow Colorado**MUR:** 8017**I. INTRODUCTION**

The Complaint in this matter alleges that ProgressNow Colorado violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for mailers (which the Complaint labels as “electioneering communications”) that lacked disclaimers.¹ Specifically, the Complaint alleges that the mailers were designed to undermine support for U.S. Senate candidate Joe O’Dea shortly before the 2022 Republican senate primary election in Colorado.

Because the available record does not sufficiently indicate that ProgressNow Colorado was involved with the mailers, the Commission finds no reason to believe ProgressNow Colorado violated 52 U.S.C. § 30104(b), (c), or (g), 52 U.S.C. § 30120(a) or 11 C.F.R. § 110.11(a).

II. FACTUAL BACKGROUND

Joe O’Dea and Ron Hanks were both candidates in the June 28, 2022 Republican primary election for U.S. Senate in Colorado.² The mailers pictured in Attachment 1 were sent to

¹ “Electioneering communication” is a defined term that is limited to certain broadcast, cable, and satellite communications. 11 C.F.R. § 100.29. Because mailers are neither broadcast, cable, nor satellite communications, the disclaimer requirements for electioneering communications are inapplicable. *See* 11 C.F.R. § 110.11(a)(4). However, all public communications by political committees, as well as public communications by other persons that expressly advocate for or against a candidate in a federal election also require disclaimers. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). Therefore, this report analyzes whether the mailers implicated those requirements.

² *See* Joseph Matthew O’Dea, Statement of Candidacy (Oct. 8, 2021), <https://docquery.fec.gov/pdf/871/202110089467207871/202110089467207871.pdf>; Ron Hanks, Statement of Candidacy (Oct. 1, 2021), <https://docquery.fec.gov/pdf/809/202110019467154809/202110019467154809.pdf>.

MUR 8017 (ProgressNow Colorado)
Factual and Legal Analysis
Page 2 of 6

Colorado voters in the weeks leading up to that election.³ Two of the three mailers contrast the positions of O’Dea and Hanks on the issue of “gun rights” and “taxes and spending.”⁴ A third mailer portrays Hanks as a “Defender of the Second Amendment” and O’Dea as someone who supports restricting gun rights.⁵ Two of the mailers state that Hanks had been “endorsed” by the Colorado Republican Party.⁶ The mailers include the postmark: “**PAID** Denver, CO PERMIT NO. 2571.”⁷

The Complaint alleges that ProgressNow Colorado violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 by sending the mailers pictured in Attachment 1 without disclaimers.⁸ While not included the Complaint’s caption, the Complaint identifies “progressive and other democratic-aligned groups, including ProgressNow Colorado” as “part of a coordinated effort to use false electioneering communications to discredit Joe O’Dea.”⁹ The Complaint also alleges that the “coordinated effort” included the specific mailers at issue.¹⁰

³ Compl. at 3, Exs. 1-5 (June 16, 2022), MUR 8017 (Unknown Respondent(s), *et al.*).

⁴ *Id.*, Ex. 3-5, MUR 8017.

⁵ *Id.*, Exs. 1-2.

⁶ *Id.*, Exs. 2, 5.

⁷ *Id.*, Ex. 3-5, MUR 8017.

⁸ *Id.* at 3, MUR 8017.

⁹ *Id.* at 3. The only specific entity identified was ProgressNow Colorado. ProgressNow Colorado is a nonprofit Colorado corporation that formed in 2005. *See* Nevada Secretary of State, Business Entity Search, <https://www.coloradosos.gov/biz/BusinessEntityCriteriaExt.do> (search “ProgressNow Colorado”) (linking to articles of incorporation and amendments to articles of incorporation). It is currently recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code. *See* IRS Exempt Organizations Business Master File Extract (last visited June 12, 2023), <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-co-bmf> (search in Colorado for “ProgressNow”). A news article cited in the Complaint reported that “ProgressNow Colorado announced . . . it will launch a campaign against businessman Joe O’Dea” and reported its executive director as saying the campaign could involve mailers. Bente Birkeland, *The Big New Player in Colorado’s Senate Primary? Democratic Groups*, CPR NEWS (June 8, 2022), <https://www.cpr.org/2022/06/08/colorado-senate-republican-primary-democrat-groups/>.

¹⁰ Compl. at 3, MUR 8017 (“On information and belief, this campaign includes the electioneering communications, mailers, at issue in this Complaint.”).

ProgressNow Colorado submitted a sworn declaration from its executive director in which she states that she is “not familiar with the mail pieces” pictured in the Complaint and that ProgressNow Colorado “has no record of these communications, [or] of any involvement with such communications, or any expenditures or contributions made for such communications.”¹¹

III. LEGAL ANALYSIS

The Act and Commission regulations require a disclaimer on certain types of communications identifying who paid for the communication and, where applicable, whether a communication was authorized by a candidate. Among other communications, disclaimers are required on all “public communications” made by a political committee and on all publicly available internet websites of a political committee.¹² Disclaimers are also required on all “public communications” made by any person that expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions.¹³ The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.¹⁴ “Mass mailing” means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”¹⁵

¹¹ ProgressNow Colorado Resp., Decl. of Sara Loflin (May 2, 2023).

¹² 11 C.F.R. § 110.11(a)(1).

¹³ See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). 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.

¹⁴ 11 C.F.R. § 100.26.

¹⁵ *Id.* § 100.27.

A. There is No Reason to Believe that ProgressNow Colorado Failed to Include Disclaimers in Violation of 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a)

The only link in the record between ProgressNow Colorado and any of the mailers is a reported quote from ProgressNow’s executive director Sara Loflin. However, ProgressNow’s Response includes a sworn declaration from Loflin that she is not familiar with the mailers, and that ProgressNow has no record of the mailers or involvement with them.¹⁶ In the absence of any additional information connecting ProgressNow Colorado to the mailers, we believe that the record sufficiently indicates that ProgressNow did not pay for them.¹⁷ Accordingly, the Commission finds no reason to believe that ProgressNow Colorado violated 52 U.S.C. § 30104(b), (c), or (g), or 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 in connection with the mailers identified in the Complaint.

B. There is No Reason to Believe ProgressNow Colorado Failed to Report Independent Expenditures in Violation of 52 U.S.C. § 30104(b), (c), or (g)

All political committees must disclose disbursements as part of their regular reporting to the Commission.¹⁸ Further, all political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting.¹⁹ Any person other than a political committee that makes expenditures that expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an

¹⁶ ProgressNow Colorado Resp., Decl. of Sara Loflin.

¹⁷ ProgressNow Colorado did report paying \$325 for an independent expenditure in the form of a digital ad opposing O’Dea in the 2022 general election. *FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&most_recent=true&is_notice=true (search “ProgressNow” within 2022 election cycle).

¹⁸ 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. *See Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

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

independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).²⁰ Additionally, political committees and other persons that make independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-hour notice.²¹ Political committees and other persons that make independent expenditures aggregating \$10,000 or more for an election in any calendar year, up to and including the 20th day before an election, must report the expenditures by filing a 48-hour notice.²²

The available information suggests that expenditures for each mailer likely exceeded \$250. Therefore, they should have been disclosed to the Commission, either as an independent expenditure or as a communication made by a political committee. The Commission's database shows that no political committee located in Colorado reported payments to Christian Printers and no committee reported payments to Christian Printers (or Christian Edwards) in the month leading up to Colorado Republican primary election. Similarly, the Commission's database shows no independent expenditures paid to Christian Printers (or Christian Edwards) in the 2022 election cycle. In fact, the Commission's database shows no independent expenditures against O'Dea for what can be described as mail during the entire 2022 election cycle.

²⁰ The Act defines an "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); 11 C.F.R. § 100.16.

²¹ See 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1). 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 aggregating less than \$10,000 in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. §§ 104.4(c), 109.10(d).

²² 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). Political committees and other persons must file 48-hour notice by 11:59 p.m. on the second day following the date on which the independent expenditure communication aggregating \$10,000 or more in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. § 104.4(b)(2).

MUR 8017 (ProgressNow Colorado)
Factual and Legal Analysis
Page 6 of 6

- 1 Because the record sufficiently indicates that ProgressNow did not pay for the mailers,
- 2 the Commission finds no reason to believe that ProgressNow Colorado violated 52 U.S.C.
- 3 § 30104(b), (c), or (g) in connection with the mailers.

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Unknown Respondent(s) **MUR:** 8023

I. INTRODUCTION

The Complaint in this matter alleges that Unknown Respondent(s) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for mailers (which the Complaint labels as “electioneering communications”) that lacked disclaimers.¹

As explained below, the mailers attached to the Complaint appear to both meet the definition of “public communication” and expressly advocate the election or defeat of a clearly identified federal candidate, and therefore required disclaimers. Because the mailers lacked disclaimers, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a). And because the expenditures made in connection with these mailers do not appear to have been reported to the Commission, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30104(b) or (c), and/or (g).

¹ “Electioneering communication,” is a defined term that is limited to certain broadcast, cable, and satellite communications. 11 C.F.R. § 100.29. Because mailers are neither broadcast, cable, nor satellite communications, the disclaimer requirements for electioneering communications are inapplicable. *See* 11 C.F.R. § 110.11(a)(4). However, all public communications by political committees, as well as public communications by other persons that expressly advocate for or against a candidate in a federal election also require disclaimers. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). Therefore, the Commission analyzes whether the mailers implicated those requirements.

II. FACTUAL BACKGROUND

Joe O’Dea and Ron Hanks were both candidates in the June 28, 2022 Republican primary election for U.S. Senate in Colorado.² The mailers pictured in Attachments 1 were sent to Colorado voters in the weeks leading up to that election.³ The mailers focus exclusively on O’Dea and state that O’Dea “says he’s a Republican,” “Claims He Wants to ‘Cut Wasteful Spending,’” “Claims He’s A Conservative,” or “Claims He Supports The Second Amendment,” but add “Joe O’Dea is NOT who he says he is” because he donated to the U.S. Senate candidate of the opposing political party.⁴ The mailers include the same postmark: “**PAID** Denver, CO PERMIT NO. 2571.”⁵

The Complaint claims that the mailers were sent by Unknown Respondent via Christian Printers and should have included a disclaimer.⁶

III. LEGAL ANALYSIS

The Act and Commission regulations require a disclaimer on certain types of communications identifying who paid for the communication and, where applicable, whether a communication was authorized by a candidate. Among other communications, disclaimers are required on all “public communications” made by a political committee and on all publicly available internet websites of a political committee.⁷ Disclaimers are also required on all “public

² See Joseph Matthew O’Dea, Statement of Candidacy (Oct. 8, 2021), <https://docquery.fec.gov/pdf/871/202110089467207871/202110089467207871.pdf>; Ron Hanks, Statement of Candidacy (Oct. 1, 2021), <https://docquery.fec.gov/pdf/809/202110019467154809/202110019467154809.pdf>.

³ Compl. at 3-8 (July 8, 2022), MUR 8023 (Unknown Respondent(s), *et al.*).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1.

⁷ 11 C.F.R. § 110.11(a)(1).

MUR 8023 (Unknown Respondent(s))
Factual and Legal Analysis
Page 3 of 9

communications” made by any person that expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions.⁸ The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.⁹ “Mass mailing” means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”¹⁰

The current record does not conclusively prove that each mailer meets the definition of a “mass mailing,” but such proof is not required at the preliminary stage of administrative enforcement. Instead, the Commission considers the mailers’ professional appearance, the inclusion of a U.S. Postal Service (“USPS”) permit imprint, and the level of voter turnout in the relevant election as indicative of a mass mailing.

Here, all the mailers were sent via USPS Marketing Mail (formerly Standard Mail), which means, at a minimum, *at least* 200 copies of each mailer were distributed.¹¹ Second, each mailer appears professionally produced. Indeed, Christian Printers, which appears to have printed the mailers at issue, is a “full service commercial printer.”¹² Third, the voter turnout in the relevant election — the Republican primary election for U.S. Senator for Colorado — was

⁸ See 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). 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.

⁹ 11 C.F.R. § 100.26.

¹⁰ *Id.* § 100.27.

¹¹ See USPS, *USPS Marketing Mail*, <https://pe.usps.com/businessmail101?ViewName=StandardMail> (last visited June 12, 2023).

¹² See Christian Printers, *Capabilities*, <https://ceprinter.com/capabilities> (last visited June 12, 2023).

MUR 8023 (Unknown Respondent(s))
Factual and Legal Analysis
Page 4 of 9

633,845, which indicates that the mailers likely exceeded 500 pieces.¹³ Therefore, it appears that the mailers meet the definition of a “mass mailing.”

A. There is Reason to Believe Unknown Respondent(s) Violated 52 U.S.C. § 30120 By Failing to Include Disclaimers on Public Communications That Expressly Advocate the Election or Defeat of a Federal Candidate

Because each mailer appears to meet the definition of a “mass mailing,” and qualifies as a “public communication,” any mailer that expressly advocates must include a disclaimer.¹⁴ A communication expressly advocates under 11 C.F.R. § 100.22(a) if it:

“[u]ses 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!’”¹⁵

A communication expressly advocates under 11 C.F.R. § 100.22(b) if:

“[w]hen 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.”¹⁶

¹³ Colorado Secretary of State, *Database of Historical Election Information*, <https://historicalelectiondata.coloradosos.gov/eng/> (search “2022” for “United States Senator” in “Republican Primary”).

¹⁴ 11 C.F.R. § 110.11(a)(2).

¹⁵ *Id.* § 100.22(a).

¹⁶ *Id.* § 100.22(b). 11 C.F.R. § 100.22(b) has been upheld by the U.S. Court of Appeals for the Tenth Circuit, which includes Colorado. *Free Speech v. FEC*, Case No. 12-CV-127-S, 2013 WL 12142583, at *7 (D. Wyoming

MUR 8023 (Unknown Respondent(s))
Factual and Legal Analysis
Page 5 of 9

None of the mailers use the sorts of phrases, campaign slogans, or individual words that constitute express advocacy under 11 C.F.R. § 100.22(a). Accordingly, we analyze whether the mailers expressly advocate under 11 C.F.R. § 100.22(b).

1. The Mailers Expressly Advocate Under 11 C.F.R. § 100.22(b)

The mailers expressly advocate under 11 C.F.R. § 100.22(b). The electoral portion is clear: each mailer clearly identifies Joe O’Dea, a federal candidate as a federal candidate by stating O’Dea “wants to run against, Michael Bennet,” describing O’Dea as a “Bennet challenger” and that Bennet is “the same senator [O’Dea] now wants to defeat.”¹⁷ Each mailer also employs the phrase “Joe O’Dea is NOT who he says he is” preceded by statements that O’Dea “says he’s a Republican,” “Claims He Wants to ‘Cut Wasteful Spending,’” “Claims He’s A Conservative,” or “Claims He Supports The Second Amendment,” but donated to the candidate of the opposing political party.¹⁸ That constitutes a comment on O’Dea’s character (*i.e.*, that O’Dea is purposely not telling the truth should not be trusted). Taken as a whole, these mailers can only be interpreted by a reasonable person as encouraging the defeat of Joe O’Dea: their reference to O’Dea’s candidacy and their comment on O’Dea’s character shortly before the

Mar. 19, 2013) (“[A]gree[ing] with the assessment of the Fourth Circuit in [*Real Truth About Abortion v. FEC*, 681 F.3d 544, 552-56 (4th Cir. 2012)]” which upheld 11 C.F.R. § 100.22(b) against a constitutional challenge) (adopted in full as the opinion for the Tenth Circuit in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), *cert. denied* 572 U.S. 1114, No. 13-772 (2014)). The court viewed 11 C.F.R. § 100.22(b) as closely correlated to the “functional equivalent test” announced in *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 460-70 (2007). *See Free Speech*, 720 F.3d at 795.

¹⁷ *See, e.g.*, Compl. at 3, MUR 8023 (noting O’Dea “wants to run against, Michael Bennet”), 4 (describing O’Dea is a “Bennet challenger”), and 5 (stating O’Dea donated to Michael Bennet, “the same senator he [O’Dea] now wants to defeat”). Unlike the individuals depicted in the billboard in MUR 7930, O’Dea has never been a federal officeholder.

¹⁸ *Id.* at 4 (O’Dea “Claims He Supports The Second Amendment”), 6 (“Claims He Wants to ‘Cut Wasteful Spending”), 7 (O’Dea “Claims He’s A Conservative”), and 8 (O’Dea “says he’s a Republican”).

Republican primary election¹⁹ — the mailers appear to have been sent within 30 days of the primary election — leaves no doubt that the mailers encourage actions to defeat O’Dea, as opposed to some other action.

In its explanation and justification for section 100.22(b), the Commission stated, “communications discussing or commenting on a candidate’s *character, qualifications or accomplishments* are considered express advocacy under new section 100.22(b) if, in context, they can have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.”²⁰

Like the Commission’s interpretation of endorsements, the Commission has interpreted communications commenting on a candidate’s *character, qualifications or accomplishments* as encouraging a candidate’s election or defeat even absent a “call to action” (*i.e.*, verbs telling the reader/viewer/listener to affirmatively take electoral action as found in 11 C.F.R. § 100.22(a)).²¹

¹⁹ The Complaint characterized the mailers as electioneering communications, indicating that they were distributed within 30 days of the Colorado Republican primary. *Id.* at 1; 11 C.F.R. § 100.29(a)(2) (defining “electioneering communication” as certain communications that are “publicly distributed . . . within 30 days before a primary or preference election”).

²⁰ Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (emphasis added).

²¹ For example, in MURs 5511/5525, the Commission concluded that attacks on John Kerry’s character, fitness for public office, and capacity to lead, including phrases such as “JOHN KERRY CANNOT BE TRUSTED” and “unfit for command” were “unmistakable, unambiguous and suggestive of only one meaning” — and had no reasonable meaning other than to encourage actions to defeat him in the upcoming election. Conciliation Agreement at IV.25-28, MUR 5511/5525 (Swift Boat Veterans). The Commission made the same conclusion with respect to ads that commented on George Bush’s character. *See* Conciliation Agreement at IV.27-28, MUR 5487 (Progress for America Voter Fund); Conciliation Agreement at IV.29, MUR 5440 (The Media Fund). In MUR 5831, the Commission concluded that, in context, an ad attacking Bob Casey’s qualifications and stating: “Can we really risk Bob Casey learning on the job?” constituted express advocacy under 11 C.F.R. § 100.22(b), because the electoral portions were “unmistakable, unambiguous and suggestive of only one meaning” — to vote against Bob Casey. Factual and Legal Analysis (“F&LA”) at 8-9, MUR 5831 (Softer Voices). In MUR 5819, the Commission concluded that, in the context of being communicated eight days before the election, an automated telephone call directed to absentee voters stating that a candidate “has over twenty years of experience in both the public and private sector, and he has fought hard and delivered on his promises . . . [and] has made tough decisions that are right for Hawaii” was “the type [of statement] contemplated when the Commission promulgated Section 100.22(b).” F&LA at 3-4, MUR 5819 (U.S. Chamber of Commerce). Courts have similarly declined to require communications contain an affirmative “call to action” in order to be the functional equivalent of express advocacy.

MUR 8023 (Unknown Respondent(s))
Factual and Legal Analysis
Page 7 of 9

In one recent matter, the Commission suggested that a billboard depicting two federal candidates that “criticiz[ed] their character (*i.e.* implying that they have a propensity to lie)” but which lacked an electoral call to action would be express advocacy but for the fact that the candidates pictured were also federal officeholders and because the billboard did not mention their status as federal candidates.²² In that context, the Commission determined the billboard’s message was not unambiguous.²³

In sum, the mailers appear to be public communications that expressly advocate the election or defeat of a federal candidate. Accordingly, they each should have included a disclaimer. Because they did not, the Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11.

B. There is Reason to Believe that Unknown Respondent(s) Failed to Report the Costs of the Mailers in Violation of 52 U.S.C. § 30104(b), (c), and/or (g)

All political committees must disclose disbursements as part of their regular reporting to the Commission.²⁴ Further, all political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting.²⁵ Any person other than a political committee that makes expenditures that expressly advocate the election or defeat of a federal candidate that exceed \$250 must file an

See, e.g., The Real Truth About Abortion Inc. v. FEC, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) (viewing application of 11 C.F.R. § 100.22(b) to ad which stated, *inter alia*, that Senator Obama “has been lying” would not be unconstitutional), *aff’d* 681 F.3d 544; *Citizens United v. FEC*, 558 U.S. 310, 325-26 (2010) (interpreting the film *Hillary* as the functional equivalent of express advocacy).

²² F&LA at 12-13, MUR 7930 (Minocqua Brewing Company SuperPAC, *et al*).

²³ *Id.*

²⁴ 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. *See Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007).

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

independent expenditure report with the Commission pursuant to 52 U.S.C. § 30104(c).²⁶ Additionally, political committees and other persons that make independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of an election, must report the expenditures by filing a 24-hour notice.²⁷ Political committees and other persons that make independent expenditures aggregating \$10,000 or more for an election in any calendar year, up to and including the 20th day before an election, must report the expenditures by filing a 48-hour notice.²⁸

The available information suggests that expenditures for each mailer likely exceeded \$250.²⁹ Therefore, they should have been disclosed to the Commission, either as an independent expenditure or as a communication made by a political committee. The Commission's database shows that no political committee located in Colorado reported payments to Christian Printers and no committee reported payments to Christian Printers (or Christian Edwards) in the month leading up to Colorado Republican primary election. Similarly, the Commission's database shows no independent expenditures paid to Christian Printers (or Christian Edwards) in the 2022 election cycle. In fact, the Commission's database shows no independent expenditures against O'Dea for what can be described as mail during the entire 2022 election cycle.

²⁶ The Act defines an "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); 11 C.F.R. § 100.16.

²⁷ See 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1). 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 aggregating less than \$10,000 in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. §§ 104.4(c), 109.10(d).

²⁸ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). Political committees and other persons must file 48-hour notice by 11:59 p.m. on the second day following the date on which the independent expenditure communication aggregating \$10,000 or more in a calendar year is publicly distributed or otherwise publicly disseminated. See 11 C.F.R. § 104.4(b)(2).

²⁹ See *supra* p. 3.

1 The Commission finds reason to believe that Unknown Respondent(s) violated 52 U.S.C.
2 § 30104(b) or (c) by failing to report expenditures made in connection with the mailers. Also,
3 because the mailers appear to have been distributed shortly before the June 28, 2022, Republican
4 primary election in Colorado, and may have cost over \$1,000, a 24-hour notice may also have
5 been required.³⁰ Accordingly, the Commission finds reason to believe that Unknown
6 Respondent(s) violated 52 U.S.C. § 30104(g).³¹

³⁰ At the time of the mailing, there were over 950,000 active registered Republican voters in Colorado. *See* Colorado Secretary of State, *Total Registered Voters By Party Affiliation and Status as of July 1, 2022*, available at <https://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2022/June/VotersByPartyStatus.pdf>.

³¹ *See* F&LA at 3-4, MUR 6642 (Unknown Respondents) (reason to believe that an unknown respondent failed to report independent expenditures in form of a billboard advertisement saying “FIRE KLOBUCHAR” in violation of 52 U.S.C. § 30104(b), (c), *and/or* (g)).

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS****RESPONDENT:** Christian Printers, Inc.**MURs** 8017, 8023**I. INTRODUCTION**

The Complaints in these matters allege that Christian Printers, Inc., violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for mailers (which the Complaints label as “electioneering communications”) that lacked disclaimers.¹ Specifically, they allege that the mailers were designed to undermine support for U.S. Senate candidate Joe O’Dea shortly before the 2022 Republican senate primary election in Colorado. Christian Printers, the entity that printed the mailers, denies violating the Act or Commission regulations, arguing that, as a commercial vendor, it is not responsible for including disclaimers on mailers it has not paid for.

Because Christian Printers is a commercial vendor, and appears to have been acting in that capacity with respect to the mailers at issue, the Commission finds no reason to believe that Christian Printers violated 52 U.S.C. § 30120(a) or 11 C.F.R. § 110.11(a) in connection with the mailers.

¹ “Electioneering communication” is a defined term that is limited to certain broadcast, cable, and satellite communications. 11 C.F.R. § 100.29. Because mailers are neither broadcast, cable, nor satellite communications, the disclaimer requirements for electioneering communications are inapplicable. *See* 11 C.F.R. § 110.11(a)(4). However, all public communications by political committees, as well as public communications by other persons that expressly advocate the election or defeat of a clearly identified federal candidate also require disclaimers. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). Therefore, this report analyzes whether the mailers implicated those requirements.

MURs 8017, 8023 (Christian Printers, Inc.)
Factual and Legal Analysis
Page 2 of 5

II. FACTUAL BACKGROUND

Joe O’Dea and Ron Hanks were both candidates in the June 28, 2022 Republican primary election for U.S. Senate in Colorado.² The mailers pictured in Attachments 1 and 2 of this Factual and Legal Analysis — which, respectively, correspond to the mailers attached to the Complaints in MUR 8017 and MUR 8023 — were sent to Colorado voters in the weeks leading up to that election.³ Two of the three MUR 8017 mailers contrast the positions of O’Dea and Hanks on the issue of “gun rights” and “taxes and spending.”⁴ A third MUR 8017 mailer portrays Hanks as a “Defender of the Second Amendment” and O’Dea as someone who supports restricting gun rights.⁵ Two of the MUR 8017 mailers state that Hanks had been “endorsed” by the Colorado Republican Party.⁶ The three MUR 8023 mailers focus exclusively on O’Dea and state that O’Dea “says he’s a Republican,” “Claims He Wants to ‘Cut Wasteful Spending,’” “Claims He’s A Conservative,” or “Claims He Supports The Second Amendment,” but add “Joe O’Dea is NOT who he says he is” because he donated to the U.S. Senate candidate of the opposing political party.⁷ All six mailers include the same postmark: “PAID Denver, CO PERMIT NO. 2571.”⁸

² See Joseph Matthew O’Dea, Statement of Candidacy (Oct. 8, 2021), <https://docquery.fec.gov/pdf/871/202110089467207871/202110089467207871.pdf>; Ron Hanks, Statement of Candidacy (Oct. 1, 2021), <https://docquery.fec.gov/pdf/809/202110019467154809/202110019467154809.pdf>.

³ Compl. at 3, Exs. 1-5 (June 16, 2022), MUR 8017 (Unknown Respondent(s), *et al.*); Compl. at 3-8 (July 8, 2022), MUR 8023 (Unknown Respondent(s), *et al.*).

⁴ Compl., Ex. 3-5, MUR 8017.

⁵ *Id.*, Exs. 1-2.

⁶ *Id.*, Exs. 2, 5.

⁷ Compl. at 3-8, MUR 8023.

⁸ *Id.*; Compl., Ex. 3-5, MUR 8017.

MURs 8017, 8023 (Christian Printers, Inc.)
Factual and Legal Analysis
Page 3 of 5

The Complaint in MUR 8017 alleges that an Unknown Respondent and Christian Printers violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11 by sending the mailers pictured in Attachment 1 without disclaimers.⁹ Although the MUR 8017 Complaint’s caption names Unknown Respondent as a respondent, the Complaint identifies “progressive and other democratic-aligned groups, including ProgressNow Colorado” as “part of a coordinated effort to use false electioneering communications to discredit Joe O’Dea.”¹⁰ The MUR 8017 Complaint also alleges that the “coordinated effort” included the specific mailers at issue.¹¹ The Complaint in MUR 8023 claims that the mailers were sent by Unknown Respondent via Christian Printers and should have included a disclaimer.¹²

In Response, Christian Printers admits that it printed the mailers referencing Joe O’Dea and Ron Hanks but does not identify who paid for the mailers.¹³ Christian Printers’s Response then gives two reasons why it did not violate the Act. First, it states that as a commercial vendor engaged in *bona fide* commercial activity, Christian Printers has not made an expenditure, and therefore, is not responsible for including a disclaimer.¹⁴ Second, the Response argues that Christian Printers could not have violated the Act as alleged because the mailers do not meet the

⁹ Compl. at 1, MUR 8017.

¹⁰ *Id.* at 3.

¹¹ *Id.* (“On information and belief, this campaign includes the electioneering communications, mailers, at issue in this Complaint.”).

¹² Compl. at 1, MUR 8023. Like the MUR 8017 Complaint, the MUR 8023 Complaint appears to view the mailers as electioneering communications. *Id.* They are not electioneering communications for the same reason that the mailers in MUR 8017 are not electioneering communications. *See supra* note 1.

¹³ Christian Printers Resp. at 1 (Sept. 23, 2022). Christian Printers, Inc., is an Iowa corporation which also goes by the name Christian - Edwards Print & Graphics. *Business Entities Search*, IOWA SECRETARY OF STATE, <https://sos.iowa.gov/search/business/search.aspx> (last visited June 12, 2023) (search “Christian Printers”). It is a full service commercial printer. *See* Christian - Edwards Print & Graphics, <https://ceprinter.com/capabilities> (last visited June 12, 2023).

¹⁴ Christian Printers Resp. at 1-2.

definition of “electioneering communication[s],” which is limited to certain broadcast, cable, and satellite communications.¹⁵

III. LEGAL ANALYSIS

The Act and Commission regulations require a disclaimer on certain types of communications identifying who paid for the communication and, where applicable, whether a communication was authorized by a candidate. Among other communications, disclaimers are required on all “public communications” made by a political committee and on all publicly available internet websites of a political committee.¹⁶ Disclaimers are also required on all “public communications” made by any person that expressly advocate the election or defeat of a clearly identified federal candidate or solicit contributions.¹⁷ The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.¹⁸ “Mass mailing” means “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.”¹⁹

¹⁵ *Id.* at 2.

¹⁶ 11 C.F.R. § 110.11(a)(1).

¹⁷ *See* 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)-(c). 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.

¹⁸ 11 C.F.R. §100.26.

¹⁹ *Id.* §100.27.

MURs 8017, 8023 (Christian Printers, Inc.)
Factual and Legal Analysis
Page 5 of 5

A. There is No Reason to Believe that Christian Printers Violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a) Because Only the Person Paying for the Mailers is Responsible for Including a Disclaimer

Christian Printer's Response states that it "was not the payor of the communication."²⁰

Instead, the Response argues that it is a commercial printing company that was acting as a commercial vendor.²¹ The Commission has no information to the contrary. Accordingly, because the Commission has long held that the payor, and not the vendor, is responsible for including disclaimers,²² the Commission finds no reason to believe that Christian Printers violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(b).

²⁰ See *id.* at 1.

²¹ *Id.*

²² See, e.g., Factual & Legal Analysis ("F&LA") at 4 n.6, MUR 6899 (Pat Meehan for Congress, *et al.*) ("[U]nder the Act, it appears that only the person making the 'disbursement' for the communication at issue has a duty to comply with the disclaimer obligations."); First Gen. Counsel's Rpt. at 6 ("[payor] alone is liable for the omission of a disclaimer") & Certification at ¶¶ 1-2, MUR 5083 (Gore 2000, Inc.); F&LA at 4, MUR 4109 (Barrett for Congress) ("[I]t is the person who pays for the campaign materials that is responsible for adhering to the Act's disclaimer requirements."); F&LA at 4, MUR 3682 (Fox for Congress Committee) ("[I]t is Respondents' [*i.e.*, the payor's] obligation to ensure that their advertisement includes the appropriate disclaimer.").

